

**Civil Rights  
Adjudication Training  
for the  
Texas A&M University System**

Rick Olshak, Director of Title IX Compliance  
August 2020



**NOTICE:**

This training material is provided for public review in accordance with federal law. The material may be utilized only for non-commercial educational and training purposes with the user assuming all risk for utilization of any content herein. Commercial utilization of this material is prohibited.



## **For this training...**

1. Aubrey Craft of SECO will keep members muted throughout today's training; questions will be taken by section by using the "Q&A" function in Webex; we have a lot of material to cover in our time together today. To ask a question:
  - a) Open the Q&A Panel
  - b) Type your question into the text box
  - c) In the Ask drop down list, select Aubrey Craft as the recipient
  - d) Select Send
  
2. If you have questions after the completion of this program, please direct those questions to your Title IX Coordinator (TIXC). We ask that the TIXCs collect and submit questions to Rick Olshak so that SECO can issue any necessary guidance to all System members.
  
3. Mandatory Pre-Requisite: Attendees must have completed the mandatory training on Title IX and System Regulation 08.01.01 to take this training program. Very little of the previous training program is repeated in this training.



## For this training...

4. This Power Point presentation will be available on TrainTraq, and those involved in processing civil rights cases as civil rights officers (including Title IX coordinators and deputies), adjudicators, advisors (to panels), and appellate officers must all log in to TrainTraq and pass a post-test before you will be able to participate in civil rights compliance case management. **The deadline to complete this post-test is 5:00 pm on Wednesday, September 2.** If you are attending the Webex training, you will receive an access code for the post-test at the end of the training program. If you are viewing this training on TrainTraq, the post-test will come at the end of the program. You must attend all of the first three sessions to be able to bypass the training material and access the post-test. The fourth session is focused on hearing panel chairs, single hearing officers, and advisors to hearing panels. A separate (additional) post-test will be used for those attending the fourth session.



## **For this training...**

5. Assumes no previous knowledge on content areas
6. Presentation is text heavy and intended to serve as a reference document after the training
7. The presenter is not providing legal advice; the presenter is a compliance officer and is offering compliance guidance
8. Training intended to be complemented by local training provided by the Title IX Coordinator and/or student conduct officers
9. Please note that the material being addressed in this program may involve explicit descriptions or details that some may find offensive, while others may find these materials triggering. Nothing is being done today simply for “shock value” but will be consistent with the real-world language and details that we are confronted with in this work. If you find yourself triggered, please step away to the degree that you need to, and please seek appropriate assistance if necessary.



## For this training...

10. This training is in a transitional mode and has not yet been timed to a live training audience, nor in an online environment. We will go as far as we can in the materials in each session, picking up where we leave off in the next session. We have a number of required topical areas to address and will address each one. Please note that this may affect the time we have allowed for questions by the end of session three.
11. Finally, beginning tomorrow we will be using breakout sessions, where you will be assigned to different chat groups. One person in each group will be assigned as a “Presenter” but that is simply functional and carries no responsibilities other than your presence in the chat room.
  - a) Please note that beginning tomorrow you will not be able to join by a mobile device and participate in a breakout session
  - b) There is an “Ask for Help” button in the event that you want me to join your breakout session for a question or concern



## Agenda

Session #1: Administration of the Process / Due Process

Session #2: Skill Areas

Session #3: Special Topics

Session #4: Chairing a Hearing

(for Panel Chairs, Panel Advisors, and Single Hearing Officers in Sex-based cases)



Rick's background in adjudication

A long time ago in a galaxy far,  
far away....



## Rick's background in adjudication

- 1990-1992                      Georgetown University (Coordinator, Student Judicial Services)
- facilitated and advised all live student conduct hearings
  - facilitated and advised all live appellate hearings
  - trained all conduct board and appellate board members
- 1993-1996                      SUNY-Cortland (Asst. Director of Residential Life for Judicial Programs)
- served as administrative hearing officer
  - served as investigator
  - selected and trained all members of University Judicial Review Board (JRB) and Residence Hall Judicial Board (RHJB); trained members of Greek Standards Board
  - advised JRB hearings and deliberations
  - authored Code of Student Conduct



## Rick's background in adjudication

1996-2005

Illinois State University (Director, Student Dispute Resolution Services)

- selected and trained all members of the University Hearing Panel (UHP)
- facilitated and advised live student conduct hearings
- facilitated and advised live appellate hearings
- oversaw grievance process for student complaints against faculty and staff (to 2016)
- served on athletic scholarship appeals board (to 2016)
- oversaw investigations of all registered student organizations (to 2016)
- authored Code of Student Conduct

2004-2016

Illinois State University (Associate Dean of Students)

- served as primary Title IX hearing officer
- supervised all student conduct operations
- authored Code of Student Conduct (social justice – based)



## Rick's background in adjudication

- 2016 - present      Texas A&M University System (Director, Title IX Compliance)
- training hearing officers, hearing panel members, advisors, and appellate officers
  - serve as Title IX Hearing Officer for RELLIS
  - facilitating development of System-wide Code of Student Conduct

This experience also includes many years of providing consulting services, conference training presentations, and publications on training conduct boards, sanctioning misconduct, and due process, in addition to other areas. Served as president of the Association for Student Conduct Administration (ASCA) in 2001.

### Practical experience:

- Have heard thousands of conduct cases
- Have heard hundreds of sex-based cases



## Agenda – Session One

1. Pre-Test
2. System Regulation 08.01.01 and the Adjudicatory Process
3. The Role of the Adjudicatory Process
4. Due Process in Higher Education (for students)

(5-Minute Break)

5. The Hearing Officer
6. The Pre-Hearing Conference
7. The Hearing Process



# POLL

- Have you ever served as a official (single hearing officer or member of a hearing panel) in any live hearing involving student or employee conduct?

» ANSWER YES OR NO

## Pre-Test

Here are 8 questions that we will address today through the material. Some or all of these questions may appear on the final post-test.

1. True or False – The role of the adjudicatory process is to prove that the respondent violated our standards and to punish them for their offenses.
2. Choose One – Which court decision is understood to be the landmark case for student conduct that effectively ended *in loco parentis*?
  - a) Brown v. Board of Education (1954, U.S. Supreme Court)
  - b) Dixon v. Alabama (1961, 5<sup>th</sup> Circuit)
  - c) Goss v. Lopez (1975, U.S. Supreme Court)
  - d) Davis v. Monroe County Board of Education (1999, U.S. Supreme Court)
3. Choose One – Which due process requirement has not been established by the federal courts for respondents in all student conduct cases?
  - a) Notice of allegations/charges
  - b) Hearing prior to suspension
  - c) Right to appeal any outcome
  - d) Right to challenge witnesses and information



## Pre-Test

Here are 8 questions that we will address today through the material. Some or all of these questions may appear on the final post-test.

4. True or False – A student accused of an act that is also considered a crime cannot be charged on campus if also facing criminal prosecution, as this would violate their 5th Amendment rights to avoid double jeopardy (being charged twice for the same crime).
5. True or False - Since 2011, over 70% of public colleges and universities have changed their standard in Title IX cases to a preponderance of the evidence, as a direct result of federal guidance (2011 Dear Colleague Letter on Campus Sexual Violence).
6. Choose One – Which U.S. Constitutional Amendment is most applicable to due process for alleged misconduct in the higher education setting?
  - a) First (1<sup>st</sup>) Amendment
  - b) Fifth (5<sup>th</sup>) Amendment
  - c) Sixth (6<sup>th</sup>) Amendment
  - d) Fourteenth (14<sup>th</sup>) Amendment



## Pre-Test

Here are 8 questions that we will address today through the material. Some or all of these questions may appear on the final post-test.

7. True or False – In live Title IX hearings, advisors must be allowed to represent their client, both speaking on their behalf and conducting questioning of the other party and all witnesses.
8. Choose One – In the event that a party fails to appear at a scheduled live hearing, what previously submitted statements may be included in the decision-making of the hearing officer or hearing panel?
  - a) Only their previous statements to police
  - b) Only their previous statements to civil rights investigators
  - c) Only their previous statements to the Title IX Coordinator
  - d) None of the above



## System Regulation 08.01.01 and the Adjudicatory Process

### **08.01.01 Civil Rights Compliance**

Revised [July 7, 2020](#) (Effective August 14, 2020)

Next Scheduled Review: July 7, 2025

Click to view [Revision History](#).



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### **Regulation Summary**

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The Texas A&M University System (system) will provide equal opportunity to all employees, students, applicants for employment and admission, and the public. This regulation provides guidance to each member in complying with local, state and federal civil rights laws and regulations (laws) and related system policy.



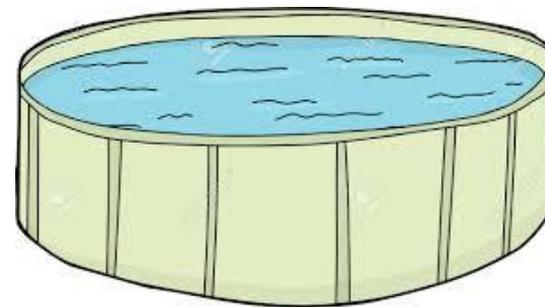
## System Regulation 08.01.01

### Section 4.2.9 – Types (“Pools”) of Cases

Title IX (4.2.10)

Sex-based Misconduct (4.2.11)

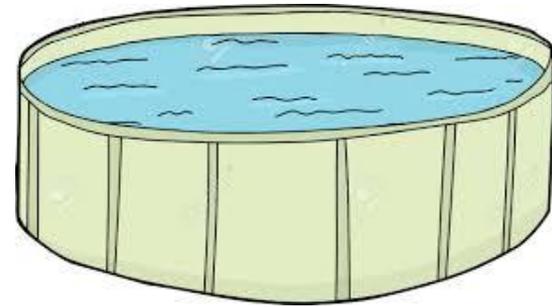
Other Civil Rights (4.2.12)



## System Regulation 08.01.01

### Section 4.2.9 – Types (“Pools”) of Cases

1. Title IX (4.2.10)
2. Sex-based Misconduct (4.2.11)
3. Other Civil Rights (4.2.12)

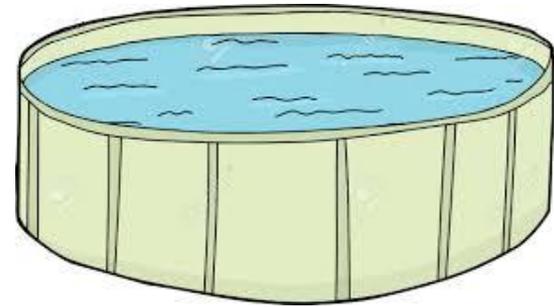


- (a) When a complaint involves allegations of misconduct that involve both sex-based allegations (1 and/or 2 above) and allegations of other civil rights violations (3 above), the process shall be conducted under the requirements established for sex-based offenses (1 or 2 above). Sex-based complaints include those complaints based on sex, sexual orientation, and/ or gender identity.

## System Regulation 08.01.01

### Section 4.2.9 – Types (“Pools”) of Cases

1. Title IX (4.2.10)
2. Sex-based Misconduct (4.2.11)
3. Other Civil Rights (4.2.12)

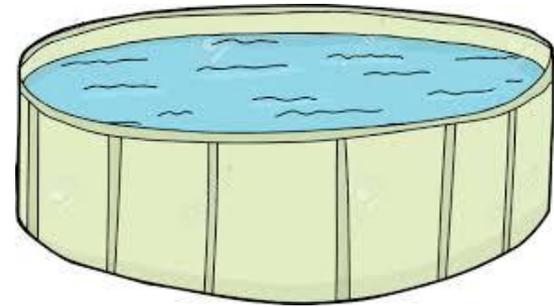


(b) In addition to reviewing complaints against students for civil rights violations, members are expected to review allegations for possible violations of codes of student conduct and professional expectations of employees.

## System Regulation 08.01.01

### Section 4.2.9 – Types (“Pools”) of Cases

1. Title IX (4.2.10)
2. Sex-based Misconduct (4.2.11)
3. Other Civil Rights (4.2.12)

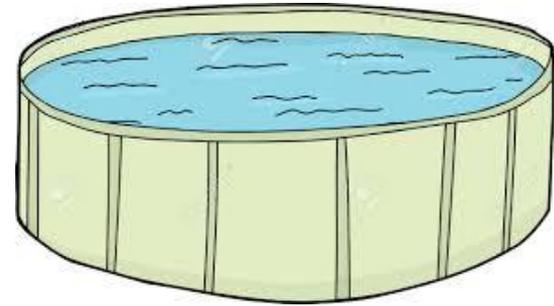


(c) When unprofessional behavior by an employee that does not rise to the level of a violation of this regulation is discovered during the civil rights investigation and adjudication process, the information will be forwarded to the employee’s supervisor.

## System Regulation 08.01.01

### Section 4.2.9 – Types (“Pools”) of Cases

1. Title IX (4.2.10)
2. Sex-based Misconduct (4.2.11)
3. Other Civil Rights (4.2.12)

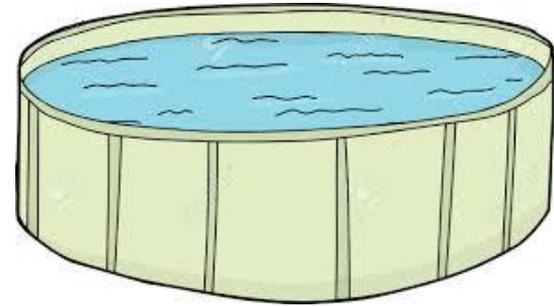


(d) When possible violations of the code of student conduct by a student that do not rise to the level of a civil rights violation are discovered during the civil rights investigation process, and where there are no civil rights charges brought forward as a result of the investigation, the information will be forwarded for review to the student conduct process.

## System Regulation 08.01.01

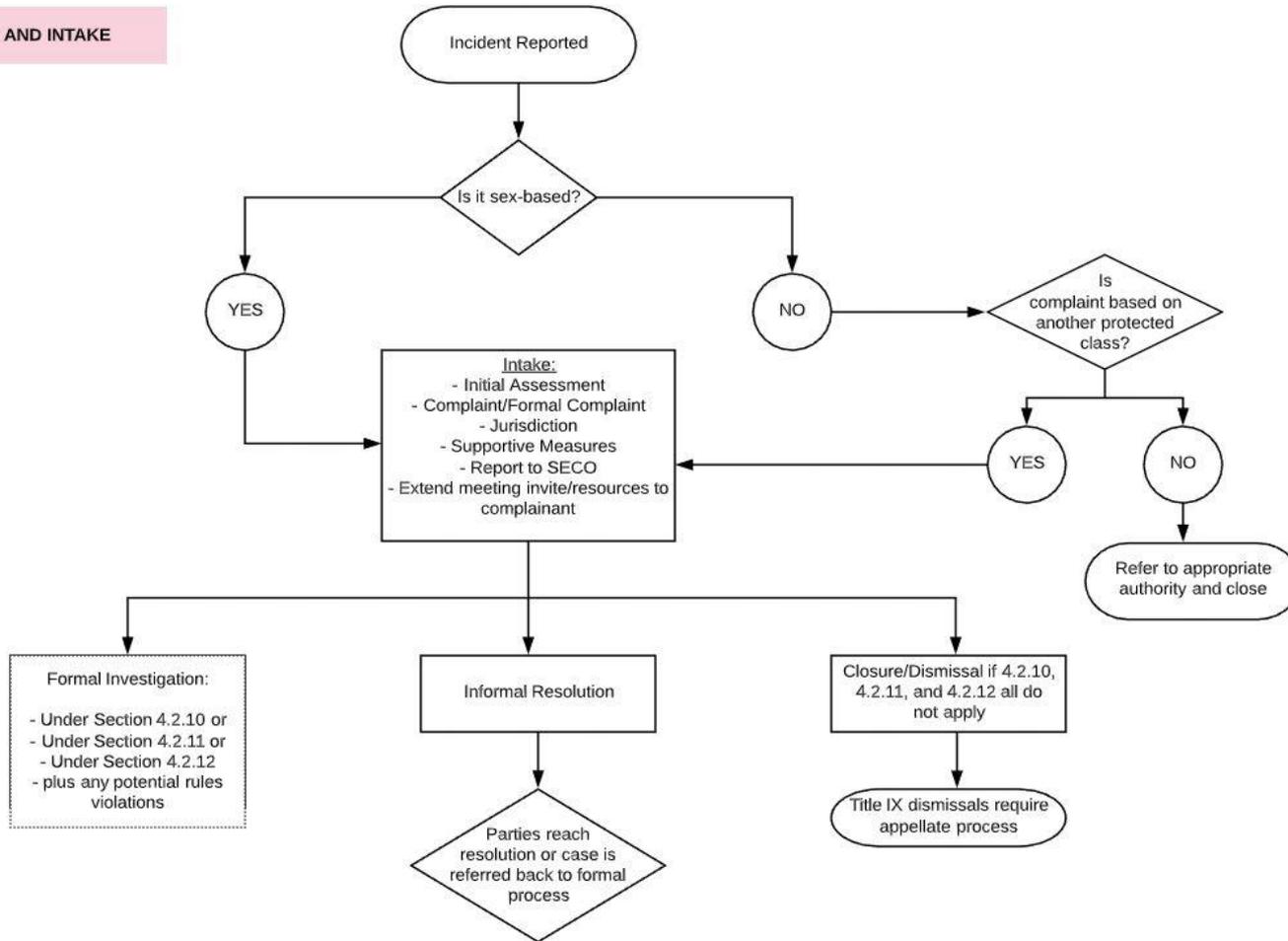
### Section 4.2.9 – Types (“Pools”) of Cases

1. Title IX (4.2.10)
2. Sex-based Misconduct (4.2.11)
3. Other Civil Rights (4.2.12)



(e) When possible violations of the code of student conduct by a student that do not rise to the level of a civil rights violation are discovered during the civil rights investigation process, and where there is also going to be an adjudication of the civil rights violation (through a formal hearing, or through informal resolution methods that result in a finding and sanction), the case will be consolidated into one adjudication conducted under the processes described in 4.2.9(a).

