



TITLE IX HEARING OFFICER AND DECISION-MAKER  
TRAINING & CERTIFICATION COURSE

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# FACULTY



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# HEARING OFFICER/DECISION-MAKER RESPONSIBILITIES



Rank your Top 3 responsibilities as a Hearing Board member.

Identify what you consider least important

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

# THE GOAL



**MAKING THE APPROPRIATE DECISION**

# HEARING OFFICER/DECISION-MAKER COMPETENCIES



- The Legal Landscape
- The Conduct/Disciplinary Process
- Investigation and Resolution Procedures
- Title IX & VAWA Requirements
- Critical Thinking Skills
- How to Prepare for a Hearing
- Hearing Decorum
- Questioning Skills
- Weighing Evidence
- Analyzing Policy
- Standards of Proof
- Sexual Misconduct/ Discrimination
- SANE and Police Reports
- Intimate Partner Violence
- Bias/Prejudice/Impartiality
- The Psychology/Sociology of the Parties
- Stalking/Bullying/Harassment
- Deliberation
- Sanctioning/Remedies
- The Appeals Process
- Cultural Competency
- Intersection with Mental Health issues
- Concurrent Criminal Prosecutions
- Writing Decisions/Rationales

# THE CHALLENGE FOR HEARING OFFICERS/DECISION-MAKERS



- Community standards spell out what constitutes the offense of sexual misconduct within your community.
  - The institutional response is impacted by Title IX requirements.
- It is not a question of right and wrong, or “If Something Happened”; it’s a question of “Is there a policy violation?”
- Your role is to uphold the integrity of the process.
- You may not agree with your policy, but you must be willing to uphold it.

*Remember, you have no  
side other than the  
integrity of the process.  
And you represent the  
process.*

# DUE PROCESS: LEGAL FOUNDATIONS

- *Dixon v. Alabama* (1961)
- *Esteban v. Central Missouri State College* (1969)
- *Goss v. Lopez* (1975)

# *DIXON V. ALABAMA STATE BD. OF ED.* 294 F. 2D 150 (5TH CIR., 1961)



- In February of 1960, six black students sat in at a public (all white) lunch counter and were arrested
- Alabama State summarily expelled all of them without any notice of the charges or of a hearing, and no opportunity to provide evidence or defend themselves
- 5th Cir. Court decision established minimum due process (reiterated by U.S. Supreme Court in *Goss v. Lopez* (1975))
  - Students facing expulsion at public institutions must be provided with at least **notice of the charges** and an **opportunity to be heard**
  - Ushered in most campus disciplinary and hearing-based processes

***DIXON V. ALABAMA STATE BD. OF ED.***  
**294 F. 2D 150 (5TH CIR., 1961)**



- Specifically, the court set forth a number of due process-based guidelines, including:
  - Notice, with an outline of specific charges
  - A fair and impartial hearing
  - Providing names of witnesses to accused
  - Providing the content of witnesses' statements
  - Providing the accused an opportunity to speak in own defense
  - The results and findings of the hearing presented in a report open to the student's inspection

# ***ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE***

## **415 F.2D 1077 (8TH CIR. 1969)**



- Students were suspended from school following participation in campus riots. They sued MSC and won. The court asserted the school must provide the following elements to satisfy due process:
- Written charge statement, made available 10 days prior to hearing
- Hearing before a panel with authority to suspend or expel
- Charged student given opportunity to review information to be presented prior to hearing
- Right of charged student to bring counsel to furnish advice, but not to question witnesses
- Right of charged student to present a version of the facts through personal and written statements, including statements of witnesses

# ***ESTEBAN V. CENTRAL MISSOURI STATE COLLEGE***

## **415 F.2D 1077 (8TH CIR. 1969)**



- An opportunity for the charged student to hear all information presented against him and to question adverse witnesses personally
- A determination of the facts of the case based solely on what is presented at the hearing by the authority that conducts the hearing
- A written statement of the finding of facts
- Right of charged student to make a record of the hearing

*GOSS V. LOPEZ*  
419 U.S. 565 (1975)



- Nine high school students were suspended for 10 days for non-academic misconduct from various public high schools. None were provided a hearing
- The court held that since PreK–12 education is a fundamental right, students were entitled to at least a modicum of “due process”
- Reiterating the 5th Circuit, it noted that the minimum due process is notice and an opportunity for a hearing and to present your side of the story

# *GOSS V. LOPEZ*

## 419 U.S. 565 (1975)



- The court further stated that the hearing could be informal and need not provide students with an opportunity to obtain private counsel, cross-examine witnesses, or present witnesses on their behalf
- Potential suspensions beyond 10 days or expulsions, however, require a more formal procedure to protect against unfair deprivations of liberty and property interests

# DUE PROCESS

- What is Due Process?
- Due Process in Procedure
- Due Process in Decision
- Comparative Due Process

# WHAT IS DUE PROCESS?



- Due Process (public institutions):
  - Federal and state constitutional and legal protections against a state institution taking or depriving someone of education or employment (14<sup>th</sup> Amendment)
- “Fundamental Fairness” (private institutions):
  - Contractual guarantee that to impose discipline, the institution will abide substantially by its policies and procedures

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# WHAT IS DUE PROCESS?



- Ultimately, both are the set of rights-based protections that accompany disciplinary action by an institution with respect to students, employees, or others
  - Informed by law, history, public policy, culture etc.
- Due process in criminal and civil courts vs. due process within an institution
- Due process analysis and protections have historically focused on the rights of the Responding Party

# WHAT IS DUE PROCESS?



Two overarching forms of due process:

- Due Process in Procedure:
  - Consistent, thorough, and procedurally sound handling of allegations
  - Institution substantially complied with its written policies and procedures
  - Policies and procedures afford sufficient Due Process rights and protections
- Due Process in Decision:
  - Decision reached on the basis of the evidence presented
  - Decision on finding and sanction appropriately impartial and fair

# DUE PROCESS IN PROCEDURE



- **Due Process in Procedure** - A school's process should include (at a minimum):
  - Notice: of charges and of the hearing/resolution process
  - Right to present witnesses
  - Right to present evidence
  - Opportunity to be heard and address the allegations and evidence
  - Right to decision made based on substantial compliance and adherence to institutional policies and procedures
  - Right to appeal (recommended)

# DUE PROCESS IN DECISION



- **Due Process in Decision** - A decision must:
  - Be based on a fundamentally fair rule or policy
  - Be made in good faith (i.e. without malice, ill-will, or bias)
  - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence
  - Not be arbitrary or capricious
- Sanctions must be reasonable and constitutionally permissible

# COMPARATIVE DUE PROCESS



- Criminal Court
- Civil Court
- Regulatory Oversight
- Administrative Hearings
- School-based
  - PreK-12
  - Student – Undergraduate; Graduate/Professional
  - Faculty – Tenured vs. Non-tenured
  - Staff
  - At-will
  - Administrators
  - Unionized

THE PROCESS: WHAT HAPPENED  
BEFORE IT GOT TO A HEARING?

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# THE IX COMMANDMENTS



<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>	<b>Investigation</b> (prompt & fair – VAWA Sec. 304)
<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>	<b>Process</b>
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	<b>Remedies</b>

# OVERVIEW OF THE TITLE IX PROCESS



Notice to Title IX officer; strategy development.

Informal resolution, administrative resolution, or formal resolution?

(and in many cases...):

Finding. Sanction.

# 10 STEPS OF AN INVESTIGATION



1. Receive Notice or Allegation.
2. Preliminary Inquiry (initial issue-spotting).
3. Gatekeeper determination.
4. Notice of Investigation to Responding Party and Notice of Formal Allegation (“Charge”).
5. Preliminary issue-spotting by investigators (will continue as new information is added).
6. Preliminary investigation strategy (strategy development will continue to evolve throughout the investigation).

