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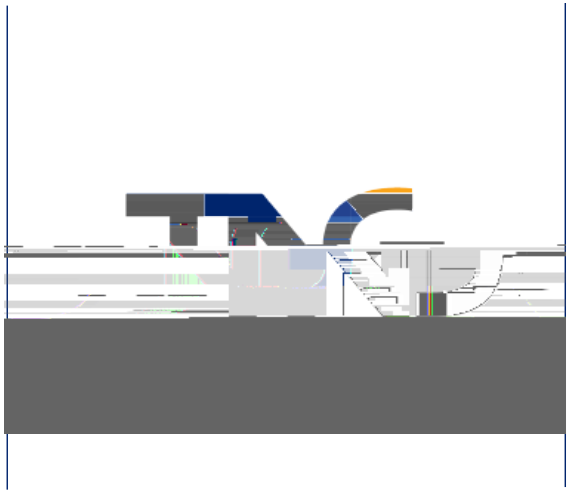
arc 2021

Trainin and Certification Co rse



An ad ice or o inion ro ided d rin t is trainin , eit er ri atel or to t e entire ro , is ne er to e constr ed as le al ad ice. Al a s cons lt it o r le al co nsel to ens re o are recei in ad ice t at considers e istin case la , an a lica le state or local la s, and e ol in federal idance.

Title IX Basics

Decision-ma er ole

D e rocess

T e Title IX rocess

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AGENDA

7 Hearin Lo istics

8 Decision-ma in ills art I

9 ele ance E ercise

10 Decision-ma in ills art II

11 olic Terminolo

12 ATIXA Consent Constr ct

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AGENDA

13 @ estionin ills

14 @ estionin Acti it

15 a in a Decision

16 A eals

17 ecord ee in and Doc mentation

18 cenarios (Time ermittin)

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TITLE IX

20 . .C. # 1681 & 34 C.F. . art 106 (1972)

; No erson in t e nited tates
s all, on t e asis of se , e
e cl ded from artici ation in,
e denied t e enefits of, or e

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THE IX COMMANDMENTS

Thorough	Reliable	Impartial
Prompt		

WHAT IS YOUR MISSION AS A DECISION-MAKER?

- Decision-ma er es onsi ilities
- Decision-ma er Com etencies

HEARING OFFICER/DECISION-MAKER RESPONSIBILITIES

an o r To 3 responsibilities as a Decision-ma er.
Identif at o consider least im ortant

	Your Rank	Group Rank
▪ Findin t e tr t		
▪ ro idin a q st res lt		
▪ ro idin an ed cational rocess		
▪ a in a safe comm nit		
▪ oldin t e institi tionus olic		
▪ Ens rin a fair rocess		
▪ rotectin t e institi tion from lia ilit		
▪ nis in ron doin		

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THE GOAL

AN EQUITABLE RESULT FROM

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WHAT DOES IT MEAN TO BE A "DECISION-MAKER?"

- Ne Title IX re lations re ire a ; Decision-ma er[to

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WHEN AND HOW THE "DECISION-MAKER" WORKS

- e ired li e earin for colle es and ni ersities
  - a ta e lace in ersonj o e er, m st ro ide an o tion for a ideo conference
  - Ke ne element is t at t e arties ma cross-e amine eac ot er and itnesses, t ro an Ad isor

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HEARING OFFICER/DECISION-MAKER COMPETENCIES (CONT.)

- res m tion of Innocence
- D e rocess and Fairness
- Bias/Im artialit /Conflicts of Interest
- tal in / e al Assa lt/Harassment
- Domestic/Datin iolence
- Discrimination
- Deli eration
- anctionin / emedies
- nderstandin t e A eal rocess
- C lt ral Com etenc
- Intersection it ental Healt Iss es
- Conc rrent Criminal rosec tions
- Im act of Failin to Testif /Ans er
- Dra in Inferences?
- ana e Accommodations D rin rocess
-

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REMEMBER, YOU HAVE NO "SIDE" OTHER THAN THE INTEGRITY OF THE PROCESS, AND YOU REPRESENT THE PROCESS.

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DUE PROCESS

- stanti e D e rocess
- roced ral D e rocess
- E identiar tandards

WHAT IS DUE PROCESS?

- Substantive and Procedural D e rocess (D)
  - i ts- ased rotections t at accom an disci linar action an instit tion it res ect to st dents, em lo ees, or ot ers
  - Informed la , istor , lic olic , c lt re etc.
- D in criminal and ci il co rts s. D it in an instit tion
- D anal sis and rotections a e istoricall foc sed on t e ri ts of t e es ondent
-

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“PROCEDURAL DUE PROCESS” - ARE YOU FOLLOWING YOUR PROCESS?

Procedural Due Process:

- Consistent, t oro , and roced rall -so nd re ie of all alle ations
- stantial com liance it ritten olicies and roced res
- olicies and roced res afford s fficient ri ts and rotections to satisf mandates of all a lica le la s
  - Clear, ritten notice of t e alle ations
  - O ort nit to resent itnesses and e idence and e eard t e Decision-ma er

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"SUBSTANTIVE DUE PROCESS" - DUE PROCESS IN THE DECISION ITSELF

Due Process in Decision

- A decision m st Y
  - Be a ro riatel im artial and fair (ot findin and sanction)
  - Be neit er ar itrar nor ca ricio s
  - Be ased on a f ndamentall fair r le or olic
  - Be made in ood fait (i.e., it o t malice, ill-

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DUE PROCESS PROCEDURAL RIGHTS IN 2020 TITLE IX REGULATIONS (CONT.)