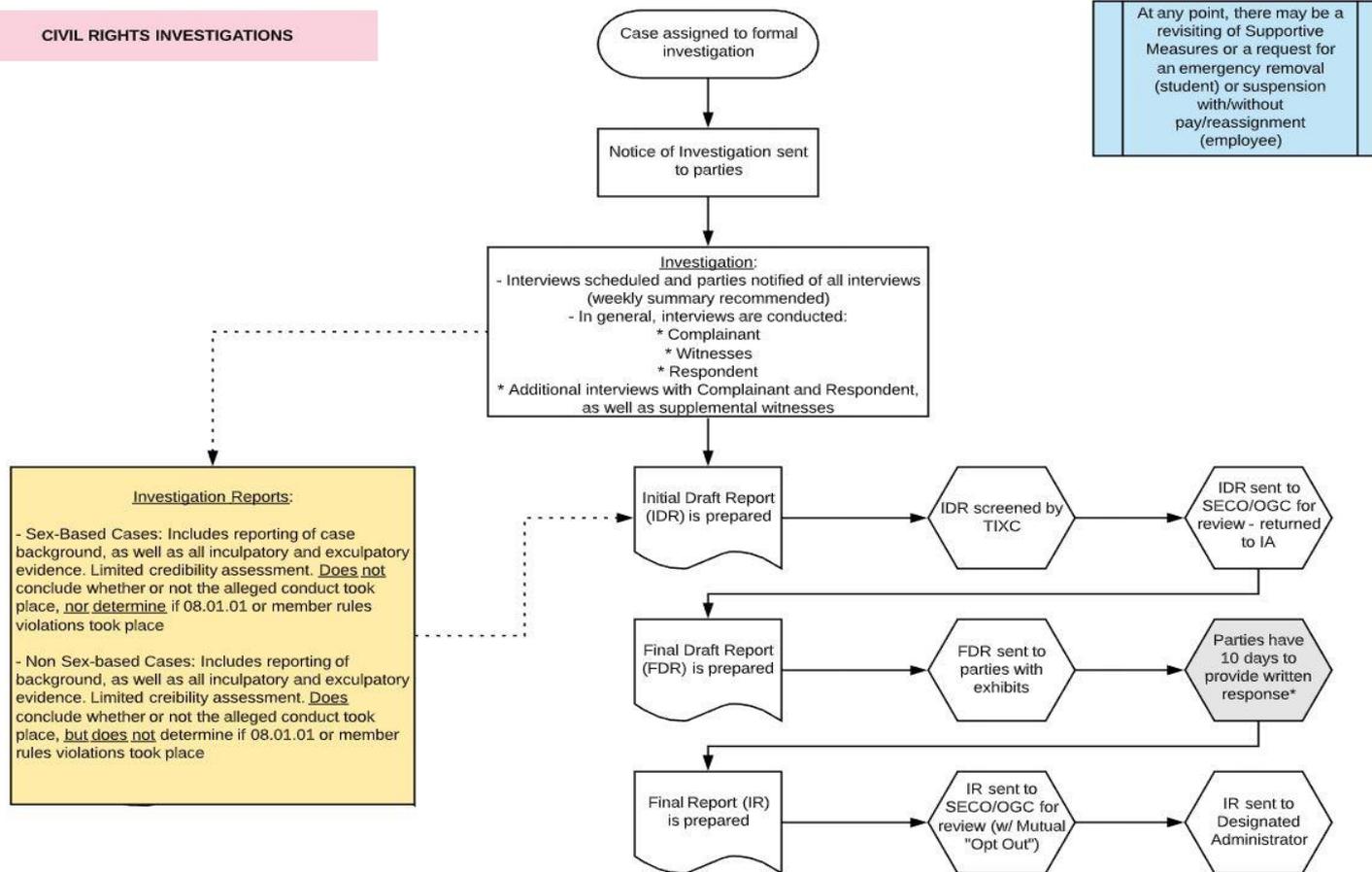
## CIVIL RIGHTS REPORTING AND INTAKE



# Civil Rights Adjudication Training

## CIVIL RIGHTS INVESTIGATIONS

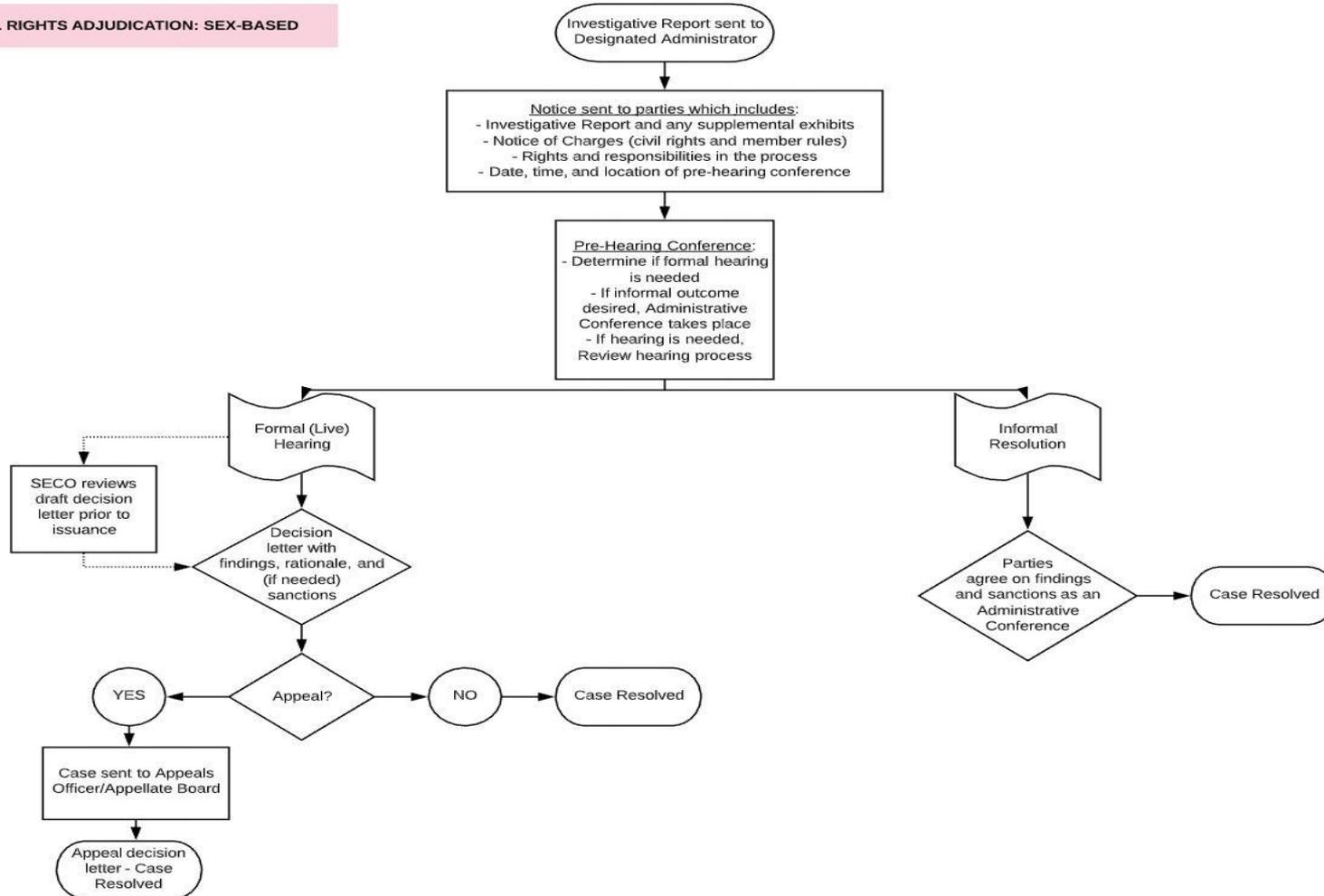
At any point, there may be a revisiting of Supportive Measures or a request for an emergency removal (student) or suspension with/without pay/reassignment (employee)



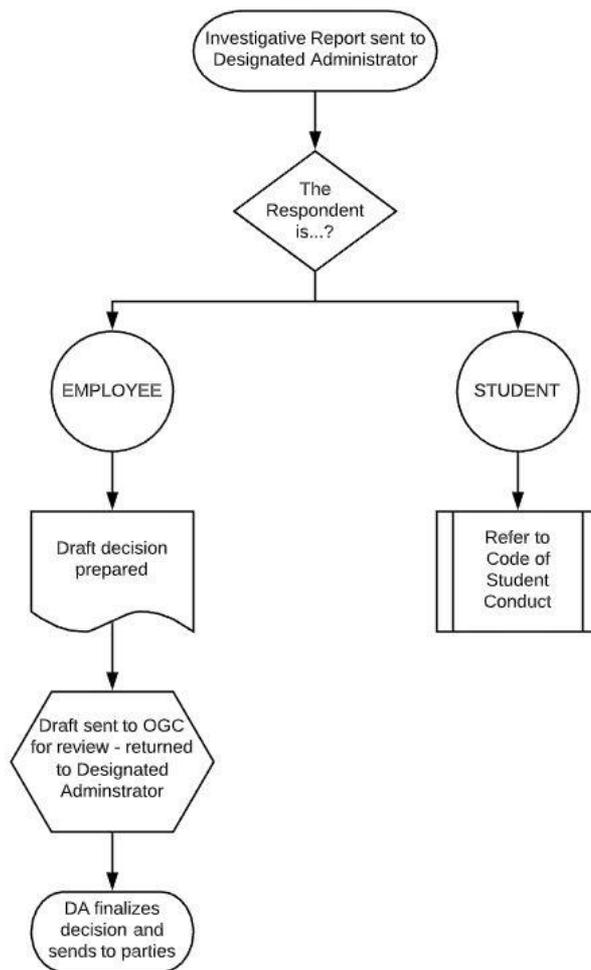
\* For sex-based cases, written responses are taken from parties; in non sex-based cases, questions for parties and/or witnesses are taken from the parties



## CIVIL RIGHTS ADJUDICATION: SEX-BASED



## CIVIL RIGHTS ADJUDICATION: NON SEX-BASED



# Civil Rights Adjudication Training

	<u>TITLE IX (4.2.10)</u>	<u>SEX-BASED MISCONDUCT (4.2.11)</u>	<u>OTHER CIVIL RIGHTS (4.2.12)</u>	<u>STUDENT CONDUCT / EMPLOYEE PROFESSIONALISM</u>
Supportive Measures	Yes	Yes	Yes	Yes
Requires	Formal Complaint	Report/Complaint	Report/Complaint	Awareness and Evidence
Standard of Evidence	Preponderance	Preponderance	Preponderance	Preponderance
Informal Resolution Allowed?	Yes – with SECO approval	Yes – with SECO approval	Yes – with SECO approval	Yes
Role of Investigative Authority	Collect and report inculpatory and exculpatory evidence	Collect and report inculpatory and exculpatory evidence	Collect and report inculpatory and exculpatory evidence; conclude if allegations are substantiated but not if 08.01.01 or member rules were violated	Refer to Member Rules and appropriate System Regulation
Adjudication	Formal (Live) Hearing	Formal (Live) Hearing	Written Review	Refer to Member Rules and appropriate System Regulation
Adjudicator	Hearing Officer or Hearing Panel (in role of DA)	Hearing Officer or Hearing Panel (in role of DA)	Designated Administrator	Refer to Member Rules and appropriate System Regulation
Allowed an Advisor?	Yes – provided by Member for formal hearing if no advisor is present	Yes – provided by member for formal hearing if no advisor is present	Yes	Yes
Role of Advisor	Cross-examination and Support	Cross-examination and Support	Support	Support
For a Finding...	Severe <u>and</u> Pervasive <u>and</u> Objectively Offensive (SPOO) <b>OR</b> Quid Pro Quo (employee respondents only)	Severe <u>or</u> Persistent <u>or</u> Pervasive <u>and</u> Objectively Offensive (hostile environment) <b>OR</b> Quid Pro Quo	Severe <u>or</u> Persistent <u>or</u> Pervasive <u>and</u> Objectively Offensive	Did it take place? Does it violate the published rule/expectation?
Appeal?	Yes	Yes	No	Refer to Member Rules and appropriate System Regulation



System Regulation 08.01.01 and the Adjudicatory Process – Questions?



The Role of the Adjudicatory Process



## The Role of the Adjudicatory Process (Hearings and Deliberations)

The role of the adjudicatory (hearing) process is:

- to review all the inculpatory and exculpatory evidence that is available,
- to see and hear the information presented, and
- to allow the parties to present information and to challenge information

The role of the deliberations process is:

- to reflect on both the information provided and your assessment of the credibility of the parties in determining what took place,
- to utilize your determination of what took place to assess whether the civil rights regulation and/or member rules were violated, and
- when determining that violations have taken place, to develop and impose sanctions that promote growth and development, repair harm caused, and protect the broader safety interests of the community.



***"Hear the case before you decide it."***

- Judge Alfred P. Murrah, (b1904-d1975, U.S. Court of Appeals for the Tenth Circuit and Director of the Federal Judicial Center)



## The Role of the Adjudicatory Process (Hearings and Deliberations)

The successful hearing official:

- reviews all written information at least two days in advance of the hearing and notes areas for exploration and questioning,
- understands that their primary initial focus is to determine what happened,
- understands they can only determine what happened by considering all of the available evidence,
- relies only on the facts and information in evidence, and does not allow information outside of the hearing to factor into a determination,
- reaches credibility determinations based on observable facts and not on hunches or suspicions,
- never considers sanctioning or the implications of sanctions until a finding has been rendered, and
- creates sanctions that are intentional, designed for education and development, seek to repair harm, and to protect the members of the broader institutional community.



The Role of the Adjudicatory Process – Questions?



Due Process in Higher Education (students)



Due Process in Higher Education (students)

## Due Process

Who has authority over you... how many jurisdictions do you live in? (POLL)

- International Law
  - Federal Law
  - State Law
- County/Municipalities
  - Professional
  - Personal



Due Process in Higher Education (students)

Due Process

Do all of these jurisdictions provide the same due process elements if there is a conflict? (POLL)

NO --- they do not, but why not?



Due Process in Higher Education (students)

## Due Process

Due process is the process that is due to us based on:

- The nature of the relationship
- The rights or privileges at stake

The greater the potential loss of rights, the higher amount of process that is due.

## Due Process in Higher Education (students)



### ➤ President James Madison (Dem-Rep., 4<sup>th</sup> President)

- Authored the 5<sup>th</sup> Amendment to the U.S. Constitution; ratified in 1791
- 5<sup>th</sup> Amendment requires due process of law in order for the government to deprive an individual of **life, liberty, or property**
- 5<sup>th</sup> Am. prohibits self-incrimination and double jeopardy in criminal proceedings
- 5<sup>th</sup> Amendment protections date back to the Magna Carta (1215)



### ➤ Senator Jacob Howard (Rep., Michigan)

- Worked closely with President Lincoln on passage of 13<sup>th</sup> Amendment to abolish slavery
- Served on Joint Committee on Reconstruction
- Drafted the 14<sup>th</sup> Amendment, which requires equal protection under the law for all persons born or naturalized in the United States; ratified in 1868
- Reversed (USSC) Dred Scott decision that black persons were not citizens
- **Due process clause guarantees substantive and procedural process in state legal proceedings (14<sup>th</sup> Amendment is primary source of due process in higher education)**
- Privileges or Immunities Clause protects individual state citizenship from interference by other states

## Due Process in Higher Education (students)

### Dixon v. Alabama (1961, 5<sup>th</sup> Circuit)

- School expelled six students for unspecified reasons without a hearing after those students participated in a civil rights demonstration
- Circuit Court held that **minimal due process (notice and hearing)** was required or the expulsion of a student
- Ended legal relationship of *in loco parentis* (THE landmark case)



## Due Process in Higher Education (students)

### Esteban v. Central Missouri State College (1969, 8<sup>th</sup> Circuit)

- School suspended two students for participation in civil rights demonstrations
- Both students in attendance, but claimed to be spectators
- Esteban refused order to return to his room
- Students sued in 8<sup>th</sup> Circuit
- Court required a second hearing with adequate procedural due process, including: written notice of charges; students permitted to review all materials to be used at the hearing in advance; allowed advisement; students allowed to present own stories, exhibits, and witnesses; decision to be based only on facts in evidence; and recording of the hearing could be made by either side
- After second hearing resulted in suspensions, court refused to intervene since procedural due process had been provided

## Due Process in Higher Education (students)

### Goss v. Lopez (1975, USSC)

- Nine students suspended from a public high school for ten days for destruction of property
- Ohio law allowed this sanction without a hearing
- USSC determined that a suspension without a hearing violated 14<sup>th</sup> Amendment Due Process Clause

## Due Process in Higher Education (students)

1968 General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education

- Issued by a local group of judges in the Western District of Missouri and included Harry Blackmun, who served as an Associate Justice on the USSC from 1970 to 1994
- Group of judges issued strong statements about distinctions in due process between criminal justice system and higher education; their observations have stood the test of time

## Due Process in Higher Education (students)

1968 General Order – key quotes:

“[S]chool regulations are not to be measured by the standards which prevail for criminal law and for criminal procedure.”