# 10 STEPS OF AN INVESTIGATION



7. Formal comprehensive investigation.

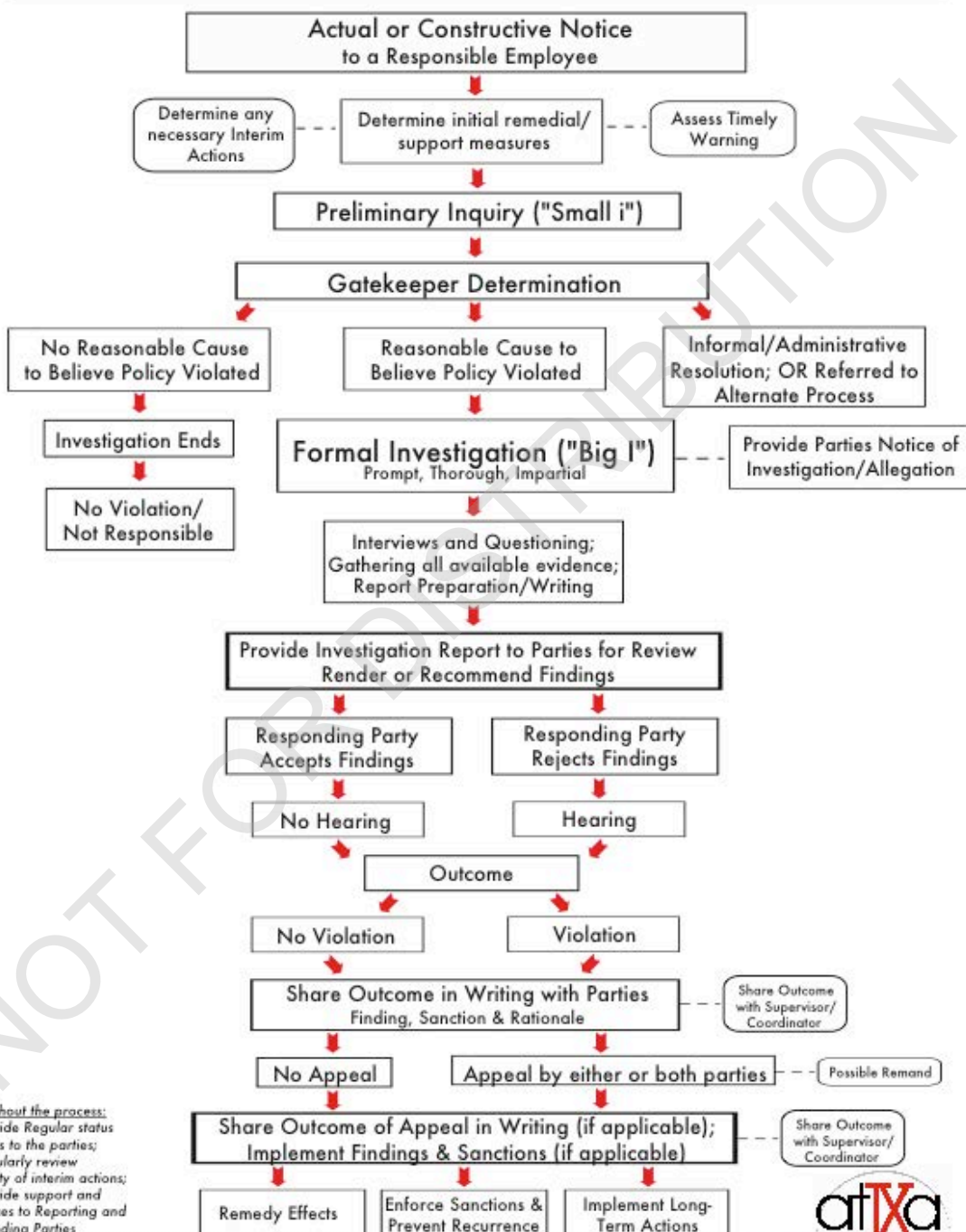
- Witness interviews
- Evidence gathering.

8. Write preliminary report.

9. Meet with Title IX Coordinator, and then parties, to review report & evidence (follow-up as needed).

10. Synthesize and analyze evidence and write final report for decision maker/panel.

# INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



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Throughout the process:  
 1: Provide Regular status updates to the parties;  
 2: Regularly review necessity of interim actions;  
 3: Provide support and resources to Reporting and Responding Parties



# THE STANDARD OF PROOF/ EVIDENTIARY STANDARD

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# EVIDENTIARY STANDARD

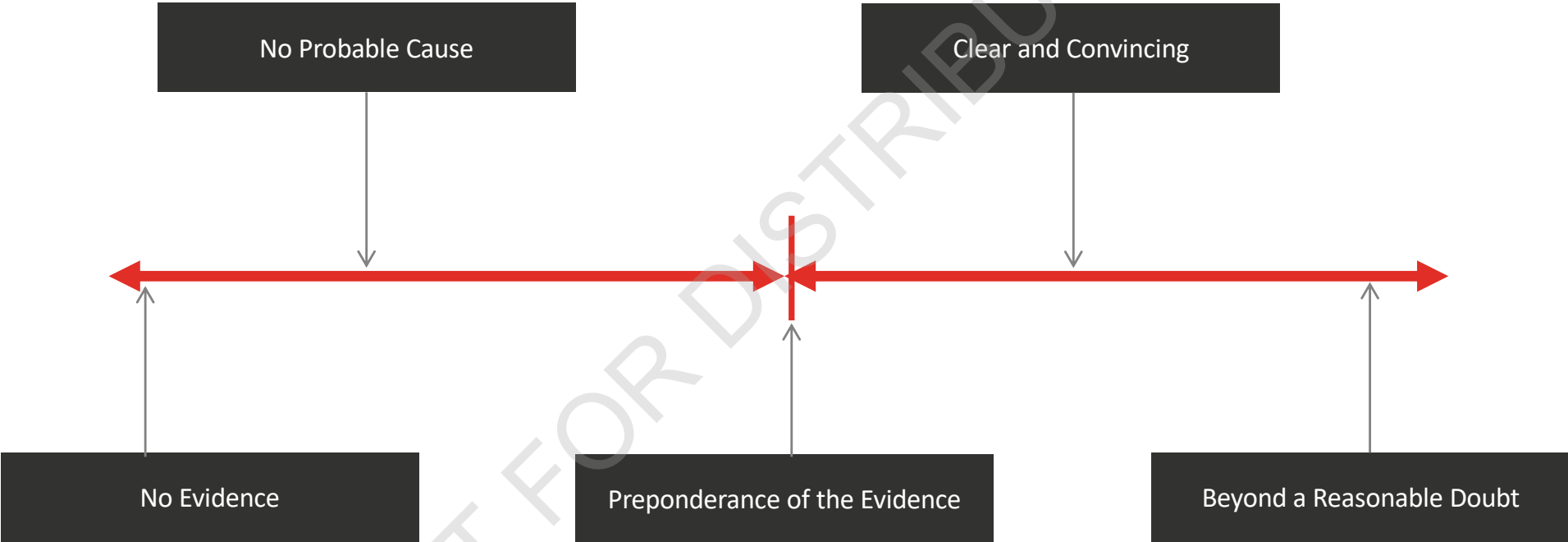


- Different Standards: What do they mean? Why do they exist?
  - Beyond a reasonable doubt
  - Clear and convincing
  - **Preponderance of the evidence**
    - The only equitable standard
- Also known as:
  - 50.1%
  - “More likely than not”
  - The “tipped scale”

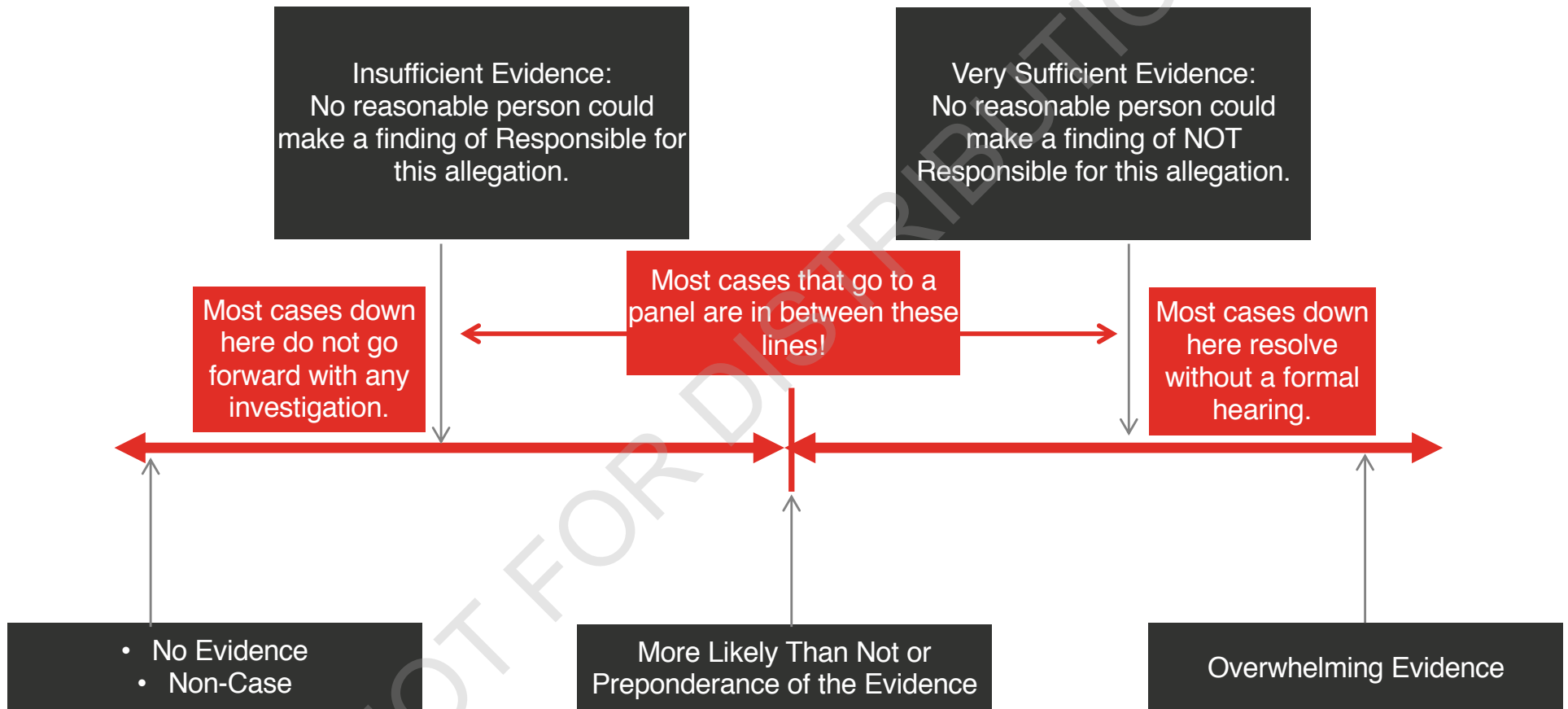
# BURDENS OF PROOF – LEGAL EDITION



## EVIDENTIARY STANDARDS



# STANDARD OF PROOF/EVIDENTIARY STANDARD



# BIAS, PREJUDICE & CULTURAL COMPETENCE

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- Among the most significant problems for hearing boards
- 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 hearing board members in questioning, findings, or sanction
  - Intervention by senior-level institutional officials
  - Not staying in your lane
  - Improper application of institutional procedures
  - Improper application of institutional policies
- The focus of this section, however, is on the cultural competence-based bias and prejudice.

# “BIAS” DEFINED



- “Biased”
  - A tendency to believe that some people, ideas, etc., are better than others that usually results in treating some people unfairly
  - An inclination of temperament or outlook; especially a personal and sometimes unreasoned judgment (merriam-webster.com)
- “Biased”
  - To cause partiality or favoritism; influence, especially unfairly (Dictionary.com)

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# “PREJUDICE” DEFINED



- To “pre-judge”
- “Prejudice”
  - Any preconceived opinion or feeling, either favorable or unfavorable (dictionary.com)
    - Often based on things we have previously read, our own experiences
- Prejudice
  - An unfair feeling of dislike for a person or group because of race, sex, religion, etc.
  - A feeling of like or dislike for someone or something especially when it is not reasonable or logical (merriam-webster.com)

# BIAS & PREJUDICE



- People do not shed their values, beliefs and life experiences at the hearing room door. Nor should we expect them to
- While bias is inevitable, it does not necessarily undermine the fairness or appropriateness of a hearing board's decision
- The key is recognizing the bias and ensuring it does not impact one's decision because bias that serves as the basis for the outcome of the hearing is improper
- Hearings must be based on evidence, not on personal beliefs about a complaint

# MULTI-PARTIALITY



- Multi-partiality: You can never be truly “neutral” or “impartial,” but you can work to neutralize your biases
  - Underrepresented populations
  - Religious concerns
  - Power and privilege
  - Adult and Non-traditional students
  - Sexual orientation
  - Disabilities
  - Race
  - Sex and Gender
  - Who is your community?

# BIAS & PREJUDICE: COMMON ISSUES



- Role of Alcohol
- Student Development...
- **Your own experiences...**
- Student-Athletes
- Fraternity/Sorority Life
- Disabilities & Mental Illness
- International Students
- Sex/Gender
- Gender Identity
- Race
- Ethnicity
- Nature of the Violation
- Religion or Religious beliefs
- Academic Field of Study/Major
- Veteran Status
- Socioeconomic Status
- Politics
- Attitude
- Pre-disposition towards one party

# PRE-HEARING CONSIDERATIONS FOR HEARING BOARDS

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# PREPARING FOR THE HEARING



- Dress professionally – Jeans, t-shirts, shorts, or sandals are not appropriate
- Arrive prepared and early
- Bring snacks and water/drinks
- Turn off your phone! And put it away!
- Bring a pen and paper
- Clear calendar after the hearing – it could take 30 minutes or it could take the entire morning and/or afternoon
- Note-writing tips
  - Less is better

# PREPARING FOR THE HEARING



## SAMPLE PREPARATION PLAN

- Review and understand all charges
- Review all the material carefully and thoroughly – get a general overview of the complaint
- Review it a second time and note all areas of consistency of information
  - You don't need additional verification or questioning on these issues, of assuming the accuracy of consistent information – but beware of suspiciously consistent stories
- Read it a third time to identify inconsistencies in the information
  - This is the area you will need to concentrate your questions

# PREPARING FOR THE HEARING



- Review the policy or section of the policy alleged to have been violated
  - Parse all the policy elements (what does it take to establish a policy violation?)
  - Identify the elements of each offense alleged
  - Break down the constituent elements of each relevant policy
- Identify all Key Elements (that may not be an independent policy violation)
  - Is there corroborating evidence?
- Have applicable policies in-hand

# PREPARING QUESTIONS



- Have the Code section at the top of your note page
- Write down the following as a reminder to you:
  - What do I need to know?
  - Why do I need to know it?
    - If the answer to this is not that it will help you determine whether or not a policy violation occurred and you can explain a rationale for that; then it is not something you need to know!
  - What is the best way to ask the question?
  - Who is the best person to get this information from? Usually the investigator.
- When dealing with conflicting testimony apply a credibility analysis (covered later), if it is not already in the report.

# THE HEARING

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# HEARING DECORUM



- Be professional, but not lawyerly or judge-like
  - This is not *Law and Order* – this is an administrative process at a school.
  - You are not cross-examining or interrogating, you are striving to determine whether the Responding Party(s) violated the institutional policy.
- Be respectful
  - Tone, Manner, Questioning.
  - Sarcasm or being snide are never appropriate.
  - Maintain your composure: Never allow emotion or frustration to show.

# HEARING DECORUM



- Work to establish a baseline of relaxed conversation for everyone in the room.
- Maintain good eye contact: “listen with your eyes and your ears”
- Listen carefully to everything that is said.
  - Try not to write too much when people are talking
  - If questioning, focus on the answer, rather than thinking about your next question
- Nod affirmatively
- Do not fidget, roll your eyes, or give a “knowing” look to another panel member
- Do not look shocked, smug, stunned, or accusing

# THE HEARING: GENERAL LOGISTICS



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

# THE HEARING



## Immediately prior to the hearing

- Set aside time to review the investigation report and evidentiary materials
  - Hearing Officers/Decision-Makers should have already received and thoroughly reviewed all relevant information
- Chair answers any procedural questions by panel/board members
- Review key questions pertaining to the allegations
- Determine key questions for the investigator, and, if necessary, for the parties and witnesses
- Chair/Decision-Maker may greet parties and Advisors and answer any procedural questions prior to the hearing

# THE HEARING



## Tips for Hearing Officers/Decision-Makers

- Recognize the need for flexibility with the order of statements and questioning, depending on the circumstances
- Be familiar with your institution's hearing board procedures
- Recognize the role and function of the Chair/Decision-Maker
- If a procedural question arises that must be addressed immediately, take a short break to seek clarification
- Treat the parties, their advisors, investigators, and witnesses with respect
- Apply all appropriate institutional policies, procedures, and standards

# THE HEARING



## Beginning the Hearing

- Start recording (remember to turn it off at breaks)
- Welcome, introductions, and establishing ground rules
- State the allegations (citing each alleged policy violation) and whether the Respondent agrees or disagrees with each of the allegations
- Indicate, on the record, that all Hearing Officers/Decision-Makers have reviewed the investigation report and all relevant evidence provided by the Investigator(s)
- Discuss Breaks
- Remind all parties and witnesses of expectation of honesty
- Discuss role of Advisors

# THE HEARING



## Beginning the hearing

- Ask parties about any additional procedural questions and provide answers as appropriate
- Provide an overview of the proceedings
  - Who will have an opportunity to speak and when (this should have been discussed with the parties PRIOR to the hearing).
  - Who will ask questions and when; and the possible need to ask additional questions of witnesses or parties
  - Deliberations
  - Finding
  - Impact Statements

## Hearing Testimony

- Investigator(s) summarize their investigation and report first
  - Review of report & evidence provided
  - Questions from the Hearing Officer/Decision-Maker
    - This includes asking if they asked questions of the parties and witnesses that the panel may have; this may include a discussion of relevance.
  - Questions from the parties (typically Reporting Party first)
- May allow Reporting Party and Responding Party provide brief opening statements if they desire

**NOTE: An excellent, thorough and reliable report may preclude the need for any questions or statements!**

# THE HEARING



## Hearing Testimony

- Reporting Party provides information (if they desire)
  - Questions from the Hearing Officer/Decision-Maker
  - Questions from the Responding Party – either through the Chair/Decision-Maker, or directly (if both parties agree to allow for direct questioning)
  - Questions already answered in the report may not need to be repeated; all questions and statements must be judged for relevance!

# THE HEARING



## Hearing Testimony

- Responding Party provides information (if they desire)
  - Questions from the Hearing Officers/Decision-Maker
  - Questions from the Reporting Party – either through the Chair/Decision-Maker, or directly
  - Questions already answered in the report may not need to be repeated; all questions and statements must be judged for relevance!

# THE HEARING



## Hearing Testimony

- Witnesses provide information (if needed)
  - Questions from the Hearing Officers/Decision-Maker
  - Questions from the Reporting Party
  - Questions from the Responding Party
- If desired and consistent with your procedures, you may provide both parties opportunity to provide closing statements – often provide a short break to prepare (e.g.: 10 minutes)
  - Reporting Party typically goes first, followed by Responding Party
- Deliberations

# THE HEARING



## Hearing Testimony: The Role of the Chair

- Run the proceedings
- Ensure institutional procedures are substantively and materially followed
- Manage breaks
- Greet everyone and thank them for their participation
- Ensure Hearing Officer/Decision-Maker and the parties are able to ask all relevant and appropriate questions
- Ensure hearing board, parties, and witnesses apply appropriate policies and definitions in questioning
- Facilitate questioning between the parties (where applicable)

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

- Determine the relevance and appropriateness of questions
- When necessary, provide directives to the board to disregard a question or information deemed unfair or highly prejudicial
- Manage Advisors as necessary
- Make determinations of the relevance of information
- Maintain the professionalism of the Hearing Officer/Decision-Maker
- Recognize your positional authority

# QUESTIONING SKILLS & GUIDELINES

—  
There is no rule that says you have to ask a question? If the report has all the information you need....