## Due Process in Higher Education (students)

### General Order – key quotes:

“The discipline of students in the educational community is, in all but the case of irrevocable expulsion, a part of the teaching process. In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary processes not equivalent to the criminal law processes of federal and state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, disenfranchised, or subjected to probationary supervision. **The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.**”



## Due Process in Higher Education (students)

### 1968 General Order – key quotes:

“In the lesser disciplinary procedures, including but not limited to guidance counseling, reprimand, suspension of social or academic privileges, probation, restriction to campus and dismissal with leave to apply for readmission, the lawful aim of discipline may be teaching in performance of a lawful mission of the institution. The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community. **By judicial mandate to impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent.**”



## Due Process in Higher Education (students)

Can we impose the death penalty on our community members? NO

Can we imprison our community members? NO

Can we deprive our community members of substantial property???

Is there a right to a higher education? (Implicit – Yes, Explicit – No)

Separate rights from privileges...

Once we extend a privilege, revoking it may require due process, most especially when we are altering the relationship between the individual and the institution



## Due Process in Higher Education (students)

In general, minimum due process includes:

- Notice of Allegations/Charges
- Right to a hearing prior to suspension/expulsion
- Opportunity to see and respond (challenge) to information/evidence
- Attendance of an Advisor (VAWA, Title IX)
- Students allowed to make their own statements, as well as submit evidence and witnesses

Due process does not include:

- Representation by advisor; advisor limited to role established by the institution (except to ask questions in Title IX live hearings)
- Use of “beyond a reasonable doubt” standard; about 90% of colleges and universities have been using a preponderance test for all student cases dating back to the 1960s
- Deferral to criminal process where there is a concurrent criminal investigation or where concurrent criminal charges are pending
- “Presumption of Innocence” (Title IX only – responsibility)
- Right of Appeal (Title IX only)



## Due Process in Higher Education (students)

### Takeaways

- There is no explicit right to a higher education, but once accepted, a student is owed due process to have the privilege of attendance taken away
- Due process (in our administrative legal setting) does not and should not reflect the due process expectations of the criminal process; our process runs independent of the criminal or civil court systems
- Behaviors may be both criminal in nature and violations of institutional regulations; educational institutions are no more qualified to say a crime has occurred than a court is qualified to say that a school's regulation have been violated
- In general, court challenges to institutions has been in the areas of substantive and procedural due process, and not an interpretation of an institution's regulations (1<sup>st</sup> Amendment being the exception)



Due Process in Higher Education – Questions?



***Let's take a five minute break.....***



The Hearing Officer



The Hearing Officer

## Six Critical Qualities of the Hearing Officer/Panelist

- Detached/Objective with respect to subject matter
- Impartial/Unbiased when it comes to the parties involved
- Only considers facts that are in evidence; recognizing that what is considered “in evidence” may change up through the end of the hearing
- Understands issues of relevance with respect to questions and evidence
- Reaches a finding of fact before considering potential sanctions
- Imposes sanctions proportionate to the violation that are designed to educate, repair harm, and protect the community

## The Hearing Officer

### Critical Skills / Knowledge Base of the Hearing Officer/Panelist

- Reading
- Listening
- Questioning
- How to conduct a pre-hearing conference
- How to conduct a live hearing
- Standards of evidence
- Types of evidence
- Credibility determinations
- Deliberations
- The finding of fact
- Sanctioning
- Appeals



## The Hearing Officer

### Special Topics Relevant to Sex-Based Cases

- Sexual Harassment, Sex-Based Misconduct, and Rules Violations
- Consent and Predation
- Alcohol and Other Drugs
- Trauma and its Potential Affects on the Process



The Hearing Officer – Questions?



The Pre-Hearing Conference



## The Pre-Hearing Conference

There are two potential objectives of the pre-hearing conference.

In most cases, the conference will simply prepare the parties for the formal live hearing. This will keep the focus on the procedures of the hearing and the due process rights of those involved.

In some cases, the conference will result in the parties determining that an informal resolution is mutually desired and considered appropriate by the complainant, the respondent, and the institution/agency. This will transform the meeting into an Administrative Conference, with the meeting facilitator then empowered to issue a finding with or without sanctions, provided that sanctions are consistent with System Regulation 08.01.01. In this event, once the parties sign the agreement the formal process is closed unless there is a violation of the terms of the agreement.



## The Pre-Hearing Conference

What to know about the pre-hearing conference:

1. Pre-hearing conferences will be joint conferences involving the complainant, respondent, and their respective advisors
2. Attendance at a pre-hearing conference is optional, but failure to attend a pre-hearing conference can not be later used as a grounds for appeal
3. Attendance at a pre-hearing conference may be in person or by video technology
4. Pre-hearing conference facilitators will not serve as the administrative hearing officer or member of a hearing panel for a formal hearing of the same case
5. Pre-hearing conferences will be scripted; the scripts will be sent to System members early next week
6. The parties must communicate on their own behalf at all times; advisors will be provided an opportunity to ask questions when prompted



## The Pre-Hearing Conference

### Order of Events (Recommended Practice)

1. Introductions of those in attendance
2. Brief opening statement by pre-hearing conference facilitator
3. Inquiry into Informal Resolution option
  - a) First with Complainant, then with Respondent
  - b) If both signal desire for informal resolution, a second statement is read, briefly outlining the process; the discussion would begin with findings (complainant, then respondent) and then (if necessary) to sanctions (complainant, then respondent, then facilitated dialogue)
    - i. Review of agreement and signatures
4. Review of Formal Hearing Process
  - a) Review of hearing process in brief (including sharing of script)
  - b) Review of due process rights for the hearing
  - c) Review of decision and appellate processes
  - d) Questions from Complainant, then Complainant Advisor (if in attendance)
  - e) Questions from Respondent, then Respondent Advisor (if in attendance)
5. Conclusion



The Pre-Hearing Conference – Questions?



The Hearing Process



## The Hearing Process

### Section 4.2.10 (p)

(p) If a formal complaint cannot be resolved through an informal process or if either the complainant or the respondent requests a hearing, a formal live hearing will be conducted by the designated administrator (a hearing officer or hearing panel).

Under this option, the following rules apply:

i. Unless waived by the parties, following the pre-hearing conference the parties will be given a minimum of five (5) business days notice of any formal hearing. The notice must include the date, time, and location of the hearing, as well as instructions for those participating in hearings through online means.



## The Hearing Process

- ii. Hearings will be closed to the public. Members must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review. Physical access to the recording or transcript must be provided upon request for the purpose of preparing an appeal following the hearing.
- iii. A complainant and a respondent at a hearing must have an advisor with them. In cases in which a party does not have an advisor, the university will provide a trained advisor to assist them in the hearing process. Training requirements for university advisors are outlined in the Training Requirements (see 1.9).
- iv. Cross-examination of the complainant, respondent, and any witnesses may not be conducted by the opposing party but must be conducted by their advisor. Questions are to be directed to the hearing officer or hearing panel chair, who will determine whether or not each question will be admitted into the hearing. If a question is deemed repetitious or not relevant, the decision-maker(s) must explain the decision to exclude it. When parties are being subject to cross-examination, the advisor may not answer on behalf of the party.



## The Hearing Process

v. Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the alleged conduct, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. The hearing panel chair or hearing officer makes final determinations on the relevance of questions and evidence.

vi. Attendance at a hearing may be in person or may be conducted through remote means, provided that all parties and the hearing officer or hearing panel can see and hear one another in real time during the course of the hearing.



## The Hearing Process

vii. If a complainant, respondent, or witness is not in attendance at a live hearing, the hearing officer or hearing panel cannot rely on the previously submitted statements of the absent party in reaching a determination, but may utilize all other evidence, including witnesses who interacted with the absent party, but not hearsay testimony of what the absent party told that individual. A complainant, respondent, or witness statement can also not be utilized in a determination if that person refuses to submit to cross-examination at a live hearing.

viii. Hearing officers/hearing panels cannot draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.



## The Hearing Process

- ix. No hearing officer or hearing panel member can also serve as an investigative authority or appellate authority in the same complaint. Students (who are otherwise not full-time employees) may not serve in the role of investigative authority, hearing officer, hearing panel member, or appellate authority.
- x. When a hearing panel is being utilized to resolve a complaint, either a voting chairperson or non-voting administrative advisor who does not serve on the panel shall oversee the live hearing and deliberations, and assist in the development of a finding of fact, decision rationale, and, when appropriate, a sanction rationale in consultation with the panel members.
- xi. Following the hearing, the hearing officer or hearing panel will develop a draft decision and submit the draft to SECO within two (2) business days. SECO will have a maximum of three (3) business days to provide feedback to the hearing officer/hearing panel. Thereafter, the designated administrator will have a maximum of three (3) additional business days to issue a decision letter. The decision letter must be sent simultaneously to both/all parties.



## The Hearing Process

xii. Decision letters must include:

1. The identification of the allegations;
2. A description of the procedural steps taken from the receipt of a formal complaint through determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held if any;
3. Findings of fact supporting the determination;
4. Conclusion regarding the application of the member's conduct standards to the facts;
5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the member imposes on the respondent, and whether remedies designed to restore or preserve equal access to the member's education program or activity will be provided by the member to the complainant, and;
6. The member's procedures and permissible bases for the complainant and respondent to appeal.



## The Hearing Process

xiii. If for any reason there is reasonable cause for a member to delay the issuance of the decision letter, this will be communicated to the parties by the designated administrator or designee.

xiv. If a student respondent withdraws or graduates from a member university pending the resolution of a complaint, the process will continue and, the member university will not issue a transcript on behalf of the student until the conclusion of the process.

xv. Member universities, upon request by another postsecondary educational institution, must provide to the requesting institution any determination that a student violated the member university's code of conduct by committing sexual harassment, sexual assault, sex-based misconduct, and/or dating violence, domestic violence, and/or stalking based on sex.



## The Hearing Process

### Best Practices in Hearings (will be included in Hearing Script):

- The Investigator (or lead investigator writing the report) should be called to every formal hearing and should be expected to sit through the entire live hearing (not deliberations) to outline the investigatory process, address any challenges to the report, and for the investigator to question all inconsistencies from the report that might be stated at the hearing
  
- The order of questioning for all parties should be:
  - Hearing Officer/Hearing Panel (coordinated by the Chair in case of a panel)
  - Investigator (for questions related to consistency with the report)
  - Opposing Party
  - For Witnesses, Complainants should have an opportunity to conduct cross examination ahead of the respondent, unless the witness has been presented by the respondent

## The Hearing Process

There are a number of administrative steps that must be assigned and completed prior to and following a hearing. These include:

1. Scheduling of Pre-Hearing Conference for Parties and Advisors
2. Notification of Pre-Hearing/Charge Letter (with final report)
3. Conduct Pre-Hearing Conference
  - A. If informal resolution, development and signing of written agreement, as well as submission of case for post-resolution follow-up (Outtake)
  - B. If no informal resolution, parties provided five (5) business days notice of hearing
4. Hearing Scheduled – notification to parties, investigator, witnesses, Title IX Coordinator, and Hearing Officer/Panel
5. At least two days prior to hearing, Hearing Officer/Panel reviews final report and exhibits
6. At least thirty minutes prior to hearing (for hearing panel), panel convenes to discuss areas and lines of questions (see next slide)
7. Following the hearing, a draft decision is sent to SECO for review. Once feedback is provided, the final decision is created and communicated to the parties, with a deadline date for appeal included in the letter.

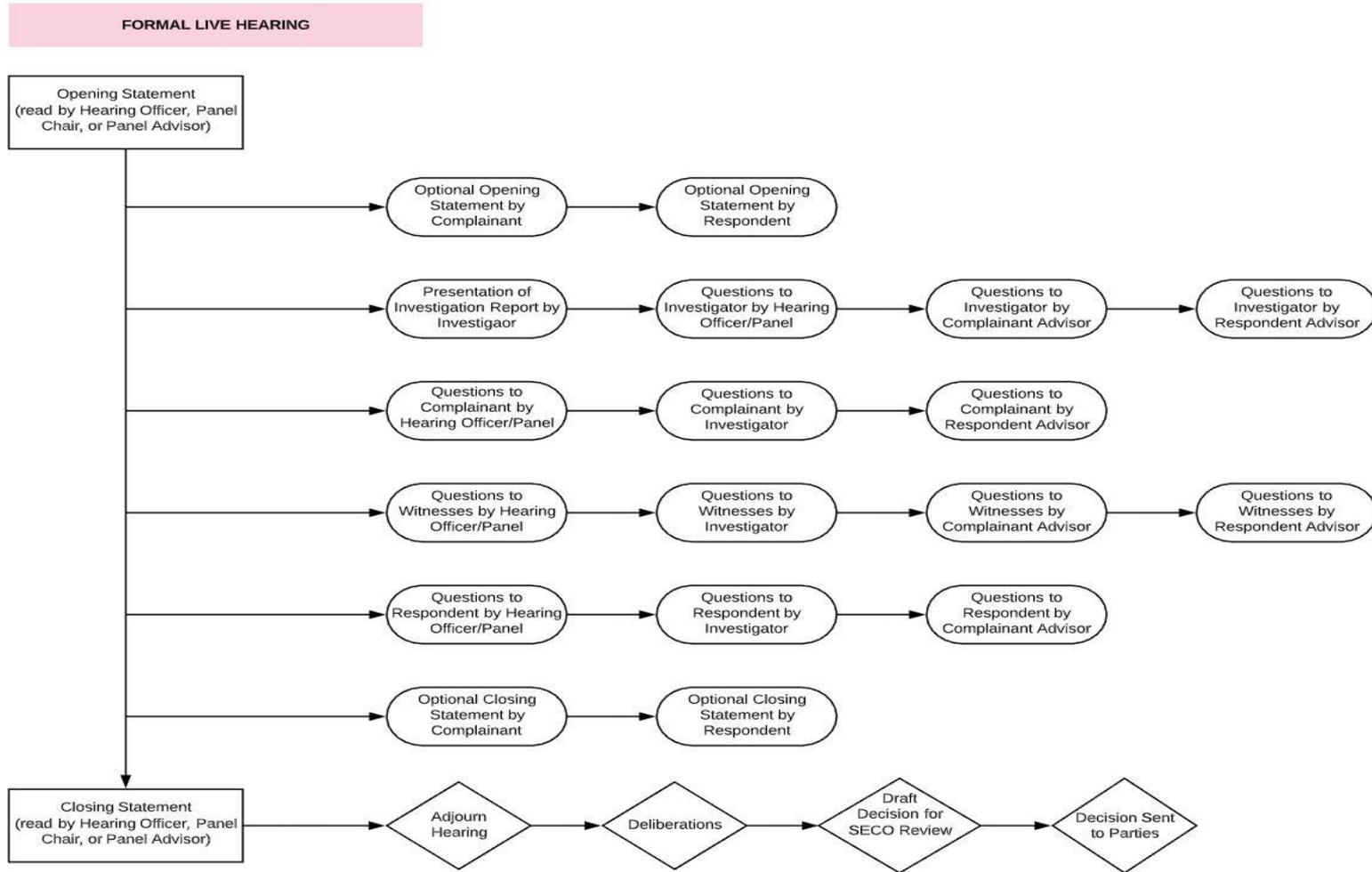


## The Hearing Process

### Pre-hearing Protocol:

1. Attend to physical environment
  - a) Clean and protected spaces for Complainant/Advisor, Respondent/Advisor, Investigator, Witnesses
  - b) If one or more will be attending virtually, ensure technology is working
  - c) Ensure that recording technology is working
  - d) For those in physical space; water, tissues, paper, pen
2. For Panels, pre-hearing strategy
  - a) Determine areas of questioning
  - b) Assign areas of questioning and develop communication cues
3. Attend to Parties (Pre-Hearing, During Hearing, and Post-Hearing)
  - a) Waiting areas for parties
  - b) Bringing parties into the room
  - c) Handling breaks
  - d) Escorting parties out at the end of the hearing





Final Questions for this session?