# GENERAL QUESTIONING SKILLS



- What are the goals of questioning?
  - Learn the facts
  - Establish a timeline
  - Try to learn the what is more likely than not what happened
- What are NOT the goals of questioning?
  - Curiosity
  - Chasing the rabbit into Wonderland
- Do not expect the “Gotcha” moment. That is not your role. You are not prosecutorial.

- Ascertain who each individual is and their relation to the other parties in the case – it should be in the report.
- Pay attention to alcohol/drug consumption and timing of consumption (the timeline should be in the report).
- Be cognizant of the difference between what was “heard” (hearsay), what can be assumed (circumstantial), and what was “witnessed” (facts).

# IF YOU STILL HAVE TO ASK A QUESTION, ASK YOURSELF



- ***Is the answer already in the report or documentation I have been provided?***
  - If not, why not? (Ask the Investigator this!)
- ***What do I need to know?***
  - Who is the best person to ask this of? Usually it will be the Investigator; it may be good to ask them if they asked it already and what answer they got.
  - The Investigator may want to know why you think it is relevant. (Remember, they were the determiners of relevancy before you and they are impartial as well.)
- ***Why do I need to know it?***
  - If it is not going to help you decide whether a policy was violated or not and you can explain how, then it is not a good question!
- ***What is the best way to ask the question?***
- ***Am I the best person to ask this question?***

# THE ART OF QUESTIONING



- Listen carefully and adapt follow-up questions.
- Work from your outline of your interview questions but be flexible
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “fooled around,” and “had a few drinks.” This should be in the report already.

# RESTATE/REFRAME



- Restate/summarize what is said. Helps validate that you are listening.
- Launder the language.
  - Remove negative or inflammatory language and emotions.
- This helps ensure you understand what is being said.
- Consider using these phrases
  - “So it sounds like...”
  - “Tell me more...”
  - “Walk me through”
  - “Help me understand”

# QUESTIONING



- Seek to discover (if the information is not in the report):
  - Relevant facts about what happened during the incident
  - Any related events
  - Any corroborating information
  - Facts necessary to establish the timeline
  - Background information about the situation, the parties, the witnesses
- Use your questions to elicit details, eliminate vagueness, fill in the gaps where information seems to be missing

# QUESTIONING



- Have a purpose for asking every question
- Try to frame questions neutrally
- Don't make questions too long or confusing
- Don't suggest an answer in your question
- Note discrepancies and ask questions based on them
- Be on the lookout for “cued” responses or rehearsed or memorized answers
- Handle emotions sensitively and tactfully
- Observe body language of the person, but don't read too much into it
- Be cognizant of your own body language

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

# QUESTIONING EXERCISE



# Information from Report



- First-year students Don and Carla met in honors English. They studied together and became close friends. They had a great deal in common and spent hours talking about their families, music, movies, and sports. As the weeks rolled on, their friendship grew, along with their respect and affection for each other. Don finally asked Carla out on a date of pizza and movie. After the movie, they went to the local bar and had beers while they discussed the movie. Over the course of the next few hours, they consumed two pitchers of beer.

# Information from Report



- Carla was quite tipsy, and Don wanted to make sure she arrived at her apartment safely, so he accompanied her to her door. Carla asked Don if he would like to come in to see how she had decorated. Don eagerly agreed. They sat on the couch and talked about how much fun they had that evening, and how glad they both were to get to know each other better. Carla told Don how easy it was to feel comfortable with him. Don was delighted to hear this and put his arms around Carla and kissed her. She eagerly kissed him back. They continued to kiss and touch, and Don gently pushed Carla back on the couch. Carla said, “I think things are going too fast.” Don replied, “We won’t do anything you are not comfortable with.”

# Information from Report



- The two continued kissing. Don, tentative at first, began to unbutton Carla's blouse. She brushed his hand aside but continued kissing him. A short time later, he reached under her blouse and fondled her breast. Carla did not stop him. Don told Carla, "I really want to make love to you." Carla did not respond. Don took this as consent and proceeded to remove Carla's panties (she was fully clothed otherwise). They had intercourse. Don cuddled Carla, who cuddled back but did not say a word. Since it was getting late and Carla was so quiet, Don gave her a kiss, told her he'd call her, and left. In the following days, Carla refused to take Don's calls and did not respond to his text messages.

# Information from Report



- Several weeks later, Carla attended a sexual assault seminar and felt that she had experienced the same type of behavior as described in the case study presented there.
- She went her advisor to ask what she should do. They called the campus police and subsequently met with a female officer. The officer reluctantly told Carla that since several weeks had passed, there would be no evidence that would support pressing criminal charges, but she encouraged Carla to file a complaint with the campus Title IX Office. Carla met with the Title IX Officer and made an allegation.

# Carla's Story



- Carla, who is from a small town, was excited to break out of the mold of her older sisters and go away to college. She is the first person in her family to attend college. Carla's mother warned her about the dangers that lurk for young women out there. She repeatedly told her not to be easy, and that a man would never respect her if she gave in.

# Carla's Story



- Carla really liked Don. They had so much fun together, and she felt that he was a very nice person who liked and respected her. Yet, if that was the case, why didn't he stop when she told him things were going too fast? He knew her family background and how she felt about casual sex. Yet, they still had sex. Was it her fault? She stated that she just couldn't remember well. She could only remember parts of the evening. Did she have too much to drink? Did she send him a wrong message? Should she have pushed him away so he wouldn't go further? If he really liked and respected her, why didn't he understand her silence and lack of response?

# Carla's Story



- Her mother was right. She knew Don would never respect her now, and she didn't respect herself either. Maybe by holding him accountable for his pushing forward to have sex too soon and not respecting her wishes, he would realize that you can't treat women that way. If only she just didn't still like him so much. She has missed a week of English class because she just can't face him.

# Don's Story



- Don was so happy to meet Carla in English class. He and his long-time high school girlfriend had broken up before he came to college, and he had been lonely since arriving there. Carla was a breath of fresh air. She was from a small town and had good values, and she was so much fun to be with.
- He had been really looking forward to their date and was a little nervous beforehand, but the evening seemed to go so well. They seemed compatible, and their kissing was so awesome. When Carla told him she thought they were going too fast, he assured her that they wouldn't do anything she didn't want to do.

# Don's Story



- Don and his high school girlfriend had sex for the past year, and before her, there had only been one other girl, but he knew how to please a girl, and he wanted to please Carla, too. Although she brushed him aside when he touched her breast over her blouse, she didn't push his hand away when he fondled her breasts under her blouse, so he thought for sure that it was cool to go forward to the next step. He took her lack of response as her not wanting to seem too eager. She even cuddled with him after they had intercourse.

# Don's Story



- So, what went wrong? Why wouldn't she take his phone calls or respond to any of his text messages? Why hasn't she been coming to class? And NOW THIS?! What is going on with this letter about an institutional investigation for alleged non-consensual sexual intercourse?

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# QUESTIONING ACTIVITY FOR CASE STUDY



- Please discuss this as a group and identify:
  1. Is there additional information do you need to obtain from the investigator to help you understand this case?
  2. If so, identify what it is
  3. Identify any questions you want to ask Carla
  4. Identify any questions you want to ask Don

# KEY POLICY TERMS

- Sexual Harassment
- Quid Pro Quo Harassment
- Retaliatory Harassment
- Hostile Environment

# SEXUAL HARASSMENT



## **Sexual harassment is:**

- Unwelcome
- Sexual, sex-based, and/or gender-based verbal, written, online, and/or physical conduct.

**Sexual harassment** may be subject to discipline when it takes the form of:

- Quid Pro Quo harassment;
- Retaliatory harassment; and/or
- Creates a hostile environment.

# 3

## Types of Sexual Harassment

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# QUID PRO QUO SEXUAL HARASSMENT



- Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature,
- By a person having power or authority over another, when
- Submission to or rejection of such conduct is made either explicitly or implicitly a term or condition of rating or evaluating an individual's educational [or employment] progress, development, or performance.

# RETALIATORY HARASSMENT



- Any adverse employment or educational action taken against a person because of the person's participation in a complaint or investigation of discrimination or sexual misconduct.
- Also includes retaliation against a reporting party by the responding party or that person's friends or others who are sympathetic to the responding party.
- Also can include retaliation directed toward a third party because of that party's participation in a grievance process or for supporting a grievant.

# HOSTILE ENVIRONMENT



- A hostile environment is created when sexual harassment is:
  - Sufficiently severe, or
  - Persistent or pervasive, and
  - Objectively offensive that it:
    - Unreasonably interferes with, denies, or limits someone's ability to participate in or benefit from the school's educational [and/or employment], social and/or residential program.

# TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



**There has been an increasing issue of conflating discomfort or being offended with the higher standard of hostile environment.**

**The circumstances to consider include:**

- The frequency (persistent or pervasive), nature, and severity of the conduct.
- Whether the conduct was reasonably physically threatening.
- Whether the conduct was objectively and subjectively humiliating.
- The objective and subjective reasonable effect on reporting party's mental or emotional state.

# TOTALITY OF THE CIRCUMSTANCES TO CONSIDER FOR HOSTILE ENVIRONMENT



- Whether conduct was directed at more than one person.
- Whether the conduct **unreasonably** interfered with the reporting party's educational or work performance.
- Whether the statement is merely an utterance of an epithet which is offensive, or offends by discourtesy or rudeness.
- Whether the speech or conduct deserves the protection of academic freedom or of the First Amendment.