SEE YOU TOMORROW!



**Civil Rights  
Adjudication Training  
for the  
Texas A&M University System**

Rick Olshak, Director of Title IX Compliance  
August 2020



## **For this training...**

1. Aubrey Craft of SECO will keep members muted throughout today's training; questions will be taken by section by using the "Q&A" function in Webex; we have a lot of material to cover in our time together today. To ask a question:
  - a) Open the Q&A Panel
  - b) Type your question into the text box
  - c) In the Ask drop down list, select Aubrey Craft as the recipient
  - d) Select Send
  
2. If you have questions after the completion of this program, please direct those questions to your Title IX Coordinator (TIXC). We ask that the TIXCs collect and submit questions to Rick Olshak so that SECO can issue any necessary guidance to all System members.
  
3. Mandatory Pre-Requisite: Attendees must have completed the mandatory training on Title IX and System Regulation 08.01.01 to take this training program. Very little of the previous training program is repeated in this training.

## For this training...

4. This Power Point presentation will be available on TrainTraq, and those involved in processing civil rights cases as civil rights officers (including Title IX coordinators and deputies), adjudicators, advisors (to panels), and appellate officers must all log in to TrainTraq and pass a post-test before you will be able to participate in civil rights compliance case management. **The deadline to complete this post-test is 5:00 pm on Wednesday, September 2.** If you are attending the Webex training, you will receive an access code for the post-test at the end of the training program. If you are viewing this training on TrainTraq, the post-test will come at the end of the program. You must attend all of the first three sessions to be able to bypass the training material and access the post-test. The fourth session is focused on hearing panel chairs, single hearing officers, and advisors to hearing panels. A separate (additional) post-test will be used for those attending the fourth session.



## **For this training...**

5. Assumes no previous knowledge on content areas
6. Presentation is text heavy and intended to serve as a reference document after the training
7. The presenter is not providing legal advice; the presenter is a compliance officer and is offering compliance guidance
8. Training intended to be complemented by local training provided by the Title IX Coordinator and/or student conduct officers
9. Please note that the material being addressed in this program may involve explicit descriptions or details that some may find offensive, while others may find these materials triggering. Nothing is being done today simply for “shock value” but will be consistent with the real-world language and details that we are confronted with in this work. If you find yourself triggered, please step away to the degree that you need to, and please seek appropriate assistance if necessary.



## For this training...

10. This training is in a transitional mode and has not yet been timed to a live training audience, nor in an online environment. We will go as far as we can in the materials in each session, picking up where we leave off in the next session. We have a number of required topical areas to address and will address each one. Please note that this may affect the time we have allowed for questions by the end of session three.
11. Finally, beginning tomorrow we will be using breakout sessions, where you will be assigned to different chat groups. One person in each group will be assigned as a “Presenter” but that is simply functional and carries no responsibilities other than your presence in the chat room.
  - a) Please note that beginning tomorrow you will not be able to join by a mobile device and participate in a breakout session
  - b) There is an “Ask for Help” button in the event that you want me to join your breakout session for a question or concern



## **Special Note:**

I have been continuing to modify this training up until the beginning of each session, providing for updates to the information as we are made aware of them, and accounting for time constraints.

In order for us to ensure that we will get through all required subject matter, I am likely removing a practical case study that would have participants assuming the roles of pre-hearing facilitator, complainant, respondent, advisors, witnesses, panel members, panel chair, panel advisor, and appellate officer.

Instead, this material will be provided to Title IX Coordinators and student conduct officials for the purpose of encouraging each of our members to conduct local table-top exercises. Based on my scheduling availability, I am willing to discuss observing the activity online and providing feedback as members desire.



## Agenda – Session Two

1. Pre-Test
2. Skill Areas
  - a) Activity
  - b) Reading
  - c) Active Listening
  - d) Questioning
- (5 minute break)
- e) Standards of Evidence
- f) Types of Evidence
- g) Credibility Determinations
- h) Deliberations and the Finding of Fact
- i) Sanctioning
- j) Appeals (next session)



## Pre-Test

Here are 8 questions that we will address today through the material. Some or all of these questions may appear on the final post-test.

1. True or False – I should avoid reading the case materials until just before the hearing so that I do not prejudice myself in any way.
2. True or False – In a panel hearing, it is best to allow the Chair to ask all questions of the parties and witnesses
3. Choose One – Of the following types of questions, which type of question is not useful in an adjudicatory setting?
  - a) Open-ended questions
  - b) Leading questions
  - c) Probing questions
  - d) Closed-ended questions



## Pre-Test

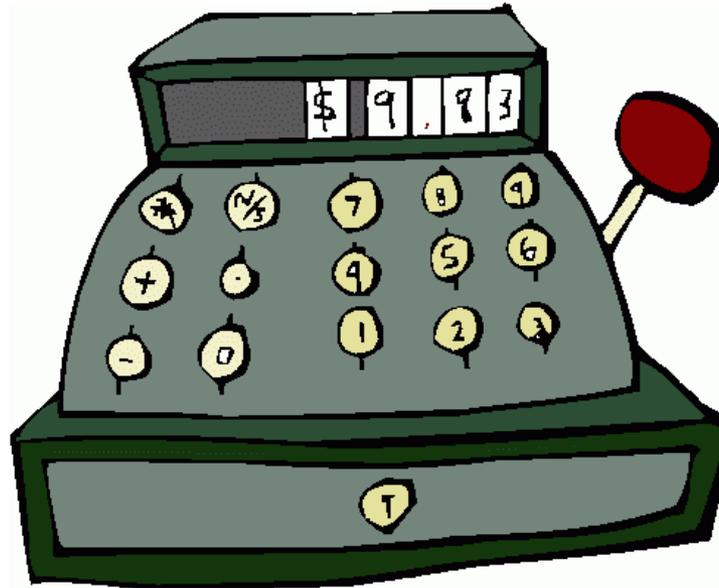
4. Choose One – In conduct matters, the standard of evidence on which we decision to file charges against a respondent is:
  - a) Clear and convincing evidence
  - b) Preponderance of the evidence
  - c) Reasonable suspicion
  - d) Substantial evidence
5. True or False – Findings of fact cannot be based solely on circumstantial evidence
6. Choose One – Which type of evidence is not useful in determining a finding of fact?
  - a) Circumstantial evidence
  - b) Documentary evidence
  - c) Direct evidence
  - d) Character evidence



## Pre-Test

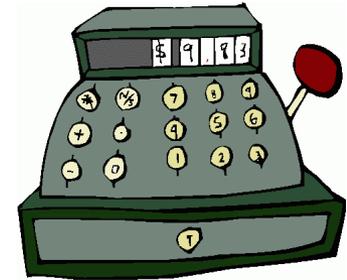
7. Choose one – Which of the following is not an explicit goal of sanctioning:
  - a) Community deterrence
  - b) Education and development
  - c) Reparation for harm
  - d) Safety of the community
8. Choose One – The appellate authority has the ability to do all of the following except:
  - a) Affirm the finding and modify the sanction
  - b) Modify both the finding and the sanction
  - c) Affirm both the finding and the sanction
  - d) Remand the case to a new hearing

## THE CASH REGISTER EXERCISE...



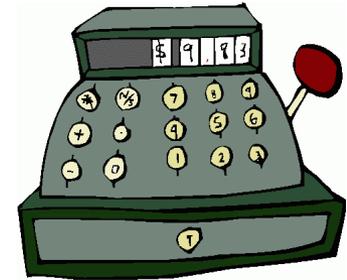
*Since we are about to review our reading and listening skills, let's test our own skills....*

## THE CASH REGISTER EXERCISE...



I am going to read you a story and allow you to see it on this slide deck. I will repeat the story and then the story will disappear from the screen. You will then be asked seven (7) questions about the story. Your answers to each question can be “Yes,” “No,” or “Unknown based on the information provided.”

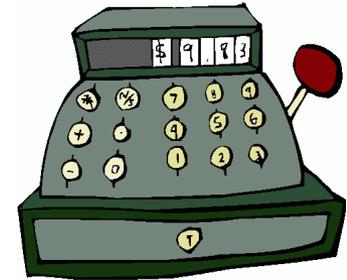
## THE CASH REGISTER EXERCISE...



### THE STORY...

A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

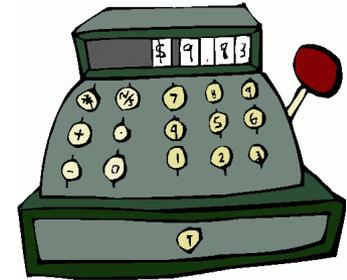
## THE CASH REGISTER EXERCISE...



### THE QUESTIONS...

- 1: Did the man appear after the owner had turned off his store lights?
- 2: Did the man who appeared demand money?
- 3: Did the cash register contain money?
- 4: Did someone open a cash register?
- 5: After the man who demanded money scooped up the contents of the cash register, did he run away?
- 6: Did the owner of the store scoop up the contents of the cash register and run away?
- 7: Was the robber a man?

## THE CASH REGISTER EXERCISE...

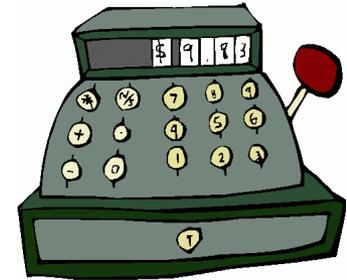


Question #1: Did the man appear after the owner had turned off his store lights?

Answer: Unknown based on the information provided. We do not know the sex of the owner.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

## THE CASH REGISTER EXERCISE...



Question #2: Did the man who appeared demand money?

Answer: Yes. It is clearly stated that the man who appeared demanded money.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

## THE CASH REGISTER EXERCISE...



Question #3: Did the cash register contain money?

Answer: Unknown based on the information provided. The story refers to the register's contents without describing what was inside.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

## THE CASH REGISTER EXERCISE...



Question #4: Did someone open a cash register?

Answer: Yes. The story specifically states that the owner opened a cash register.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

## THE CASH REGISTER EXERCISE...

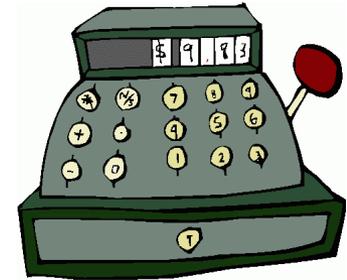


Question #5: After the man who demanded money scooped up the contents of the cash register, did he run away?

Answer: Unknown based on the information provided. The story does not state who scooped up the contents of the cash register, nor do we know if “run” and “sped” signify the same thing.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

## THE CASH REGISTER EXERCISE...



Question #6: Did the owner of the store scoop up the contents of the cash register and run away?

Answer: Unknown based on the information provided. The story does not preclude this possibility.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

## THE CASH REGISTER EXERCISE...

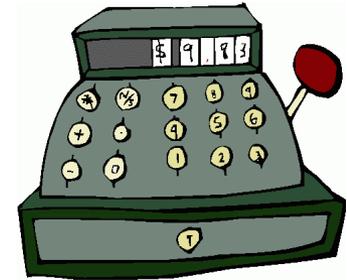


Question #7: Was the robber a man?

Answer: Unknown based on the information provided. The story does not specifically state that this was a robbery.

Story: A cashier had just turned off the lights in the store when a man appeared and demanded money. The owner opened a cash register. Everything inside the register was scooped up, and the man then sped away. A member of the police force was notified promptly.

## THE CASH REGISTER EXERCISE...



What is the lesson of this exercise?

Answer: Our brains do not like missing pieces (“thought holes”) and will instinctively rush to fill gaps in a story with what would seem to be reasonable assumptions.

While assumptions are a natural and daily part of our lives, making assumptions in an adjudicatory setting can create mistakes. Rather than filling in missing pieces, it is incumbent upon us to 1) identify any portions of a story that are missing, and 2) ask the people who were a part of the situation to provide us with those missing details.

## THE CASH REGISTER EXERCISE...



What is the lesson of this exercise?

Answer: Another takeaway from this exercise is to recognize that in general terms, we retain:

- 10% of information from oral presentations

- 35% of information from visual presentations

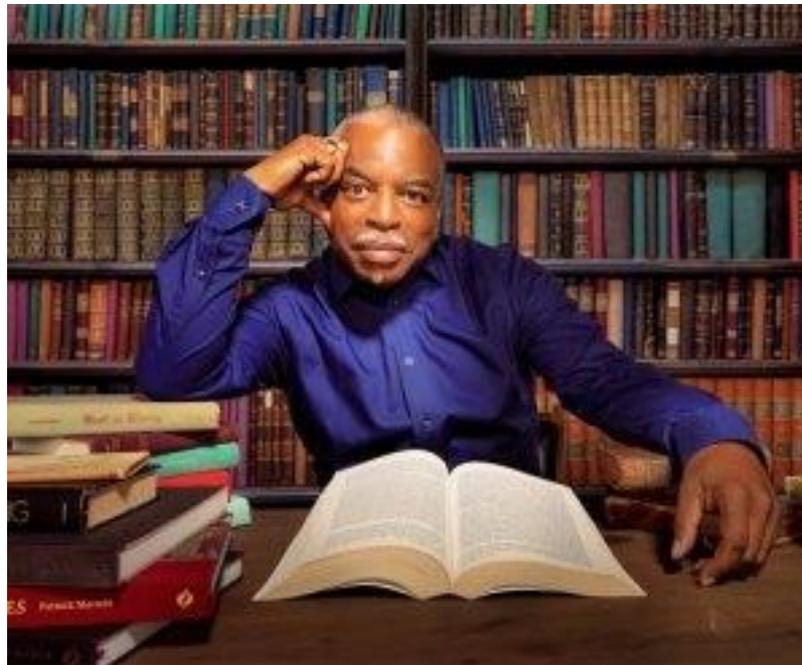
- 65% of information from visual and oral presentations

By closely reading the reports, carefully listening to the parties and witnesses, taking accurate notes, and resisting the temptation to make assumptions about what missing information might be, you are better equipped to synthesize the information you hear and see, and make accurate decisions based on the available facts.

## Skills Training



# Reading



## Reading

- Read all reports and exhibits at least two days before the scheduled live hearing
- Take notes on what you read and:
  - Create a timeline of the event(s) if not specifically included in the report
  - Where do the parties/witness statements align? Does this suggest something about the event or timeline, and do you need to challenge any assumptions that you might be making?
  - Where do the parties/witness statements diverge? This aids in you in identifying areas of inquiry for the parties and witnesses
  - Is language used in the report by the investigator lacking clarity or specificity in any way? This aids you in asking questions of the investigator
  - Did the parties or witnesses make statements in the report that lack clarity or specificity in any way? This helps you identify questions for the parties
  - Examine the specific allegations made against the respondent; what questions do you need to ask the parties that would help you understand every relevant detail of the allegation – presume for this that you would be entering the hearing without any specific knowledge of what took place between the parties
  - Finally, did either party disclose information to others following the event(s)? What was said to whom, and what questions might you have of those witnesses?

## Active Listening



## Active Listening

- Physically attend to the party (body posture, eye contact, nonverbal behaviors)
- Watch for your own nervous/distracting behaviors
- Provide uninterrupted time for a party to speak
- Offer verbal and nonverbal cues to encourage speaking without interrupting
- When appropriate, summarize and re-state what you have been told
- Mirroring verbal and nonverbal behaviors without mimicking
- When questioning, remember to actively listen to the responses
- Focus on the person and their responses; do not let your mind wander or be distracted by what you want to ask next

Questions about Reading and Active Listening?



## Questioning



## Questioning

Remember that in order for us to be able to reach a determination about any violations, we must first determine what happened... this requires us to have a complete understanding of the event(s) that took place.

For our purposes, you should imagine the event(s) as a blank canvas... your job is to fill this canvas with evidence so that you can accurately estimate what took place.

Remember that the investigative report gives you a head start on your understanding of the events (~70-90%); but only by asking questions can you gain a complete understanding of what occurred.



## Questioning

### Open-ended questions provide:

- Overall outline of the events
- The party's perspective
- “What happened...?” or “Please describe the event...”

### Closed-ended questions provide:

- Important details (who, what when, where, how)
- Items for us to seek corroboration
- “How many...” or “Please describe the room...”

### Open-ended questions provide:

- Motivation and intentions (why)
- Effect
- “What did you do when...” or “Please describe the thoughts you were having when...”