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# NON-CONSENSUAL SEXUAL CONTACT



- Non-consensual sexual contact is:
  - Any intentional sexual contact,
  - However slight,
  - With any object,
  - By one person upon another person,
  - That is without consent and/or by force.

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# ATIXA MODEL DEFINITIONS: SEXUAL CONTACT DEFINED



- Sexual contact includes:
  - Intentional contact with the breasts, buttock, groin, or genitals, or touching another with any of these body parts, or making another touch you or themselves with or on any of these body parts; or
  - Any other intentional bodily contact in a sexual manner.

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# NON-CONSENSUAL SEXUAL INTERCOURSE

- **Non-consensual sexual intercourse is:**
  - Any sexual intercourse,
  - However slight,
  - With any object,
  - By a person upon another person,
  - That is without consent and/or by force

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# ATIXA MODEL DEFINITIONS: NON-CONSENSUAL SEXUAL INTERCOURSE



- Sexual intercourse includes:
  - Vaginal or anal penetration,
  - By a penis, object, tongue, or finger, and oral copulation (mouth to genital contact),
  - No matter how slight the penetration or contact.

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# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION



- Sexual Exploitation
  - Occurs when one person takes non-consensual or abusive sexual advantage of another for their own advantage or benefit, or to benefit or advantage anyone other than the one being exploited, and that behavior does not otherwise constitute one of other sexual misconduct offenses.
- Examples of sexual exploitation include, but are not limited to...

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



- Invasion of sexual privacy.
- Non-consensual digital, video, or audio recording of nudity or sexual activity.
- Unauthorized sharing or distribution of digital, video, or audio recording of nudity or sexual activity.
- Engaging in voyeurism.
- Going beyond the boundaries of consent (such as letting your friend hide in the closet to watch you having consensual sex).

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)



- Knowingly exposing someone to or transmitting an STI, STD, or HIV to another person.
- Intentionally or recklessly exposing one's genitals in non-consensual circumstances, or inducing another to expose their genitals.
- Sexually-based stalking and/or bullying may also be forms of sexual exploitation.

# OTHER MISCONDUCT OFFENSES THAT MAY REQUIRE TITLE IX BASED RESPONSE



- Intimate Partner Violence.
- Bullying/cyberbullying.
- Hazing.
- Stalking.
- Threatening or causing physical harm.
- Conduct which threatens or endangers the health or safety of any person.
- Discrimination.
- Intimidation.
- Any rule violated on the basis of the victim's sex/gender, which is severe and/or pervasive/persistent enough to cause a discriminatory effect.

# ATIXA CONSENT CONSTRUCT

- 
- Force
  - Incapacity
  - Consent

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# CONSENT PREMISE



- Consent must be freely and knowingly given.
- If consent is given against someone's will or if they are incapable of knowingly giving consent then any consent given under these circumstances is not valid consent.

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# OVERVIEW OF THE 3 CONSENT QUESTIONS



1. Was force used by the accused individual to obtain sexual access?
2. Was the reporting party incapacitated?
  - a. Did the accused individual know, or
  - b. Should s/he have known that the alleged victim was incapacitated (e.g., by alcohol, other drugs, sleep, etc.)?
3. What clear words or actions by the reporting party gave the accused individual permission for the specific sexual activity that took place?

# FORCE

There are four types of force to consider:

- **Physical violence** -- hitting, restraint, pushing, kicking, etc.
- **Threats** -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
- **Intimidation** -- an implied threat that menaces and/or causes reasonable fear
- **Coercion** – the application of an *unreasonable* amount of pressure for sexual access.
  - Consider:
    - Isolation
    - Frequency
    - Intensity
    - Duration
  - Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force

# INCAPACITY



- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent
- Incapacitation is a determination that will be made after the incident in light of all the facts available
- Assessing incapacitation is very fact-dependent
- Blackouts are frequent issues
  - Blackout = no working (form of short-term) memory for a consistent period, thus the person is unable to understand who, what, when, where, why, or how
    - But the 2a question must be answered, as blacked out individuals are able to engage in activities that may not make 2a a definitive “yes”
  - Partial blackout or Brownout possibilities must be assessed as well

# INCAPACITY



When a person blacks out, they make decisions, hold conversations, and even continue to drink. They appear to be conscious, but they will not remember what happened. This is extremely risky, as the person may attempt to drive, have sex, or perform other risky behaviors.

What if the responding party was incapacitated as well?

- What was the form of incapacity?
  - Alcohol or other drugs
    - Incapacity ≠ Impaired, drunk, intoxicated or under the influence
    - Incapacity = an extreme form of intoxication (alcohol)
  - Administered voluntarily or without reporting party's knowledge
  - Rape drugs
  - Mental/cognitive impairment
  - Injury
  - Asleep or unconscious

# INCAPACITATION



- To better understand and determine the relationship between the use of alcohol and capacity it's important to understand there are multiple levels of effect of alcohol, along a continuum
  - The lowest level is impairment, which occurs with the ingestion of any alcohol. A synonym for impairment is “under the influence”
  - The next level is intoxication, also called drunkenness, similar to the state’s drunk driving limit
    - A person can be drunk but still have the capacity to give consent

# INCAPACITATION



- Incapacity is a level of alcohol consumption in which an individual is incapable of understanding information presented, appreciating the consequences of acting or not acting on that information and making an informed choice
  - Incapacitation is a state beyond drunkenness or intoxication, where decision-making faculties are dysfunctional.
- “Too intoxicated to consent” or “unable to consent as a result of AOD” are too limiting as policy standards, because they cannot cover the blackout situation where *someone does consent to sex, but does not know that they are.*

# INCAPACITATION



- In order to consent effectively to sexual activity, you must be able to understand Who, What, When, Where, Why and How with respect to that sexual activity.
- This is another way of stating the law's expectation that consent be knowing or informed, and any time it is not, consent cannot be effective.
- To be more precise, an incapacitated person cannot give a valid consent.

# INCAPACITY ANALYSIS



- First, **was the reporting party incapacitated** at the time of sex?
  - Could the person make rational, reasonable decisions?
  - Could the reporting party appreciate the situation and address it consciously such that any consent was informed –
    - **Knowing who, what, when, where, why, and how.**
- Second, **did the responding party know** of the incapacity (fact)?
- Or, **should the responding party have known** from all the circumstances (reasonable person)?

# BEHAVIORAL CUES



- Evidence of incapacity may be in the report taken from context clues, such as:
  - Slurred speech
  - The smell of alcohol on the breath in combination with other factors
  - Shaky equilibrium; stumbling
  - Outrageous or unusual behavior
  - Passing out
  - Throwing up
  - Appearing Disoriented
  - Unconsciousness
  - Known Blackout
    - Although memory is absent in a blackout verbal and motor skills are still functioning.

# CREATE A TIMELINE



- First must determine by a “more likely than not” standard if the reporting party was incapacitated.
  - This inquiry will likely be triggered by statements such as: “The next thing I remembered was.....”  
“I woke up and.....”  
“I don’t remember anything after.....”
  - That is your cue to start a timeline of the events during the incident to make the first-level analysis of whether the reporting party was incapacitated (using a preponderance of the evidence standard).

# TIMELINE CONSTRUCT



- Begin the timeline at the time the incident began, starting at the time the reporting party began consuming alcohol/engaging in recreational drug use. Ask:
  - When did you eat? What did you eat?
  - What were you consuming (e.g., wine, beer, or hard liquor)?
  - How much were you drinking (e.g., shot, 12 oz., or large cup)?
  - How many drinks did you have?
  - Were you using any recreational drugs?
  - Are you on any personal medications?

# BAC/BAL

- One “drink”  $\approx$  .025 BAL.
  - 12 oz.
  - 5 oz. wine.
  - 1.5 oz. liquor (a typical “shot”).
- Metabolic rate – one drink per hour.
  - .015/hr. (avg.).
  - Dependent on age, gender, height, weight, medications, genetics, experience with drinking, etc.



# TIMELINE CONSTRUCT (CONT.)



- If the Reporting Party did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. The report should address this.
  - Where were they when they were drinking?
  - Did you leave their drink at any time then resume drinking it?
  - Did anyone provide drinks for them? Who?
- There should also typically be a credibility analysis in the report regarding these answers.

# KNOWLEDGE CONSTRUCT

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

# FINAL INCAPACITY ANALYSIS



- If the Reporting Party was not incapacitated, move on to the Consent analysis (Question #3).
- If the Reporting Party was incapacitated, but:
  - The Responding Party did not know it, AND
  - The Responding Party could not have reasonably known it then the policy was not violated for this reason. Move on to the Consent analysis.
- If the Reporting Party was incapacitated, and:
  - The Responding Party knew it or caused it then there is a policy violation. Sanction accordingly.
  - The Responding Party could or should have known it then there is a policy violation. Sanction accordingly.

# CONSENT

Question 3 is the Consent question:

- What clear *words or actions* by the Reporting Party gave the Responding Party permission for each sexual or intimate act as it took place?
- Equity demands a pure consent-based policy, defining what consent is rather than defining it by what it is not (e.g. force, resistance, against someone's will, unwanted, someone unable to consent, etc.).
- The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

# CONSENT IS...



- Informed, knowing, and voluntary (freely given),
- Active (not passive),
- Affirmative action through clear words or actions,
- That create mutually understandable permission regarding the conditions of sexual or intimate activity.
- Cannot be obtained by use of:
  - Physical force, compelling threats, intimidating behavior, or coercion.
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated.

# CONSENT: RULES TO REMEMBER



- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated – verbally or non-verbally – by the person withdrawing it.

# Assessing Incapacitation Case Study



**Kyle & Bob**

# Kyle & Bob



- Kyle O'Neil, the complainant, a first-year student;
- Bob Thompson, the respondent, a second-year student

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# Kyle O'Neil's Statement



It was Friday night and man it had been a long week. I was invited to an off-campus party and was ready to blow off steam. My adjustment to college has been a challenging one. Frankly, I'm struggling with feelings that I had not recognized before and it's scaring me. I just wanted to forget all the stress of school and my personal life and have a good time.

I was dancing and doing some drinking and a guy came up to me and started dancing. I'd seen him on campus and thought he was really good looking. No one seemed to be paring off so it didn't feel awkward.

# Kyle O'Neil's Statement



Over the next couple hours I had a blast, Bob got me some more beers and then they started passing out Jello shots. I'd never had them before and they were great. I think I had a bunch.

I started feeling really nauseous and hit the can cause I knew I was going to be sick. I got sick and decided it was time to head home. I only made it as far as the outside door and got sick again, right there in the bushes. I didn't realize anyone was around, but Bob came up to me and asked if I needed help. I was so glad for someone to help me get back to my dorm.

# Kyle O'Neil's Statement



I remember us coming in my room and I remember hugging Bob (I don't know why-I think I was just so glad to be back). Then I got sick again. Bob was still there when I came back from the bathroom and he encouraged me to lay down. I must have. The rest of the night is a blur. I remember someone rubbing my back, it must have been Bob.

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# Kyle O'Neil's Statement



When I woke up I was naked and had a terrible hangover and then I saw a note from Bob. I didn't realize he left me one. I also saw a used condom in the trash. I was so confused and didn't know what had happened. I called him to find out just what went on last night and he asked me out! I'm so upset! What did I do? What did he do? I don't know if I want to find out, but I know it's bad. He did this to me and I want him held responsible. This whole thing is messing with my mind.

# Bob Thompson's Statement



On the night of Friday, September 13<sup>th</sup>, I went to an off-campus party. There was a band, and a lot of alcohol. I got to the party at about 11:00 pm, and slammed about three beers in the first hour I was there. It was very crowded, and people were dancing. A lot of people already seemed to be drunk. I hung out around the dance floor with my friend Jami Warren for a while, until I noticed Kyle O'Neil dancing. He was really hot, and I had noticed him on campus a few times. I didn't know if he was into guys but I was willing to find out. I went up to him and we started talking

# Bob Thompson's Statement



He seemed a little tipsy and in a pretty loose mood. We talked for a while, and he asked me to get us some more drinks I think I got him about two or three beers over the next hour.

I didn't have anything more to drink because the three beers I slammed were doing the trick just fine. Around 1:00 am, somebody started passing out Jell-O shots spiked with grain alcohol. I didn't want to mix beer and liquor, but Kyle had a few shots.

We danced a lot, and he had a few more Jell-O shots. He went off to the bathroom, and after that I couldn't find him, and that really bummed me out. I waited around to see if he would show up again, but he didn't. I took off and started to walk back to my residence hall.

# Bob Thompson's Statement



As I left the party, I heard someone vomiting. I looked over and saw Kyle in the bushes, throwing up. I went over to help him, and he seemed to be in pretty bad shape. I offered to take him home, and he told me where his dorm was and leaned on my arm. When we got to his dorm, I helped him inside, and was about to leave, but he asked me to come up to his room, just to make sure he got there. I took him upstairs, opened the door for him, and let him in.

He asked me to get him a glass of water, and I did. I started to take off again, but he asked me not to go. When I turned around, he hugged me. We hugged for a while, but he wasn't feeling well, and went into the bathroom. When he came out, he said he felt better, but tired.

# Bob Thompson's Statement



We crashed on the couch and then started kissing. I started to massage his back, and he fell asleep. He woke up about 20 minutes later, and started to kiss me, and fondle me. He took off my shirt, and I took off his, eventually we were both naked. I started to give him oral sex, and he said he needed some rest. I asked him if this was OK and if he was OK, and he said he was, he just needed to rest some more. I asked him if he had a condom, and he said he had one in his dresser. I went to get it, and when I got back to the couch, he was asleep again. He woke up after about 20-30 minutes, and I suggested that he just go to sleep. But, he said he felt much better, and started to give me oral sex.

# Bob Thompson's Statement



After a while, he put the condom on and we had sex. It was great. Afterward I gave him my number and left. The next day, he called me to ask me why my name and number was on the pad by his sofa. I told him about meeting him at the party, and about our evening together. He seemed to get upset, and said he remembered meeting me at the party, and me helping him back to his dorm but almost nothing else. I asked if he wanted to go out sometime, and he said “I’m not gay” and hung up on me. Two days later, I was notified by the Dean that Kyle filed a complaint against me, and here I am.

# Group Discussion



- Please discuss if you would determine, based on a preponderance of the evidence if Kyle was incapacitated.
  - What information do you need to know?
  - What evidence will you use to determine your answer?
- If you believe Kyle was incapacitated, do you believe Bob knew or reasonably should have known?
  - What evidence will you use to support your answer?

# EVALUATION OF EVIDENCE AND DECISION-MAKING SKILLS

- Understanding Evidence
- Credibility
- Analyzing the Information
- Making a Finding

# UNDERSTANDING EVIDENCE



- Formal rules of evidence do not apply. If the information is considered relevant 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 charges

# UNDERSTANDING EVIDENCE



- You may consider and assign weight to evidence based on:
  - Documentary evidence (e.g., supportive writings or documents).
  - Electronic evidence (e.g., photos, text messages, and videos).
  - Real evidence (i.e., physical objects).
  - Direct or testimonial evidence (e.g., personal observation or experience).
  - Circumstantial evidence (i.e., not eyewitness, but compelling).
  - Hearsay evidence (e.g., statement made outside the hearing, but presented as important information).
  - Character evidence (generally of little value or relevance).
  - Impact statements (typically only relevant in sanctioning).

# CREDIBILITY



- “To assess credibility is to assess the extent to which you can rely on a witnesses’ testimony to be accurate and helpful in your understanding of the case”
  - Credible is not synonymous with truthful – but may involve lack of truthfulness
  - Memory errors do not necessarily destroy a witness’ credibility
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- Pay attention to the following factors...

# FACTORS TO CONSIDER FOR CREDIBILITY



- Demeanor
  - Nonverbal language
  - Demeanor issues should be cue to ask more questions
- Non-cooperation
  - Look for short, abrupt answers or refusal to answer
  - OK to ask, “You seem reluctant to answer these questions – can you tell me why?”
- Logic/consistency
  - Ask yourself, “Does this make sense?”
- Corroborating evidence
- Inherent plausibility – is the evidence more likely than the alternative?

# FACTORS TO CONSIDER FOR CREDIBILITY



- Is the description of the incident plausible?
  - Logic/Consistency/Reasons to Avoid Specific Response
  - Ask “Does this make sense?”
- Is the description corroborated? Corroborating evidence is important
- Did the witness report his/her account to anyone close to the time of the events?
- Does the witness have a reason or motive to lie or falsify information about the account?
- Does the witness have a past record of behavior that would either substantiate or refute his/her account?

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# MAKING CREDIBILITY DETERMINATIONS



- Look at consistency of story – substance and chronology of statements also if there are other exact stories
- Consider inherent plausibility of all information given
- Look for the amount of detail (facts) provided, factual detail should be assessed against general allegations, accusations, excuses or denials that have no supporting detail
- Pay attention to non-verbal behavior (i.e., does the person seem to be telling the truth), but don't read too much into it

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# ANALYZING THE INFORMATION (CONT.)



- Assessing each answer: for each piece of information you have as a result of your analysis and matching your need to assess its evidentiary value. Measure with the following questions:
  - Is the question answered with fact(s)?
  - Is the question answered with opinion(s)?
  - Is the question answered with circumstantial evidence?

**!** Withhold judgment until all the evidence has been considered.

# DELIBERATIONS

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# DELIBERATIONS



## General Information

- Deliberations should involve only the Hearing Officer(s)/Decision-Maker(s) – witnesses, investigator and others excused
- Do not record deliberations; recommend against taking notes
- With a Panel, the Chair can be voting or non-voting
- Typically, there is no specific order in which allegations must be addressed, so board can decide what makes sense in each case
- With a hearing panel, we recommend the Chair first obtain a sense as to where panel members stand on each allegation
- Decisions must be based on the specific policy alleged to have been violated

# DELIBERATION INITIAL DECISION



- Consider what model of deliberation you want to use:
  - Hierarchical – Chair or prominent member of the panel leads discussion; often shown deference (is that good?)
  - Consensus – build to a shared, often unanimous conclusion (avoid negotiating or compromise, though)
  - Adversarial – opposing viewpoints argued until a majority is clear (argue issues, but don't make it personal)

## The Role of the Chair of a Board/Panel

- Ensure all viewpoints of board members are addressed
- Ensure board members apply appropriate standards and applicable policies
- Address and make findings for each alleged policy violation individually and parse the policies.
  - Can only address the policies with which the Responding Party was charged.
- Do not allow board members to consider evidence or allegations/charges not provided by investigators or during the hearing
- Neutralize any power imbalance between board members
- Ensure an impartial decision that is free of substantive bias
- Draft a rationale for the decision with the input of board members

## Findings, Impact Information, and Sanctions

- Be sure to separate the “Finding” from the “Sanction.”
  - Do not use impact-based rationales for findings (e.g.: intent; impact on the Reporting Party; impact on the Responding Party, etc.)
  - Use impact-based rationales for sanctions only.
- Reporting Party and Responding Party should be allowed to deliver an impact statement only if and after the Responding Party is found in violation
- Understand that the question of whether someone violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Be careful about not heightening the standard for a finding because the sanctions may be more severe

## Foundation for Decisions

- Decisions must be based only upon the facts, opinions, and circumstances provided in the investigation report or presented at the hearing
- Decisions must be based on the specific policy alleged to have been violated
- Issue Spotting
  - Look at each element to be assessed in the policy (e.g. intent, sexual contact, voluntary, etc.), separate it out and determine if you have evidence that supports that a violation of that component is more likely than not.