## Questioning Method

### Draw a “picture” of the event(s)

- Open/Closed/Open
- Listen to the answers!
- Don't ask leading questions (answers implied)
- Don't allow your questions to betray your opinion
- Beware multiple choice questions
- Avoid multiple part questions – ask in succession (but not “rapid fire”)
- Use probing questions to seek “holes” in the story when they appear
- Use silence as a tool



## Questioning Method

### Draw a “picture” of the event(s)

- Don't create answers (either in the hearing or in subsequent deliberations)
- Be aware of their verbal/nonverbal behavior
- Be aware of your own verbal/nonverbal behavior
- For Panels, all panels members should be involved in questioning, and questions/lines of questioning should be reviewed and even assigned prior to the hearing
- For Panels, all panel members should note the responsibility of the Chair to allow or refuse questions



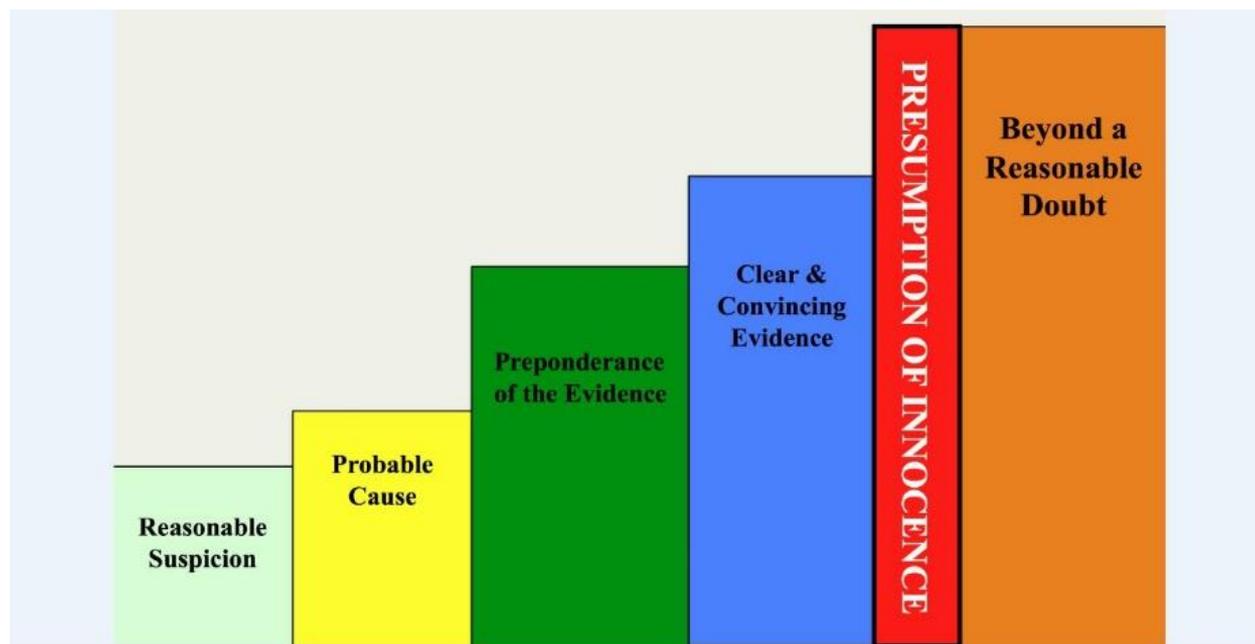
Questions about Questioning?



***Let's take a five minute break.....***



## Standards of Evidence



## Standards of Evidence

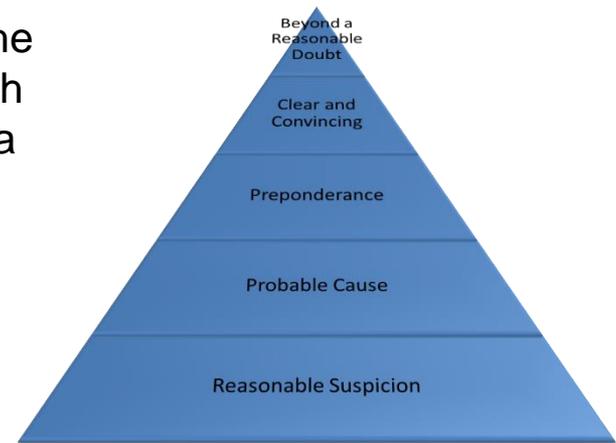
### **Beyond a Reasonable Doubt...**

Meaning: No other logical explanation can be derived from the facts except that the defendant committed the crime for which they are charged, thereby overcoming the presumption that a person is innocent until proven guilty.

~ 90-99% certainty

Where do we use this in society, and why?

Do we use this in the 08.01.01 process? If so, where?



## Standards of Evidence

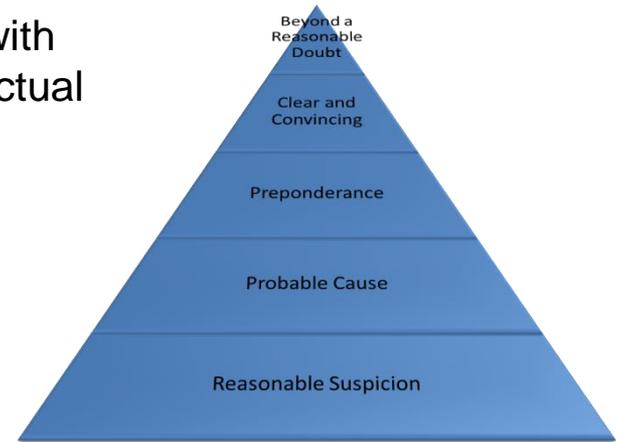
### **Clear and Convincing Evidence...**

Meaning: The party must present evidence that leaves you with a firm belief or conviction that it is highly probable that the factual contentions of the claim or defense are true.

~ 67-75% certainty

Where do we use this in society, and why?

Do we use this in the 08.01.01 process? If so, where?



## Standards of Evidence

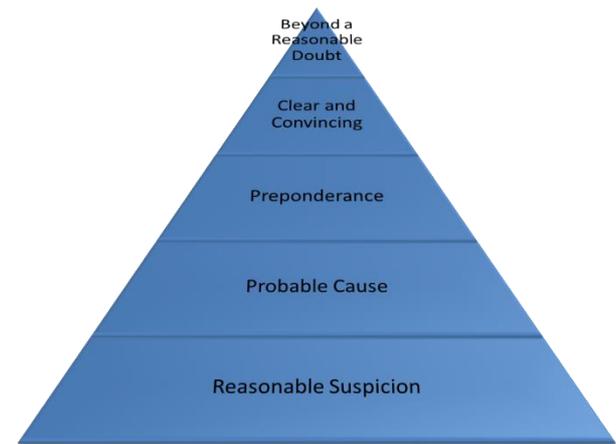
### **Preponderance of the Evidence...**

Meaning: What is more likely than not to be true, based on probable truth or accuracy. There is neither a presumption of guilt, nor a presumption of innocence.

50.1% + certainty

Where do we use this in society, and why?

Do we use this in the 08.01.01 process? If so, where?



## Standards of Evidence

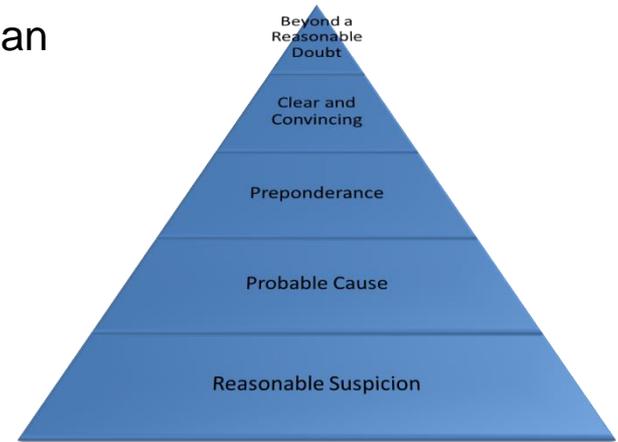
### **Substantial Evidence (Probable Cause)...**

Meaning: Reasonable grounds for making a search, making an arrest, or pressing a charge.

~ 40% + certainty

Where do we use this in society, and why?

Do we use this in the 08.01.01 process? If so, where?



## Standards of Evidence

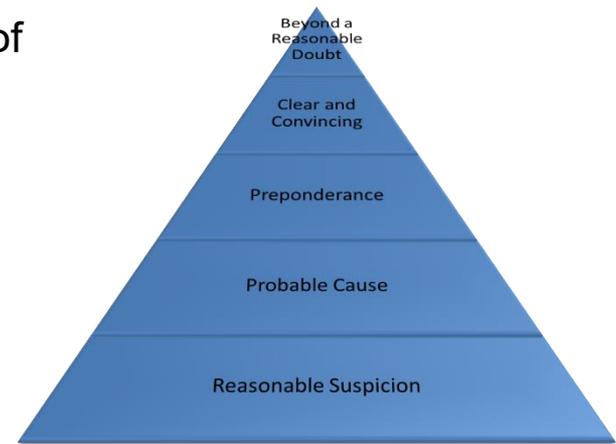
### **Reasonable Suspicion (Notice)...**

Meaning: Specific facts (more than a “hunch” or a “scintilla” of evidence) that justify further investigation.

~ 25% + certainty

Where do we use this in society, and why?

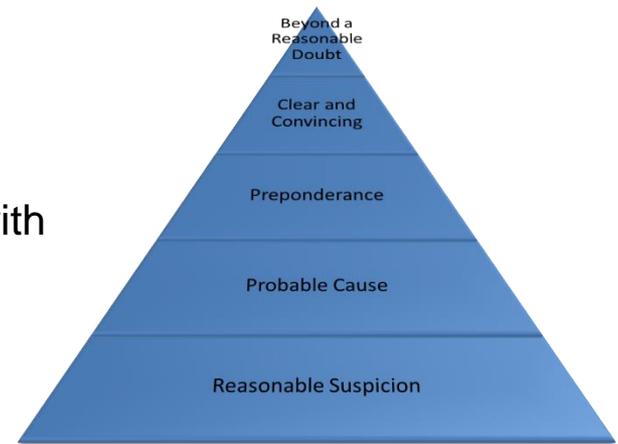
Do we use this in the 08.01.01 process? If so, where?



## Standards of Evidence

### Uses of Evidentiary Standards (conduct and civil rights)

1. Notice and Gate-keeping (Reasonable Suspicion)
2. Bringing a charge (Substantial Evidence)
3. Finding a violation (Preponderance of the Evidence)
4. Determining appeals (Preponderance of the Evidence, with presumption that original decision is correct)



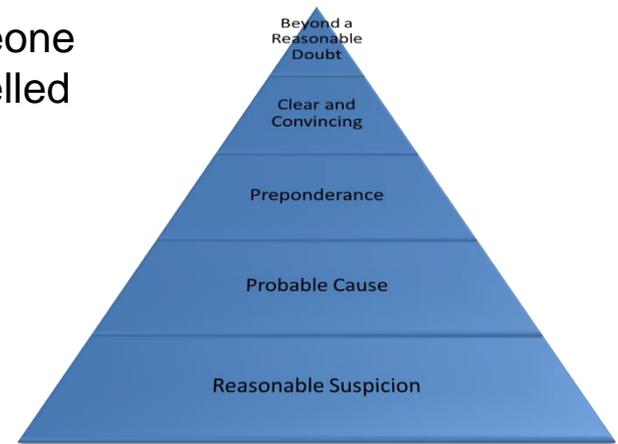
## Standards of Evidence

### Uses of Evidentiary Standards (conduct and civil rights)

It is not uncommon that people express a concern that someone might be terminated from employment or suspended or expelled from a university while using “only” a preponderance of the evidence as a basis for this decision.

Do you share this concern?

Allow me to help dispel this understandable fear for those that may have it.



## Standards of Evidence

### Uses of Evidentiary Standards (conduct and civil rights)

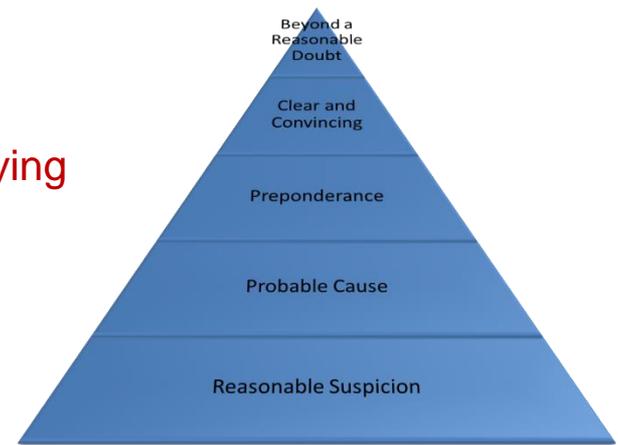
Is it possible that we can make a mistake when employing a preponderance of the evidence test?

Does the criminal justice system ever make mistakes employing a “beyond a reasonable doubt” standard?

All human decision-making involves the possibility of making mistakes.

Our goal is to make the best decision possible, based on the best available information that exists in evidence.

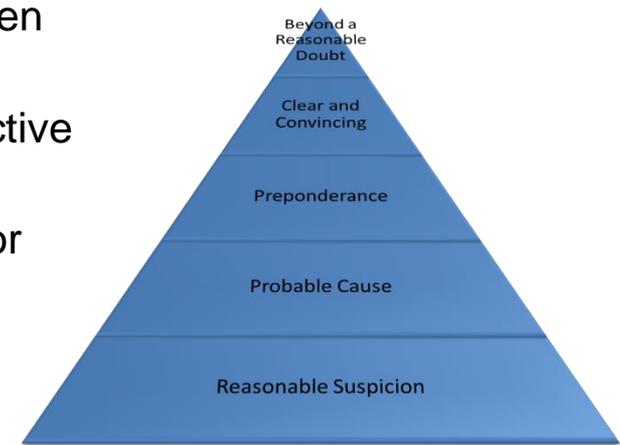
The better you **do your job**, the lower the risk of a mistake. This training is designed to teach each of us what our roles are in this process, and what we need to do to reduce our risk of making a mistake.



## Standards of Evidence

### Why do we utilize the preponderance standard?

- It is the only equitable standard, applying no undue burden on either the complainant or the respondent
- We utilize a preponderance test because it is most reflective of the educational nature of our System
- We utilize a preponderance test because it is provided for by the federal government, and used by the federal government for the purposes of civil rights enforcement
- Finally, a preponderance test is far easier to teach and train with than the clear and convincing standard, which can be a variable standard



## Standards of Evidence

### **What does applying a preponderance test look like? Let's apply a fact pattern -**

- RA Smells Marijuana
- 2<sup>nd</sup> RA Independently Confirms Smell
- Initial Confrontation and Delay
- Open Door and Smoke in Room; towel rolled up behind door
- Bloodshot Eyes for all 4 people in room
- Claiming they were watching a movie and fell asleep; confusion on what movie
- Cold outside; fan in window blowing out
- Incense burning; can of air freshener on dresser
- Blow tube under the bed that smells of cannabis

Questions about Standards of Evidence?



## Types of Evidence



## Types of Evidence

1. Direct\* (first-hand, physical evidence)
2. Circumstantial\* (physical evidence with inferences)
3. Documentary (reports, texts, etc.)
4. Hearsay
5. Expert
6. Character

\*The U.S. Supreme Court has stated that "circumstantial evidence is intrinsically no different from testimonial [direct] evidence"(Holland v. United States, 348 U.S. 121, 75 S. Ct. 127, 99 L. Ed. 150 [1954]). Thus, the distinction between direct and circumstantial evidence has little practical effect in the presentation or admissibility of evidence.



Questions about Types of Evidence?



**See you next Tuesday!!!**



**Civil Rights  
Adjudication Training  
for the  
Texas A&M University System**

Rick Olshak, Director of Title IX Compliance  
August 2020



## **For this training...**

1. Aubrey Craft of SECO will keep members muted throughout today's training; questions will be taken by section by using the "Q&A" function in Webex; we have a lot of material to cover in our time together today. To ask a question:
  - a) Open the Q&A Panel
  - b) Type your question into the text box
  - c) In the Ask drop down list, select Aubrey Craft as the recipient
  - d) Select Send
  
2. If you have questions after the completion of this program, please direct those questions to your Title IX Coordinator (TIXC). We ask that the TIXCs collect and submit questions to Rick Olshak so that SECO can issue any necessary guidance to all System members.
  
3. Mandatory Pre-Requisite: Attendees must have completed the mandatory training on Title IX and System Regulation 08.01.01 to take this training program. Very little of the previous training program is repeated in this training.

## For this training...

4. This Power Point presentation will be available on TrainTraq, and those involved in processing civil rights cases as civil rights officers (including Title IX coordinators and deputies), adjudicators, advisors (to panels), and appellate officers must all log in to TrainTraq and pass a post-test before you will be able to participate in civil rights compliance case management. **The deadline to complete this post-test is 5:00 pm on Wednesday, September 2.** If you are attending the Webex training, you will receive an access code for the post-test at the end of the training program. If you are viewing this training on TrainTraq, the post-test will come at the end of the program. You must attend all of the first three sessions to be able to bypass the training material and access the post-test. The fourth session is focused on hearing panel chairs, single hearing officers, and advisors to hearing panels. A separate (additional) post-test will be used for those attending the fourth session.