# REVIEW OF PROCESS



- Review the institutional policies in play.
- Parse the policy.
  - Specific findings for each policy and each responding party.
- Review the evidence and what it shows (relevance).
- Assess credibility of evidence and statements as factual, opinion-based, or circumstantial.
- Determine whether it is more likely than not policy has been violated.
- Cite concretely the reasons for your conclusions.

# SANCTIONING IN SEXUAL MISCONDUCT CASES

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# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Title IX and case law require:
  - Bring an end to the discriminatory conduct (Stop)
  - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (Prevent)
  - Restore the Reporting Party as best you can to their pre-deprivation status (Remedy)
- This may clash if the other sanctions only focus on educational and developmental aspects
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the Reporting Party and the community

# COMMON STUDENT SANCTIONS



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

# WHAT SANCTIONS?



- A student is found responsible for non-consensual sexual intercourse involving another student; the panel determined the Reporting Party was incapacitated and the Responding Party should have known of this incapacity
  - The panel felt that part of the problem was the students' inexperience with sexual matters and poor communication
  - The Responding Party is an excellent student and is well-liked by campus community; he will graduate in a month
  - The Reporting Party indicates that she does not want the Responding Party to be suspended or expelled

# WHAT SANCTIONS?



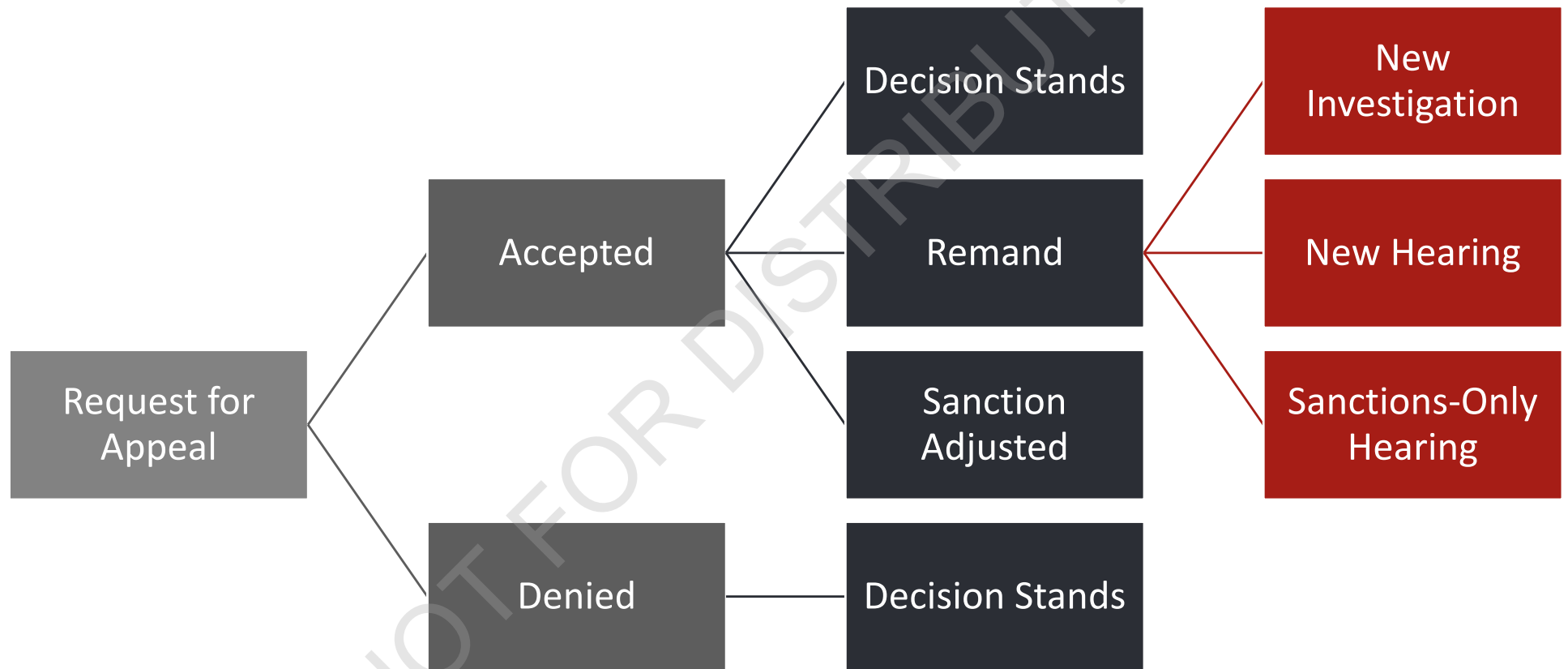
- The Hearing Board determines that five members of the men's soccer team (Students A, B, C, D, and E) subjected the first-year students to various hazing-related rituals, including paddling and pouring hot sauce on the first-year students' genitals
  - Four students (A, B, C, and D) engaged in the paddling
  - Two students (A and B) poured hot sauce on the genitals of first-year students
  - One student (E) was present throughout, but did not paddle or pour hot sauce on the first-year students

# APPEALS

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- Key Elements
- Where Appeals Go Off the Rails
- Grounds for Appeal
- Appeals Logistics
- Process Flowchart

# APPEALS: THE PROCESS



# APPEALS: KEY ELEMENTS



- One level of appeal
- Limited grounds for appeal (see next slide)
- Deference to original hearing authority
- Sanctions take effect immediately
- Short window to request an appeal
  - Can always grant an extension if necessary
- Document-based and recording review
  - NOT de novo
- Request for an appeal

# APPEALS: GROUNDS FOR APPEAL



- **A procedural error or omission occurred that significantly impacted the outcome of the hearing**
  - E.g.: Insufficient evidence to warrant the finding, substantiated bias, material deviation from established procedures, etc.
- **To consider new evidence, unknown or unavailable during the original hearing or investigation, that could substantially impact the original finding or sanction**
  - A summary of this new evidence and its potential impact must be included
- **The sanctions imposed are substantially disproportionate to the severity of the violation** (or: the sanctions fall outside the range of sanctions the university/college has designated for this offense)

# PRACTICE DELIBERATION

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# INTRODUCTION OF INVESTIGATION REPORT



## NOTICE

- On Monday, August 10, 2018 , the Title IX Coordinator (TIXC) met with Complainant and the Sexual Assault Victim's Advocate. The Complainant reported that on Friday May 2, 2018 the Responding Party engaged in non-consensual penetration of the Complainant while the Complainant was in state rendering the Complainant unable to give consent.
- As a result of this allegation and additional evidence presented at the time of intake, the TIXC asked the Title IX Investigator to conduct a thorough and impartial investigation using the provisions outlined in the University's Grievance Policy and in accordance with Title IX, and following guidelines from the Department of Education Office of Civil Rights.
- Complainant is a sophomore student. Responding Party is a senior student.

# INTRODUCTION OF INVESTIGATION REPORT



## ALLEGATIONS

- The TIXC tasked the investigators with determining whether the Responding Party is responsible for violating the College Grievance policy (using the preponderance of evidence standard) specifically in regards to the allegations below:
- Sexual Harassment
- Non-Consensual Sexual Contact
- Initiating sexual activity with a person who is incapacitated and unable to provide consent due to alcohol and/or drug consumption or other condition
- Non-Consensual Sexual Penetration

# INVESTIGATION REPORT



## INVESTIGATION SUMMARY

- **Summary of the Complainant's statements and evidence relevant to the case (Note: all pronouns used are gender non-specific "they"):**
- Complainant reported that starting close to 11:00 pm on Friday May 2 through 4:00 am on Saturday, May 3, 2018, the Complainant was at the off-campus residence of the Responding Party.
- Complainant believes that they watched 2-3 episodes of a Netflix series, Stranger Things. While watching this show, they shared a bottle of wine and 3 beers (approximately 2 - 3 hours).
- Complainant is unsure of how many glasses of wine or beer they drank, but believes that they had about the same amount to drink as the Responding Party and not an abnormal amount as compared to other nights.

# INVESTIGATION REPORT



- Complainant left the room one time during the evening to use the restroom. Complainant noted that they shared this information with the police detective that the Complainant spoke to at the hospital and that the detective suggested that the Complainant might have been drugged.
- Complainant recalls that sometime during the third episode of Stranger Things and after they had used the restroom that they started to feel “weird, unable to move normally, dizzy.”
- Complainant recalls the Responding Party began touching the Complainant’s genital region and kissing the Complainant.
- Complainant felt like they were unable to move.
- Complainant recalls that the Responding Party then got up off the couch where they were watching the show and took the Complainant by their hand and led them down the hallway to a bedroom. The Complainant assumed the bedroom belonged to the Responding Party, but was not sure since they had never been to the house before.

# INVESTIGATION REPORT



- Complainant recalls that the Responding Party led the Complainant to the bed and sat the Complainant on the bed.
- Complainant recalls that the Responding Party continued to kiss and touch the Complainant as they had been doing in the room with the television.
- Complainant recalls observing the Responding Party removing their own clothing.
- Complainant recalls the Responding Party asking the Complainant if it was okay if they removed the Complainant's clothing. The Complainant does not remember if they said yes or no or nothing.
- Complainant remembers the Responding Party leaving the room for a short period of time (several minutes), before returning to the room and closing the door behind them. The Complainant remembers the door to the bedroom being open until this time.

# INVESTIGATION REPORT



- Complainant remembers that the lights were also on and that they could hear other people in the house.
- Complainant remembers waking up several hours later confused and dazed and uncertain to what had happened.
- Complainant got up and went to the bathroom and saw bruises on their shoulders and hips and a large bruise on their neck.
- Complainant said they “quietly freaked out” and texted Witness One.
- Complainant described being in pain and feeling like they had to crawl around the room to find all their clothes.
- Complainant remembers getting dressed in the hallway before leaving the house around 4 am. Complainant remembers Witness Two was asleep on the couch when the Complainant left.

# INVESTIGATION REPORT



- Complainant called Witness One who met the Complainant and walked the Complainant to the Student Health Center.
- Complainant also called the Victim's Advocate and was then taken to the hospital for a medical evaluation.
- Complainant met with a police detective who documented the bruises and took a report (Police Report #2017-XX052117).
- Complainant received the SANE kit back from the hospital in late July. Toxicology report only showed high levels of alcohol. Complainant did not share the results of the physical examination from the SANE kit with the Investigator.
- Complainant reported this incident to the College after realizing they were in a class for their major with the Responding Party this fall.
- Complainant provided the investigators with the full text exchange with Witness One. Complainant was unable to provide texts from the Responding Party because they deleted and then blocked the Responding Party shortly after this incident.

# RESPONDING PARTY'S STATEMENT



- **Summary of the Responding Party's statements and evidence relative to the case:**
- Responding Party stated that on Friday, May 2, 2018 they received a Snapchat from the Complainant asking if they wanted to hang out.
- Responding Party recalled that they traded several texts and Snapchats with the Complainant before meeting up near the Campus Center a little before 11 pm.
- Responding Party recalls that they then walked to the Safeway on Rose Street and purchased a bottle of wine, a six pack of beer, and a loaf of bread.
- On the way back from Safeway, the Responding Party asked Complainant if they wanted to "Netflix and chill." The Responding Party reports that the Complainant said "yes."
- Responding Party believes they arrived back to the Responding Party's off-campus house around 11:40 pm.

# RESPONDING PARTY'S STATEMENT



- Responding Party recalls putting the wine, beer and bread in the kitchen and that while they set up their laptop to watch some shows, the Complainant went to the kitchen and opened the wine and beer and brought wine, beer, glasses, and bread back to the living room.
- Responding Party claims they do not like wine so ended up only drinking beer. The Responding Party recalls the Complainant finishing the bottle of wine and having some of the beer the Responding Party was drinking.
- Responding Party recalls Complainant getting up at some point in the evening to go to the bathroom.
- Responding Party denies placing anything in Complainant's glass or being aware of anyone else doing so.
- Responding Party said they started kissing and there was "lots of touching." When asked who initiated the kissing and touching the Responding Party said that they had initiated both.
- Responding Party recalls getting a text from their housemates and so the Responding Party grabbed the Complainant's hand and led the Complainant

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# RESPONDING PARTY'S STATEMENT



- Responding Party recalls getting a text from their housemates and so the Responding Party grabbed the Complainant's hand and led the Complainant down the hall to the Responding Party's bedroom.
- Responding Party recalls taking off their own clothes and then asking the Complainant if they "needed help" taking off their clothes. The Responding Party said that the Complainant asked for help in getting their clothes off and so the Responding Party helped.
- Responding Party recalls that the kissing and touching continued for quite a while.
- Responding Party recalls grabbing a towel off of the back of the door and leaving the room as they heard their roommates return (Witness Two and Three). Responding Party talked with the roommates for a short period of time before going to the bathroom, getting a condom, and returning to the bedroom. The Responding Party thinks they might have been out of the room for up to 5 minutes

# RESPONDING PARTY'S STATEMENT



- When the Responding Party returned to the room, they thought the Complainant was asleep, but once they touched the Complainant's shoulder they woke up.
- The Responding Party then got back up and closed the door.
- The Responding Party reports that the Complainant then began to touch the Responding Party and they took that to mean that the Complainant was interested in engaging further.
- The Responding Party put the condom on and the two began to actively explore each other.
- The Responding Party recalls asking the Complainant if everything was okay and was pretty sure the Complainant said yes

# RESPONDING PARTY'S STATEMENT



- The Responding Party recalls penetrating the Complainant, both the Complainant and Responding Party climaxing and then both laughing as the Responding Party told the Complainant that Witness Two had told the Responding Party to “keep it down.”
- When asked specifically about how consent was obtained the Responding Party said “that just seemed like the way things were going, so that is the way they went.”
- The Responding Party recalls them talking for a while and then falling asleep.
- When the Responding Party woke up around 10 am, the Complainant was gone. The Responding Party texted the Complainant thanking the Complainant for a “wild and fun night.” The Responding Party reports that the Complainant never responded. When asked what the Responding Party contributed the lack of response to, the Responding Party said “then - summer, now - this.”
- The Responding Party was unable to produce any text messages as they accidentally dropped their phone in the river this past summer while water skiing.

# WITNESS #1



- **Witness One** is a sophomore student who has been best friends with the Complainant since middle school. Witness One and Complainant live in the same hall and are planning to live off campus together next year.
- Witness One received a text message from the Complainant at around 4 am on Saturday, May 3, 2018 that was confusing. Witness One did not know where Complainant was. In subsequent texts Complainant indicated that they thought they were at the Responding Party's house. Witness One recalls being afraid for Complainant because Witness One didn't know Responding Party and it seemed out of character for Complainant to hang out with someone that they "didn't know very well."
- Witness One met Complainant walking home near Sherwood and immediately took Complainant to the Student Health Center.
- Witness One described Complainant as "totally out of it."

# WITNESS #1



- Witness One recalls that the Complainant could not recall how much they had had to drink, eat or smoke and so they suggested they go to the hospital. On the way to the hospital Witness One called the Victim's Advocate. The Victim's Advocate met Witness One and the Complainant at the hospital.
- Witness One recalls that the Complainant could not recall how much they had had to drink, eat or smoke and so they suggested they go to the hospital. On the way to the hospital Witness One called the Victim's Advocate. The Victim's Advocate met Witness One and the Complainant at the hospital.
- Witness One reports that while they drove the Complainant to the hospital, they were not in the room during the examination.
- Witness One recalls being afraid for Complainant because Witness One didn't know Responding Party and it seemed out of character for Complainant to hang out with someone that "[they} didn't know very well."

# WITNESS #2



- **Witness Two** is the housemate of the Responding Party. Witness Two and the Responding Party share membership in several student clubs. Witness Two is also a senior.
- Witness Two remembers seeing the Responding Party around 2 am in the house they shared. Witness Two remembers the Responding Party coming out of their room with just shorts on.
- Witness Two recalls joking about Responding Party's luck.
- Witness Two recalls telling Responding Party to try to “keep it down” as Witness Two was going to sleep.
- Witness Two and Three shared text messages from a group chat with the Responding Party in which they debriefed the night.

# WITNESS #3



- **Witness Three** is the housemate of the Responding Party. Witness Three went to high school with the Complainant's older brother. Witness Three and Witness Two play on the same sport team. Witness Three is a junior
- Witness Three remembers seeing the Responding Party around 2 am in the house they shared. Witness Three recalls the Responding Party having a towel wrapped around them.
- Witness Three recalls joking about Responding Party's luck.
- Witness Three recalls walking down the hallway ahead of the Responding Party and seeing the Complainant under the covers of the bed. Witness Three recalled the Complainant seemed very still as though they might be asleep.
- Witness Two and Three shared text messages from a group chat with the Responding Party in which they debriefed the night. One text message from Witness Three read "thanks for keeping it down ha ha -- clearly not -- damn [Complainant] likes it rough - might need to share this with [Complainant's brother] -- he would probably kill you."

# CREDIBILITY ASSESSMENT



- The investigators determined that all three witnesses were credible and provided no reason for the investigators to question their credibility.
- The Complainant was equally credible to the extent they could be considering the sporadic gaps in their memory. [Note: Gaps in one's memory is not enough to suggest that the Complainant credibility should be questioned.]
- The Responding Party was found to be less credible. The Responding Party's credibility was questioned in their recounting of the period of time after the Responding Party returned from talking with Witness Three and Two. The Responding Party reported that the Complainant seemed asleep when they returned. Witness Three corroborated this as well. The Responding Party's narrative that the Complainant then became fully awake and willing to engage in "wild" sexual activity, while certainly plausible, seems to advantage the Responding Party's narrative in light of the impending charges of non-consensual penetration.

QUESTIONS?



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# CONTACT INFORMATION

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