## **For this training...**

5. Assumes no previous knowledge on content areas
6. Presentation is text heavy and intended to serve as a reference document after the training
7. The presenter is not providing legal advice; the presenter is a compliance officer and is offering compliance guidance
8. Training intended to be complemented by local training provided by the Title IX Coordinator and/or student conduct officers
9. Please note that the material being addressed in this program may involve explicit descriptions or details that some may find offensive, while others may find these materials triggering. Nothing is being done today simply for “shock value” but will be consistent with the real-world language and details that we are confronted with in this work. If you find yourself triggered, please step away to the degree that you need to, and please seek appropriate assistance if necessary.



## For this training...

10. This training is in a transitional mode and has not yet been timed to a live training audience, nor in an online environment. We will go as far as we can in the materials in each session, picking up where we leave off in the next session. We have a number of required topical areas to address and will address each one. Please note that this may affect the time we have allowed for questions by the end of session three.
11. Finally, beginning tomorrow we will be using breakout sessions, where you will be assigned to different chat groups. One person in each group will be assigned as a “Presenter” but that is simply functional and carries no responsibilities other than your presence in the chat room.
  - a) Please note that beginning tomorrow you will not be able to join by a mobile device and participate in a breakout session
  - b) There is an “Ask for Help” button in the event that you want me to join your breakout session for a question or concern



## **Special Note:**

I have been continuing to modify this training up until the beginning of each session, providing for updates to the information as we are made aware of them, and accounting for time constraints.

In order for us to ensure that we will get through all required subject matter, I am likely removing a practical case study that would have participants assuming the roles of pre-hearing facilitator, complainant, respondent, advisors, witnesses, panel members, panel chair, panel advisor, and appellate officer.

Instead, this material will be provided to Title IX Coordinators and student conduct officials for the purpose of encouraging each of our members to conduct local table-top exercises. Based on my scheduling availability, I am willing to discuss observing the activity online and providing feedback as members desire.

## Agenda – Session Three

1. Pre-Test
2. Skill Areas
  - g) Credibility Determinations
  - h) Deliberations and the Finding of Fact
  - i) Sanctioning
  - j) Appeals (next session)

(5 minute break)

3. Special Topics
  - a) Consent and Predation
  - b) Alcohol and Other Drugs
  - c) Trauma and its Potential Affects on the Process

## Pre-Test

Here are 8 questions that we will address today through the material. Some or all of these questions may appear on the final post-test.

1. True or False – Consent to sexual activity requires active verbal consent (“Yes”) to any sexual activity.
2. True or False – Two adults who are drunk cannot engage in consensual sexual activity.
3. Choose One – The correct order of evaluating whether or not sexual activity was consensual is:
  - a) Force, Consent, Incapacity
  - b) Incapacity, Force, Consent
  - c) Consent, Force, Incapacity
  - d) Force, Incapacity, Consent

## Pre-Test

4. Choose One – Place these terms from lowest to highest in terms of effect on decision-making:
  - a) Impairment, Influence, Incapacitation, Intoxication
  - b) Intoxication, Influence, Impairment, Incapacitation
  - c) Influence, Impairment, Intoxication, Incapacitation
  - d) Intoxication, Impairment, Incapacitation, Influence
5. True or False – A “blackout” is when an intoxicated person passes out from having consumed too much alcohol.
6. Choose One – Which of the following has the greatest effect on an average person’s tolerance to alcohol?
  - a) Body Mass
  - b) Stomach Contents
  - c) Race/Ethnicity
  - d) Type of Alcohol Consumed

## Pre-Test

7. True or False – In order to know whether or not a person’s account of an incident has been affected by trauma, it is important for the hearing officer/panel to determine if a person alleging a traumatic experience has actually been traumatized.
8. Choose One – Which of the following is true:
  - a) Trauma is just another word for “stress.”
  - b) It is just as traumatic to be accused of sexual assault as it is to be sexually assaulted.
  - c) Signs of trauma will always be present when a person has been exposed to a traumatic event.
  - d) Trauma is characterized by a release of hormones throughout the body and directs a person’s response to an immediate threat

## Credibility Determinations

**CREDIBLE  
SOURCE**

## Credibility Determinations

How can you determine if someone is a credible/truthful source of information?

Many rely on their “gut” (sometimes referred to as a “BS Meter”); but what does this mean?

Credibility comes down to:

- Persuasiveness
- Relevance
- Reliability
- Bias

## Persuasiveness

A person is persuasive if:

- their story is believable
- their story is not countered by more persuasive accounts
- their story is able to sustain challenges

Persuasiveness is not about the number of witnesses corroborating information, but rather the quality of the witnesses corroborating information

## Relevance

A person is considered relevant if:

- their story related to the substance of the allegations (party to, witness of, knowledge before or after the fact, or patterns of behavior)
- it is of sufficient value to matter in the determination of a finding of fact
- be offered by an individual with actual knowledge of the substance of the allegations and is not hearsay

Relevance relates to the specific incident in question and not “like” incidents; we are not interested in comparing apples to oranges, nor even apples to other apples; we only have an interest in a single apple.



## Reliability

A person is considered relevant if:

- their story is consistent (or complementary) over multiple tellings
- it is of sufficient value to matter in the determination of a finding of fact
- be offered by an individual with actual knowledge of the substance of the allegations and is not hearsay

Relevance relates to the specific incident in question and not “like” incidents; we are not interested in comparing apples to oranges, nor even apples to other apples; we only have an interest in a single apple.

## Bias

All people are biased. In providing information, it is important to own the bias that is present and to minimize its impact on the relaying of information.

For our purposes, we are concerned about three types of bias

- Bias towards or against people involved in the incident by a reporter of information
- Bias towards or against subject matter involved in the incident by a reporter of information
- Bias brought into a hearing by an adjudicator

## Bias

### **Bias towards or against people involved in the incident by a reporter of information:**

- What is the relationship between the reporter of information and the parties involved?
- What is the relationship between the reporter of information and the institution?
- While having a relationship with parties involved in an incident does not suggest that the person will be deceitful to aid or hurt the person's case, it may well "color" the person's recollection of the incident. Adjudicators can and should inquire about the strength of the relationship and seek to ask questions about portions of the incident that people may be less likely to prepare in advance.

## Bias

### **Bias towards or against subject matter involved in the incident by a reporter of information:**

In some instances, people's perceptions may be impacted by a bias regarding the conditions of the incident. Rather than trying to mislead an investigator, some reporters of information simply rely on assumptions about the people or circumstances involved in an incident, based on their own biases. When investigators hear people speaking in general terms about a situation, they should test the person's re-telling with more specific questions.

It is important to seek definitions on terms such as:

“Hooked up”	Stalking
“Creepy”	Dating
“Had sex”	Abusive

Whenever reporters of information express strong feelings about a topic, it is important to seek to differentiate their feelings from their observations and/or involvement.

## Bias

### **Bias brought into an investigation by an investigator:**

Adjudicators are supposed to be “impartial”, yet there is no such thing as pure objectivity in human beings. As an adjudicator, it is important to be aware of the issues that serve as “hot buttons” for you and provoke emotional responses. Be cognizant of your bias as you hear the case, or in exceptional circumstances ask to be removed from the case.

Additionally, one common short-coming of adjudicators and appellate officers is their manufacturing of possible alternatives when attempting to arrive at a conclusion. Instead of listening to the information presented and weighing it appropriately, a common temptation is to begin “supposing” about what took place by introducing facts not offered by the parties or witnesses. It is critical that adjudicators only utilize the information provided to them in reaching a conclusion.

When we refer to “facts in evidence,” we mean those provided by the parties, the witnesses, or by the physical evidence.

Questions about Credibility Determinations?



## Deliberations and the Finding of Fact



## Deliberations

### Order of deliberations:

- What happened? Develop a narrative of what you believe took place, based solely on facts in evidence, and accounting for all inculpatory and exculpatory information presented
- Make credibility determinations where conflicting information is present
- Develop a finding of fact (a summary of what happened that includes specific conclusions about behavior)
- Based on the finding of fact, is there a violation of published rules and regulations?
- If a violation is found, proceed to sanctioning. Note: Sanctioning is never to be discussed prior to the establishment of a finding of fact.

## Deliberations

### Writing an effective finding of fact:

- Should be reasonably brief (in most cases) yet also highly specific as to what took place (one to two paragraphs, based on allegations)
- Should provide sufficient information to allow either party to appeal, as well as assist an appeals administrator/panel in understanding your conclusions
- Should be written towards both/all parties; do not personalize
- Remember your potential audiences...
  - Complainant
  - Respondent
  - Appellate Officer(s)
  - OGC/SECO
  - Lawyers/advisors
  - Parents
  - Media/Social Media
  - Judge
  - Department of Education

## Deliberations

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  - Media/Social Media
  - Judge
  - Department of Education



Questions about Deliberations or the Finding of Fact?



# Sanctioning



## Sanctioning

1. Sanctioning Goals
2. Sanctioning Formula
3. Sanctioning Grid for Sex-Based Cases



## Sanctioning Goals

1. Education and Development
2. Restoration (reparation of harm to individual and the academic community)
3. Balance between individual being sanctioned and the academic community

Our stated goals for sanctioning never include punishment, nor do we explicitly reference deterrence. This is not to say that sanctions we impose are not perceived as punishments, but simply that it is never our explicit intent.

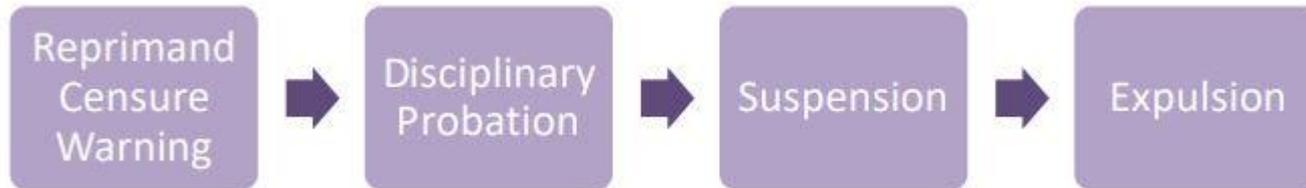
## Sanctioning Formula

1. Nature of the behavior +
2. Prior disciplinary history of respondent +
3. Aggravating factors +
4. Mitigating Factors = Sanction

Sanctions are the creation of learning outcomes intended for the situation and the behavior; “**active**” and “**inactive**” sanctions are then selected to achieve the intended outcomes. These intended outcomes should be communicated via the decision letter as a rationale for the sanction.

## Inactive Sanctions

Inactive sanctions are official, written university responses to misconduct that generally do not require any action by the respondent. These sanctions (with the exception of suspension and expulsion) generally do not explicitly serve as teaching tools, but instead provide a baseline for sanctions for any future conduct violations.



It is important to emphasize that disciplinary suspensions should be conditional on, and reinstatement only allowed upon, successful completion of all assigned active sanctions.

## Active Sanctions

Active sanctions are generally those designed to achieve learning outcomes by the student respondent by providing them with information and/or experiences that help them deepen their understanding of university expectations and cause them to reflect on the implications of their own actions.

Examples of active sanctions include:

- Assessment, treatment, and/or education for alcohol and other drug issues
- Workshops (e.g., healthy relationships, conflict management, anger management)
- Counseling assessment
- Interviews and educational essays
- Guided reflection papers



## Active Sanctions

Active sanctions in sex-based cases should generally not place the student respondent in a setting with either the complaining party or other vulnerable parties (such as a shelter or support group).

Additionally, other active sanctions can solidify interim measures and/or deter further contact between the parties, such as contact restrictions and restrictions from specific campus areas or activities (remedies).

In general, there should be (except in cases of permanent expulsion) a pairing of inactive and active sanctions that address all desired learning outcomes. All active sanctions should have written reflection components assigned to them that are then included in the student's conduct record.



## Sanctioning Grid for Sex-Based Cases

### **Minimum Inactive Sanctions for:**

Sex-Based Violence and/or Nonconsensual Penetration (with predation)

**Permanent Expulsion**

Sex-Based Violence and/or Nonconsensual Penetration (without predation)

**One-year (two consecutive major semesters) Suspension**

Nonconsensual Sexual Contact

**Disciplinary Probation**

Sexual Exploitation

**Disciplinary Probation**

Stalking

**Warning/Reprimand/Censure**

Harassment or Misconduct Based on Sex

**Warning/Reprimand/Censure**

Questions about Sanctioning?



## Appeals



## Appeals



### Role of Appeals Process:

Appeals processes exist to review whether or not the original hearing/review was conducted fairly. They do not serve as new (de novo) hearings, nor do they consider any information outside of the scope of the appeal.

As a result, deference is always given to the original decision, which is why the burden of proof shifts to the appealing party. Appeals boards (and administrators) are not authorized to supplant their judgment over the original decision maker(s) without cause, as defined in the grounds for appeal.

In Title IX appeals, best practice is to grant one appeal proceeding for all parties. The reporting party and the responding party are to be granted equitable appeal rights.

## Appeals



Grounds for Appeal:

- (a) a procedural irregularity that affected the outcome;
- (b) new evidence, not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome. The new evidence must be provided at the time of appeal with the appropriate member appeals form;
- (c) the Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome;
- (d) the appropriateness or severity of the sanctions.

## Appeals

Procedural Irregularity:

– the appellant is contending that a substantive error was committed as a part of the student conduct process that deprived the appellant of a fair hearing of the case. This would include but not be limited to a substantiated bias, an arbitrary and capricious finding, a material deviation from established procedures, etc.

There is a difference between an error and a substantive error.

## Appeals

### Procedural Irregularity Example #1:

– The appellant argues that they were provided four days notice for a hearing when the regulation guarantees five days notice. The appellant does not indicate that this made any difference in the case, but argues that any error is substantive enough to void the decision.

This is not a case of a substantive error.

## Appeals

### Procedural Irregularity Example #2:

– The appellant argues that evidence was allowed that should not have been at the hearing. The appellant states that a witness who was the only person to raise a specific fact did not attend the hearing and allow for questioning. Yet the panel included this information as a basis for its decision.

If corroborated, this may be a case of a substantive error.

## Appeals

### New Evidence:

– the appellant is contending that there is new information that was unavailable to the appellant at the time of the original proceeding, and that this information would have substantially impacted the outcome of the proceeding. The appellant must include the new information with the appeal. Note that this criteria is extremely challenging for individuals who choose or fail to attend or participate in the original proceeding they are appealing.

The key word of this definition is “unavailable”; if the appellant was aware of the information prior to the hearing and able to gain access to the information through reasonable effort, this condition would not apply.

## Appeals

### New Evidence Example #1:

– The appellant argues that they chose not to participate in the civil rights investigation and live hearing because of an ongoing criminal investigation. After the hearing they were notified that the criminal matter has been dismissed, so they file an appeal stating they are now willing to submit their new information.

Their information is not “new.” This is not a case of new evidence.

## Appeals

### New Evidence Example #2:

– The appellant states that following the hearing they were approached by a friend who stated that they witnessed the incident but were not aware that any disciplinary proceedings were going on. Their testimony would be supportive of the appellant's case. The new witness writes and signs a statement with the new information and submits it with the appeal.

Provided the identity of the witness can be validated and that the information would be of sufficient weight to affect the outcome, this would be considered new evidence.

## Appeals

### Conflict of Interest/Bias:

– the appellant is contending that the Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome;

This cannot be a generalized claim of bias but must demonstrate cause that indicates a lack of impartiality on the part of the official.

## Appeals

### Conflict of Interest/Bias Example #1:

– The appellant states that one of the panel members appeared at a campus “take Back the Night” march and disclosed their own sexual assault experience to other survivors several months prior to the hearing; the goal of the brief commentary was to urge survivors to get support and to report what took place. According to the appellant, this type of public advocacy makes it clear that the panel could not hear the case in an unbiased manner.

Assuming this is the entirety of the argument for bias, the ground is unfounded. Simply sharing a personal story does not establish an inability to remain sufficiently impartial to be able to hear facts and render a decision. This does not establish a conflict of interest or bias.

## Appeals

### Conflict of Interest/Bias Example #2:

– The appellant states that the investigator told them during two separate interviews that the facts seemed to support the idea was lying, and the investigator encouraged the appellant to “come clean” in order to receive better consideration in the adjudicatory process. The investigator confirms that they made this comment twice hoping to secure a confession.

Although the information does not specifically address the events under review, it raises significant questions as to the neutrality of the investigator. An appeals administrator/panel may remand the case back to the adjudicatory authority, who may in turn request a new investigation.

## Appeals

Appropriateness/Severity of Sanction:

– the appellant is contending that the sanction is not appropriate to the findings of the case.

Sanctions are dependent upon the nature of the offense, the previous conduct history of the student, and any mitigating and/or aggravating factors. Sanctions may vary widely, even for similar offenses. Sanction rationales are to be included in decision letters to aid both student understanding and to educate the appeals officer or board. Remember that the A&M System has established minimum inactive sanctions in sex-based discrimination cases that are always to be followed except in cases with significant mitigating factors; mitigating factors must be established in the finding of fact or on basis of appeal.



## Appeals

### Appropriateness/Severity of Sanction Example #1:

– The appellant argues that a one-year suspension from the university is disproportionate because they did not commit the offense for which they are being sanctioned.

The finding of the case is a violation, so no appellant can re-argue the finding by appealing the sanction. This is not a case on an overly severe sanction.

## Appeals

### Appropriateness/Severity of Sanction Example #2:

– The appellant argues that assigning the respondent the sanction of volunteering at a local shelter for domestic violence victims is inappropriate, given that the respondent was held responsible for dating violence, thus placing the respondent into contact with other victims of dating and domestic violence, and because the complainant regularly uses the services of the shelter, thus raising the potential of a violation of a no-contact order issued by the same hearing panel.

Placing a respondent and complainant from a dating violence case together is both not recommended practice and potentially dangerous. Placing the respondent into mandated contact with other survivors is also strongly discouraged. Assuming the cited facts are correct, this would be considered an inappropriate sanction.

Questions about Appeals?



## Consent and Predation



*This section includes materials adapted from materials provided by the Association of Title IX Administrators (ATIXA)*

## Consent and Predation

What is consent?

Under System Regulation 08.01.01...

Consent – **clear, voluntary and ongoing agreement** to engage in a **specific sexual act**. Persons **need not verbalize their consent** to engage in a sexual act for there to be permission. Permission to engage in a sexual act may be indicated through physical actions rather than words. A person who is asleep or mentally or physically **incapacitated**, either through the effect of drugs or alcohol or for any other reason, or whose agreement was made by threat, coercion, or force, cannot give consent. Consent may be **revoked** by any party at any time.

## Consent and Predation

### Three types of sexual interactions

1. Wanted and consensual sex
2. Unwanted but consensual sex
3. Unwanted and nonconsensual sex

Of these, only the **last** represents a violation of regulations/rules

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

1. Force – was force use by the respondent to obtain sexual access?
2. Incapacity – did the respondent know, or should the respondent have known, that the complainant was incapacitated?
3. Consent – what clear words or actions by the complainant gave the respondent permission for the specific sexual activity that took place (how did you know that you had consent)?

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 1. Force – 4 types

- a) Physical Violence (hitting, restraining, pushing, etc.)
- b) Threats (anything that gets person to do something they would not absent the threat)
- c) Intimidation (implied threat that causes reasonable fear)
- d) Coercion (act, process, or power of compelling a person to take an action, make a choice, or allow an act to happen that they would otherwise not choose or give consent to)

For Coercion, consider unreasonable actions that seek to deprive someone of the ability to withhold consent (consider Isolation, Frequency, Intensity, Duration, Ability to control environment, Ability to clearly state one's choices); Small "c" versus capital "C"

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 2. Incapacity

a state in which a person, due to a disability, the use of alcohol or drugs, being asleep, or for any other reason, is not capable of making rational decisions about consent to sexual activity and recognizing the consequences of their decision.

Incapacity is fact dependent. When dealing with potential incapacity due to the consumption of alcohol, we compare an approximated blood alcohol level (when available) with the behaviors presented as described by all of the parties and witnesses. Blackouts (no memory of who, what, when, where, why, or how for a designated time) and partial blackouts (brownouts, “spotty” or fragmented memories) are frequently indicators of a lack of capacity.

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 2. Incapacity

Forms of incapacity:

- Alcohol or other drugs
- Mental/Cognitive impairment
- Asleep or unconscious
- Injury

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 2. Incapacity

Questions:

- Was the person incapacitated at the time of sex?
  - Could they make rational choices?
  - Could they appreciate the consequences of their actions?
  - Could they know who, what, when, where, how, and why?
- Did the respondent know of the incapacity?
- Or – Should the respondent have known of the incapacity based on all the circumstances (reasonable person)?

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 2. Incapacity

Evidence of Incapacity:

- Slurred speech
- Impaired motor functions
- Shaky equilibrium, stumbling
- Passing out
- Throwing up
- Appearing disoriented
- Unconscious
- Known Blackout

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 2. Incapacity

“Should have known” – Did the respondent:

- Use alcohol and/or drugs with the complainant?
- Provide alcohol and/or drugs to the complainant?
- Have awareness of a complainant’s incapacity?
- Have a familiarity with the complainant from previous interactions? If so, how was this event similar or different from previous events?

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 3. Consent

- a) What clear words or actions by the complainant gave the respondent permission for each sexual act that took place? If words and actions are established, the interaction was consensual. If there are no words or actions established, the interaction was nonconsensual.
- b) Yes means yes. No means no. Nothing means no. Silence or inactivity does not equal consent.
- c) Consent cannot be inferred from the manner in which a complainant dresses, from purchasing items, for conducting favors, or from using alcohol and/or drugs.

## Consent and Predation

### The Consent Construct (ATIXA) – Three consent questions

#### 3. Consent

- d) Consent must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- e) Consent can be withdrawn at any time, as long as the withdrawal is clearly communicated – verbally or nonverbally – by the person withdrawing it.
- f) The definition of consent does not vary based upon a participant's sex, sexual orientation, gender identity, or gender expression.

## Consent and Predation

### Consent Complications

- Lack of relationships and understood norms of behavior
- Past interactions with one another that may be transposed onto the current encounter
- Past interactions with others that get transposed onto a new partner
- Influence of alcohol and/or drugs
- Alternative Lifestyles and Power Exchanges (BDSM, con noncon, etc.)

## Consent and Predation

Predation: an intent to engage in acts of misconduct prior to their occurrence demonstrating premeditation, planning or forethought, and is reflected in communicated intent (physical, verbal, visual, or written), threats directed at a party, attempts to incapacitate a party, attempts to isolate a party, utilizing physical force or violence, or other actions that a reasonable person would construe as a pre-meditation to engage in actions that are unwanted by/against the recipient. Committing any of these actions with an individual under the age of consent is also considered predatory.

Typically, predation is identified through the use of force, threats, coercion, and behaviors designed to isolate a party. Consider any evidence of planning, the use of pressure, creating an environment encouraging the over-consumption of alcohol, and other factors indicating that the respondent created an environment where consent could not be meaningfully withheld (see previous section on Force).



Questions about Consent and Predation?



## Alcohol and other Drugs



*This section includes materials adapted from materials provided by the Association of Title IX Administrators (ATIXA)*

Alcohol and other Drugs

Can two adults who are both “drunk” engage in consensual sex with one another? (poll)



### Alcohol and other Drugs

Can two adults who are both “drunk” engage in consensual sex with one another?

**YES** – our standard for lack of consent is not “drunk” (otherwise defined as inebriated/intoxicated), but incapacitated.

## Alcohol and other Drugs

Tolerance is established by biology – can be raised lowered over time by drinking beyond the point of impairment (lowered by not doing so)

What is a drink? ([niaa.nih.gov](http://niaa.nih.gov))

12 oz. of beer (5% alcohol)

5 oz. of wine (12% alcohol)

1.5 oz. distilled spirits (40% alcohol)

One drink often equates to a .025 BAL

Metabolism rate is generally .015 per hour (average, depending on age, sex, height, weight, medications, genetics, experience with drinking, etc.)

## Alcohol and other Drugs

### Factors that effect our body's reaction to alcohol

sex

body mass

illness

stomach contents

water consumption

type of alcohol consumed

amount of alcohol consumed

prescription medications

allergies

age

tolerance

race

method of drinking

duration of drinking

carbonation

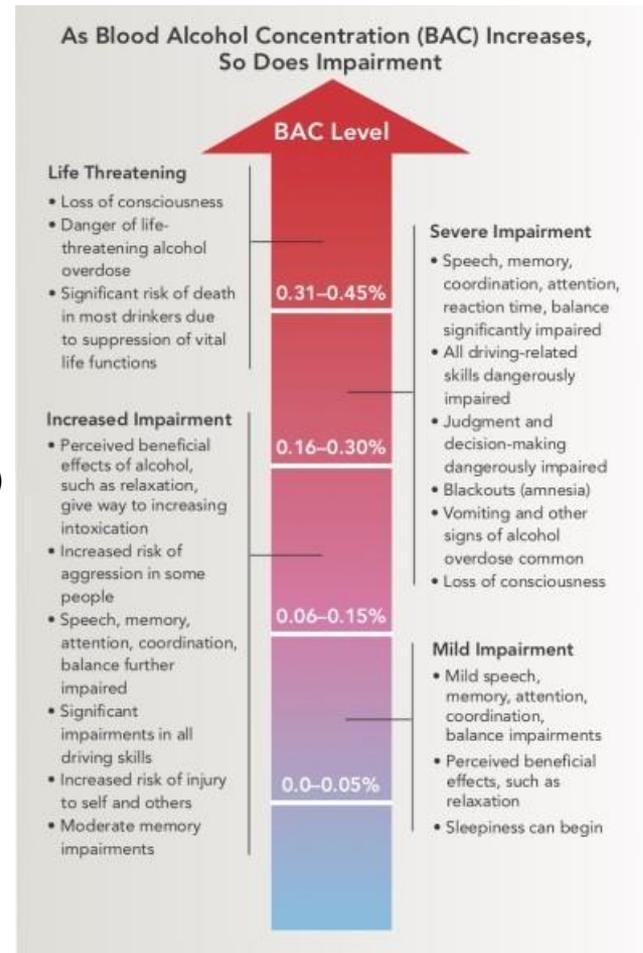
menstrual cycle

non-prescription medications

## Alcohol

- .31-up** Coma / Risk of Death
- .25-.30** Stupor (Incapacitation certain)  
Mental, physical, and sensory functions shutting down
- .20-.24** Severe Intoxication (Incapacitation likely)  
Severe Disorientation, Blackouts, Vomiting, Shutdown of motor skills
- .16-.19** Heavily Intoxicated (Incapacitation possible)  
Depression, Nausea, Disorientation, Blackouts
- .11-.15** Intoxication/Inebriation  
Heightened impairment, Risk of aggression, Risk of injury
- .05-.10** Impairment  
Speech, Coordination, Balance, Reactions, Memory
- .02-.05** Influence  
Mild relaxation, lightheadedness, warmth

Sources: NIH.gov and UWEC.edu



## Alcohol and other Drugs

What about Mutual Incapacity?

POLL: If an investigator discovers that mutual incapacity exists, and that this is confirmed by the hearing officer/panel which of the following statements is most likely to be true?

- A. Neither party is in violation
- B. Both parties are in violation
- C. Only the original respondent is in violation

## Alcohol and other Drugs

What about Mutual Incapacity?

If an investigator discovers that mutual incapacity exists, and that this is confirmed by the hearing officer/panel which of the following statements is most likely to be true?

- A. Neither party is in violation
- B. Both parties are in violation
- C. Only the original respondent is in violation

ANSWER: B

The investigator would bring this to the attention of the Title IX Coordinator, who would then visit with the parties to determine the future direction of the complaint.

## Alcohol and other Drugs

### Marijuana –

THC creates a dopamine “high” that serves as a stimulant, depression, and sometimes triggers hallucinogenic effects

Short-term: alters senses and experiences; triggers emotions such as happiness, relaxation, anxiety relief, creativity and euphoria; alters sense of time, creates difficulty thinking and problem solving, impairs memory, impedes motivation

Physically: reddening of the eyes, fast heartbeat, increased blood pressure, dry mouth, dizziness, increased appetite, calming sensations, relief from pain, “feathery” feelings of relaxation throughout the body, increased sensitivity, and other potential remedies to physical ailments

## Alcohol and other Drugs

### Marijuana –

Standard recreational use generally equates to that of .08 level of impairment; this is cumulative when coupled with alcohol or other substances

### In general for all illicit drugs –

- By design, illicit drugs cause impairment
- Quality control for illicit drugs is problematic
- When combined with alcohol, effects are cumulative

Questions about Alcohol and Other Drugs?



# Trauma



*This section includes materials adapted from materials provided by the Association of Title IX Administrators (ATIXA)*

## Trauma

Trauma –

Trauma is exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity.

Trauma results from war, natural disasters, physical violence (non-sexual and sexual), relationship violence, stalking, and child abuse. Trauma is different than stress in how it activates certain parts of the brain and shuts down others.

## Trauma

What is trauma?

The Brain:

Cortex (thinking)

Limbic (emotions)

Brain Stem (survival)

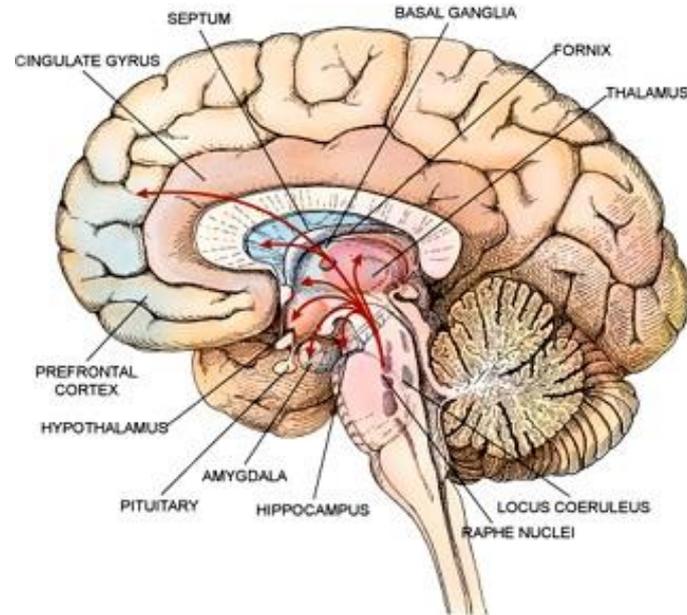
The Brain and Trauma (activated):

Hypothalamus

Pituitary

Hippocampus

Amygdala



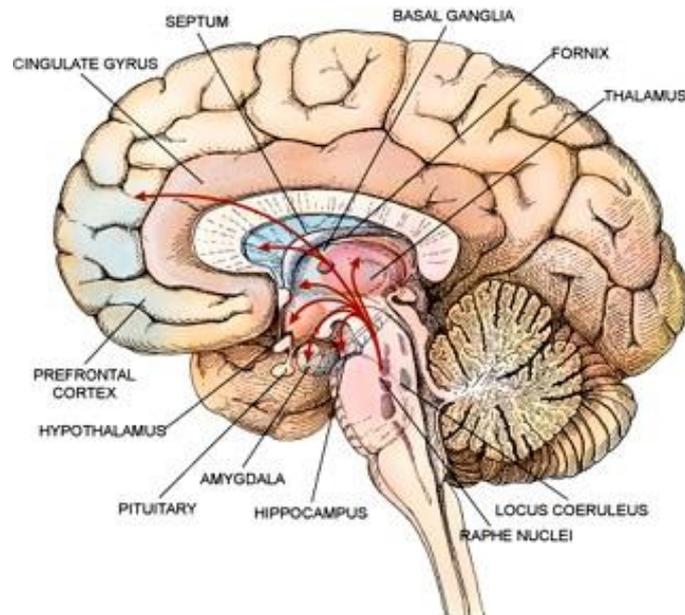
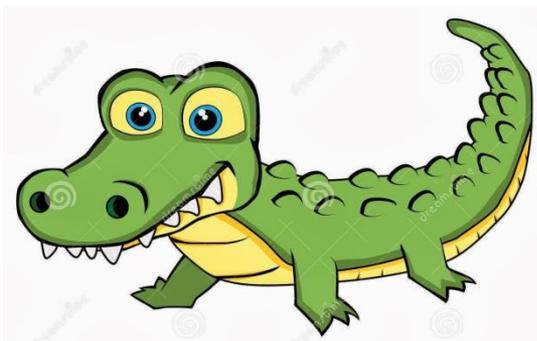
## Trauma

What is trauma?

The Brain:

“Alligator Brain” controls:

- Fight (approach)
- Flight (avoidance)
- Freeze (submission)



## Trauma

### Trauma triggers:

- Fight, Flight, Freeze response (not a choice)
- Incapacitation of frontal lobe through the release of a hormonal flood, which can last for up to 4 days and may be reactivated by a triggering event
- Up to half of those experiencing a sexual assault experience a tonic immobility which is described as a paralysis – this is a biological response
- Hippocampus (Memory Maker) can still accept sensory data and encode it, but cannot consolidate memories and store (think of a card catalog); memory recall tends to be fragmented and recall can be slow and difficult



## Trauma

### Trauma and Adjudication –

- a) Don't diagnose whether or not trauma exists; respect that it may exist
- b) Expect a non-linear account; the important issue is whether or not the accumulation of stories is coherent and consistent and not contradictory
- c) Use open-ended questions and be patient in allowing for responses; don't bombard someone with multiple questions or multi-part questions
- d) Allow time
- h) Never impose your expected reactions to an event on to someone else; how people react in a traumatic situation (and following it) may seem counter-intuitive
- i) Use non-judgmental and non-blaming language; avoid "Why" questions
- j) Emphasize transparency and predictability

Final Questions?



**Civil Rights  
Adjudication Training  
for the  
Texas A&M University System**

Rick Olshak, Director of Title IX Compliance  
August 2020



## Agenda – Session Four

1. Pre-Test
2. Role of the Hearing Chair (includes single hearing officers)
  - a) Responsibilities
  - b) Managing a Hearing
  - c) Evidence and Admissibility
  - d) Working with Party Advisors

(5 minute break)

3. The Hearing Panel Advisor
  - a) Responsibilities
4. Re-visit the pre-test
5. Final Questions



## Pre-Test

Here are 5 questions that we will address today through the material. These are your post-test questions.

1. Yes or No – John is a party and has answered twenty-three questions from the opposing advisor. However John refuses to answer the twenty-fourth question. The panel chair warns John that if he refuses to answer, all of his previous statements – including those made at the hearing – will be deemed inadmissible. John still refuses to answer and the chair declares John’s statements to be no longer relevant to the case. Did the chair make the correct decision?
2. Yes or No – Kimberly is a witness who appears at the hearing and refuses to answer any questions from the panel, but answers questions from both party advisors. The chair tells the panel that Kimberly’s statements may be considered in deliberations. Did the chair make the correct decision?
3. Choose One – All of the following are relevance rulings that a chair might make except one:
  - a) Admissible based on relevance
  - b) Admissible based on repetition
  - c) Inadmissible based on repetition
  - d) Inadmissible based relevance

## Pre-Test

4. True or False – A hearing panel advisor should offer helpful suggestions to the panel to help them reach decisions regarding responsibility, as well as to aid them with sanctioning.
5. Choose One – Party A tells the hearing panel that they believe a witness appearing at the hearing is not relevant to the incident in question. The opposing party disagrees. Who makes the determination on whether or not the witness can offer a statement and answer questions?
  - a) Panel Chair
  - b) Panel Advisor
  - c) Panel votes in closed session
  - d) Parties must come to an agreement on their own

## Role of the Hearing Chair



*This section includes materials adapted from materials provided by the Association of Title IX Administrators (ATIXA)*

## Responsibilities of the Hearing Chair

1. Pre-Hearing Organization
  - a) Meet with panel to determine any gaps existing within the report that require lines of questioning
  - b) Develop basic question outlines and assign questions to members of the panel; develop queues and signals to communicate needs
  - c) Discuss any concerns, panel member needs, or time restrictions prior to beginning the hearing

## Role of the Hearing Chair

### 2. Hearing Protocols

- a) Hearing outline (Slide 226)
- b) Hearings are **always** closed to the public.
- c) Member **must** make an audio or video recording of the hearing; **must** make recording/transcript available for review for an appeal – copies and transcripts are not provided.
- d) Complainant and respondent **must** have an advisor with them at the hearing, or the member will appoint one on the spot for the hearing, with no delay granted at that time.
- e) Questioning of parties and witnesses by a party **must** be asked by the advisor; otherwise the advisor takes no active role in the hearing and may not answer on behalf of their party.
- f) Questions **are to be directed** to the hearing officer or hearing panel chair, who will determine whether or not each question will be admitted into the hearing. If a question is deemed repetitious or not relevant, the decisionmaker(s) **must** explain the decision to exclude it. The hearing panel chair makes final determinations on the relevance of evidence and questions.

## Role of the Hearing Chair

### 2. Hearing Protocols

- g) Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are **not** relevant, **unless** such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the alleged conduct, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- h) Attendance at a hearing may be in person or may be conducted through remote means, **provided that** all parties and the hearing officer or hearing panel can see and hear one another in real time during the course of the hearing.
- i) If a complainant, respondent, or witness is not in attendance at a live hearing, the hearing officer or hearing panel **cannot rely** on the previously submitted statements of the absent party in reaching a determination, but may utilize all other evidence, including witnesses who interacted with the absent party, but not hearsay testimony of what the absent party told that individual. A complainant, respondent, or witness statement can also not be utilized in a determination if that person refuses to submit to cross examination at a live hearing.

## Role of the Hearing Chair

### 2. Hearing Protocols

When are a person's previous statements and hearing statements IN or OUT?

#### IN

- A party/witness refuses to answer panel questions (provided they submit to opposing questions)
- A party/witness answers panel questions and no opposing questions are asked (as long as advisor questions are permitted)
- A party/witness answers opposing questions and later answers panel questions
- A party/witness answers opposing questions and there are no panel questions
- A party/witness answers opposing questions and later refuses to answer panel questions

Adapted from Brett Sokolow (ATIXA)



## Role of the Hearing Chair

### 2. Hearing Protocols

When are a person's previous statements and hearing statements IN or OUT?

#### OUT

- A party/witness refuses to answer opposing questions
- A party/witness answers panel questions but they refuse to answer opposing questions
- A party/witness answers panel questions and then later refuses to answer opposing questions
- A party/witness refuses opposing questions and then later answers panel questions
- A party/witness refuses opposing questions and then later refuses panel questions

Adapted from Brett Sokolow (ATIXA)



## Role of the Hearing Chair

### 2. Hearing Protocols

- j) Hearing officers/hearing panels **cannot** draw an inference regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- k) No hearing officer or hearing panel member can also serve as an investigative authority or appellate authority in the same complaint. Students (who are otherwise not full-time employees) **may not serve** in the role of investigative authority, hearing officer, hearing panel member, or appellate authority.
- l) When a hearing panel is being utilized to resolve a complaint, either a voting chairperson or non-voting administrative advisor who does not serve on the panel shall oversee the live hearing and deliberations, and assist in the development of a finding of fact, decision rationale, and, when appropriate, a sanction rationale in consultation with the panel members.

## Role of the Hearing Chair

### 2. Hearing Protocols

- m) Following the hearing, the hearing officer or hearing panel will develop a draft decision and submit the draft to SECO within two (2) business days. SECO will have a maximum of three (3) business days to provide feedback to the hearing officer/hearing panel. Thereafter, the designated administrator will have a maximum of three (3) additional business days to issue a decision letter. The decision letter **must** be sent simultaneously to both/all parties.

## Role of the Hearing Chair

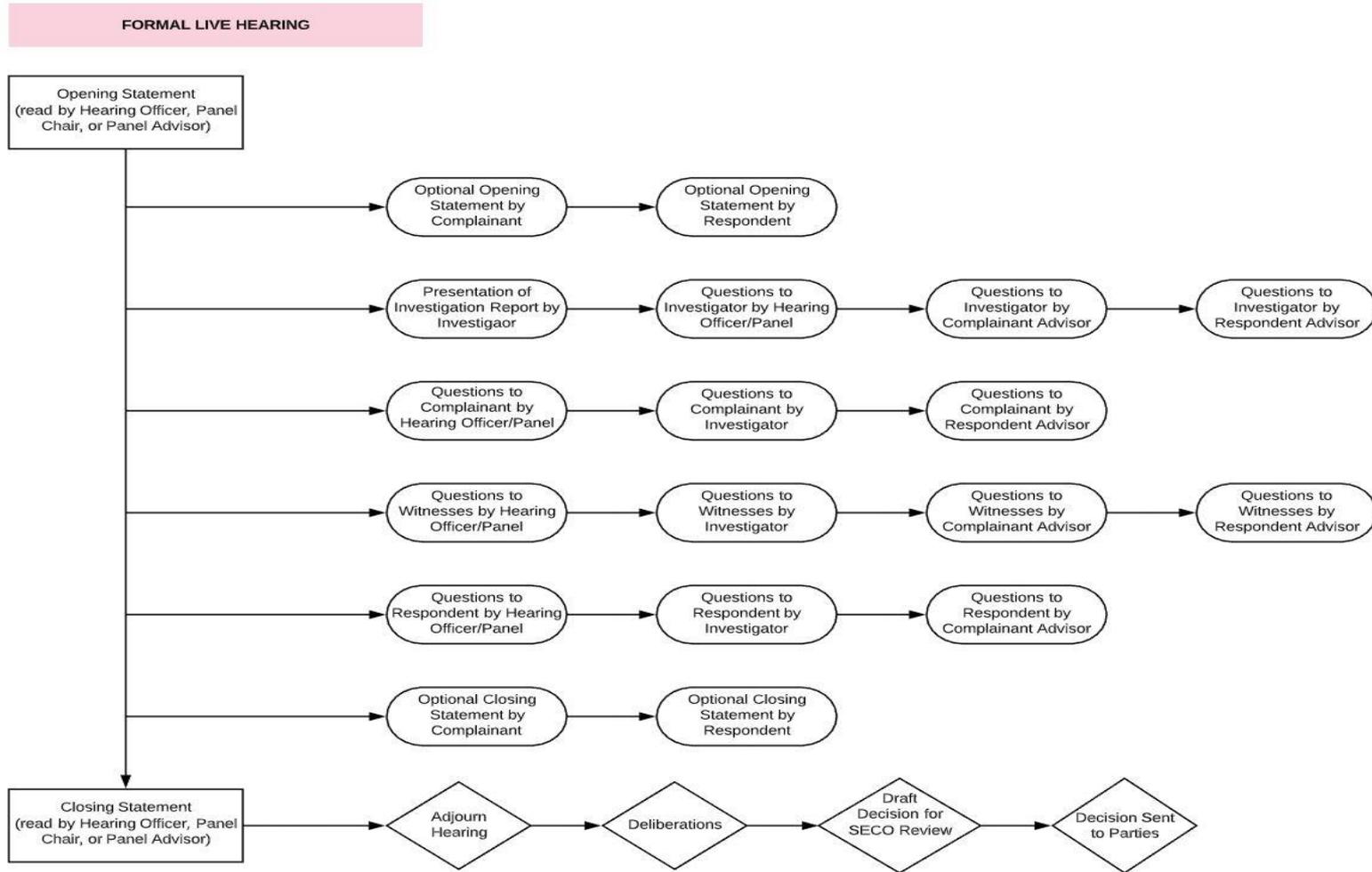
### 2. Hearing Protocols

- n) Decision letters **must** include: 1. The identification of the allegations; 2. A description of the procedural steps taken from the receipt of a formal complaint through determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held if any; 3. Findings of fact supporting the determination; 4. Conclusion regarding the application of the member's conduct standards to the facts; 5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the member imposes on the respondent, and whether remedies designed to restore or preserve equal access to the member's education program or activity will be provided by the member to the complainant, and; 6. The member's procedures and permissible bases for the complainant and respondent to appeal.
- o) If for any reason there is reasonable cause for a member to delay the issuance of the decision letter, this **will** be communicated to the parties by the designated administrator or designee.

## Role of the Hearing Chair

### 2. Hearing Protocols

- p) If a student respondent withdraws or graduates from a member university pending the resolution of a complaint, the process will continue and, the member university will not issue a transcript on behalf of the student until the conclusion of the process.
- q) Member universities, upon request by another postsecondary educational institution, must provide to the requesting institution any determination that a student violated the member university's code of conduct by committing sexual harassment, sexual assault, sex-based misconduct, and/or dating violence, domestic violence, and/or stalking based on sex.



## Role of the Hearing Chair

### 3. Evidence and Admissibility

- a) The Chair is responsible for making all determinations regarding admissibility and relevance; we have already covered admissibility as it relates to questioning and previous statements
- b) The formal rules of evidence (federal, state) do not apply to our proceedings, but rules crafted by OCR do apply
- c) If credible, it should be considered:
  - i. Evidence is any kind of information presented with the intent to prove what took place
  - ii. Certain evidence may be relevant to the credibility of the witness, but not to the alleged violation directly
  - iii. No limit on the amount/types of evidence provided it is relevant
- d) There is no restriction on parties discussing case or gathering evidence, except that supportive measures (such as no contact orders) must be followed and a party's attempt to gain information may not interfere with our attempt to gain information

## Role of the Hearing Chair

### 3. Evidence and Admissibility

- e) The parties must have access to all evidence that directly relates to the allegations for reference and use at the hearing, but they must make a case for the relevance of the information
- f) While some initial relevance and credibility determinations have been made by the investigator in the investigative report, the final decision regarding relevance and credibility at the hearing rests with the Chair. This applies to all evidence, both inculpatory and exculpatory.
- g) Character statements and impact statements are generally not admissible at a hearing. Both are intended to aid decision-makers in determining a sanction in the event that a violation is found. These materials should be stored separately at the hearing and not opened unless a violation is determined.
- h) Statements and evidence regarding complainant's prior sexual history is not relevant unless it is provided to prove that someone other than the respondent committed the alleged violation or if it concerns previous incidents of the complainant's behavior with respect to the respondent that would tend to prove consent

## Role of the Hearing Chair

### 3. Evidence and Admissibility

- i) Complainant's sexual history is not relevant even if they are the one to introduce it in the investigation or at the hearing
- j) This restriction on sexual history does not apply to the respondent's sexual history or any predisposition
- k) Regarding Advisor questioning (cross):
  - i. If an advisor's question has been addressed in the investigative report but not in the hearing, it should be permitted if it is relevant
  - ii. If an advisor's question has already been asked and answered in the hearing, the Chair should rule that the question is repetitive. If necessary, the Chair can reiterate the previously asked question and answer with the party receiving the question to verify the earlier answer; if an advisor is insistent, they must make a compelling argument to the Chair as to why re-asking a question is likely to yield a different response

## Role of the Hearing Chair

### 4. Working with Party Advisors

- a) Take a direct but nonconfrontational approach with all party advisors; never take the situation personally
- b) The role of the Advisor has been described to the party and the advisor prior to the hearing; they will be reminded of this in the script
- c) In the event that an advisor acts outside of their prescribed role (interjecting, interrupting, answering on behalf of the party, or otherwise being serving as an active participant or being disruptive, the following responses should be used in order:
  - i. Reminder of the ground rules established for the Advisor; warning that further violations of ground rules may result in the advisor being removed from the hearing
  - ii. Short (10-minute) break; Chair explains during break that this is a final warning
  - iii. Suspension of hearing: Party may proceed through the hearing process with a new appointed advisor (assuming they do not have another present); party may seek a delay in the proceedings (Chair's decision)

Role of the Hearing Chair Questions?



***Let's take a five minute break.....***



# The Hearing Panel Advisor

## 1. Responsibilities

- a) Prior to Hearing:
  - i. Dissemination of investigative report, supplemental exhibits, pre-hearing conference notifications
  - ii. Panel logistics (scheduling, physical environment, virtual environment, recording)
  - iii. Hearing letters (parties, advisors, witnesses)
  - iv. Advisor forms
  - v. Ensuring scheduling of on-call advisor(s)
  - vi. Copying and disseminating materials for hearing (hard copy, electronic)
  - vii. Coordinating in the event that OGC/SECO advisement may be needed during the hearing or deliberations

*Adapted from Brett Sokolow (ATIXA)*

# The Hearing Panel Advisor

## 1. Responsibilities

- b) During the Hearing:
  - i. Reading of opening statement (to be determined with Chair)
  - ii. Ensure that the Chair and panel stay on script in order of process
  - iii. Attending to any development in waiting areas with parties/witnesses
  - iv. Reading of closing statement (to be determined with Chair)

*Adapted from Brett Sokolow (ATIXA)*



# The Hearing Panel Advisor

## 1. Responsibilities

- c) During Deliberations:
  - i. Ensure the admissibility rules of the Chair are followed (in conjunction with Chair)
  - ii. Ensure that the panel does not introduce facts that are not in evidence 9in conjunction with Chair)
  - iii. Ensure that the panel does not discuss sanctions prior to authoring a finding
  - iv. Ensures that the panel members discuss the allegations and address all inculpatory and exculpatory evidence
  - v. Assist the panel in developing a finding of fact
  - vi. Assist the panel in determining appropriate sanctions (sanction mechanics, as well as abiding by System Regulation 08.01.01)
  - vii. Assist the panel in developing a sanction rationale
  - viii. Working with the Chair to submit a draft decision to SECO

*Adapted from Brett Sokolow (ATIXA)*



# The Hearing Panel Advisor

## 1. Responsibilities

- d) Post-Hearing:
  - i. Destroy all non-permanent materials and notes
  - ii. Receive feedback from SECO and work with Chair to author and distribute the decision letter
  - iii. Enter decision into database and ensure compliance with sanctions and remedies (designated office)
  - iv. Transition into the appeals (process)

*Adapted from Brett Sokolow (ATIXA)*



Hearing Panel Advisor Questions?



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## Pre-Test

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5. Choose One – Party A tells the hearing panel that they believe a witness appearing at the hearing is not relevant to the incident in question. The opposing party disagrees. Who makes the determination on whether or not the witness can offer a statement and answer questions?
  - a) Panel Chair
  - b) Panel Advisor
  - c) Panel votes in closed session
  - d) Parties must come to an agreement on their own

## Additional Notes

1. We will send out a note (via Aubrey) when this course (and other subsequent trainings are available on TrainTraq, along with completion deadlines
2. I will be delivering the Title IX resources to Coordinators early next week; I apologize the day, but the amount of material is voluminous
3. If you have any remaining questions following this program, please submit them to your Title IX Coordinator by the end of the day Friday so that your Coordinator can send them to me on Monday – we will send out System-wide responses for each batch of questions submitted

Final Questions?