Right to:

- ritten notice of alle ations, as ell as notice of t e date, time, location, artici ants, and r ose of in esti ation inter ie s or ot er meetin s, it s fficient time to re are
- Ins ect and re ie e idence and draft in esti ation re ort efore finali ed
- i t to ar e for incl sion of ; directl related[e idence at t e earin
-

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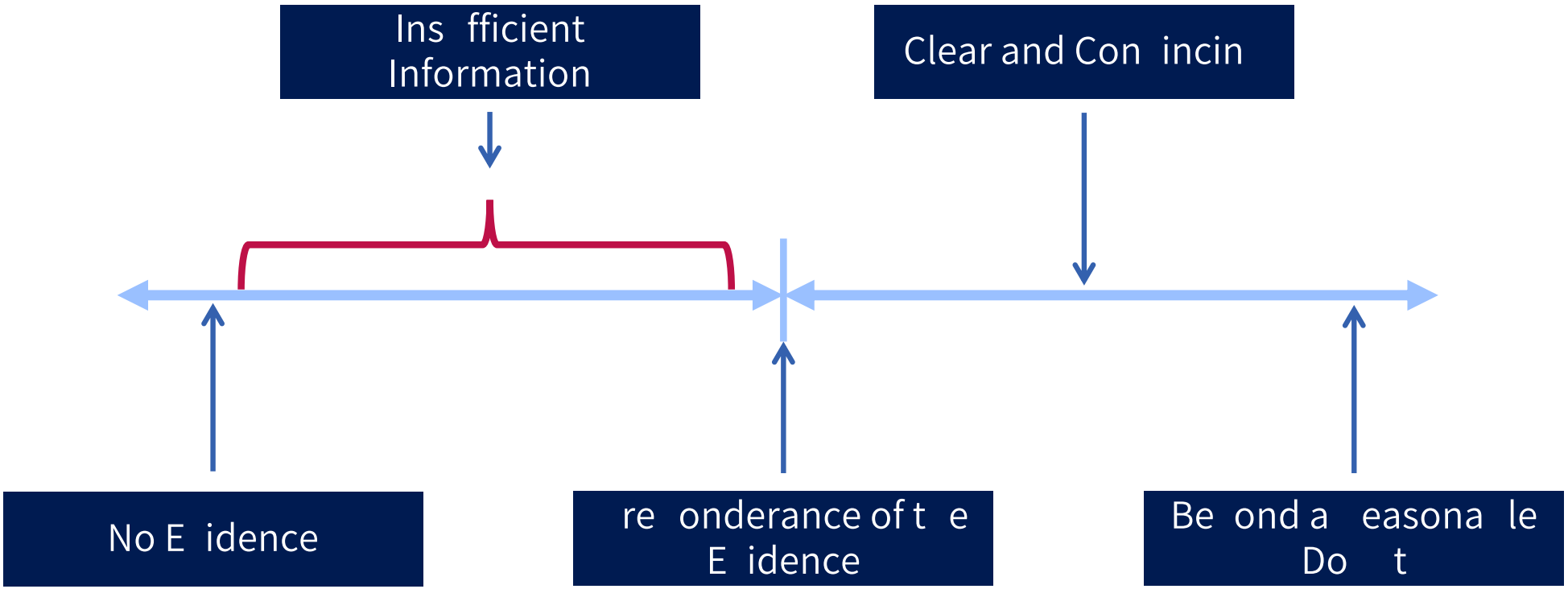
EVIDENTIARY STANDARDS



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THE “TITLE IX PROCESS”: WHAT HAPPENED BEFORE IT GOT TO A HEARING?

- T e General ases of a Title IX rocess
- Ten te s of an In esti ation
-

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EVIDENCE AND REPORT REVIEW BY PARTIES PART 1

Prior to the completion of the Investigation Report:

- E idence directl related to alle ations m stY
  - Be sent to eac art and Ad isor
  - Be in an electronic format or ard co
  - Incl de e idence on ic t e eci ient does not intend to rel
  - Incl de e c l ator and inc l ator e idence
  - Be made a aila le at an earin
-

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EVIDENCE & REPORT REVIEW BY PARTIES PART 2

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

- T e final in esti ation re ort s mmari in rele ant e idence m st e sentY
  - To eac art and Ad isor
  - In an electronic format or ard co
  - For t e artiesure ie and ritten res onse
  - Best racticeY ro ide t e in esti ation re ort to t e TIXC and/or le al co nsel to re ie for com leteness rior to ein s ared it t e arties
- For K-12 sc ools, it or it o t a li e earin , t is re ie is follo ed , or in conq nction it , t e e c an e of

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ADVISORS (CONT.)

- T e re lations en ision t at t e Ad isor ill not do more t an re eat or re rase estions framed t e art , t in man earin s, e ect t at t e Ad isor ill e far more acti e and en a ed t an t at

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PRESUMPTION OF NON-RESPONSIBILITY

- Title IX re lations re ire t at lis ed rie ance roced res incl de a statement of a res m tion of non-res onsi ilit for t e es ondent ntil a final determination is made
  - Ho ef ll t is is not ne je idence s o ld a e al a s dri en determinations
- at o ld it mean to res me neit er ; ilt[nor ; innocence?[
  - Ho does a res m tion or in li t of an affirmati e consent olic ?
  - Ho is res m tion of non-res onsi ilit different t an no res m tion?
  - at does it ta e to o ercome a res m tion?

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TRAINING MANDATES

- T e definition of se al arassment in # 106.30
- Ho to a l definitions sed t e eci ient it res ect to consent (or t e a sence or ne ation of consent) consistentl , im artiall , and in accordance it t e ot er

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LIVE HEARING

- e lations mandate li e earin for i er ed cation
  - irt al earin s are ermitted
- st create a dio/a dio is al recordin , or transcri t, of earin and ma e it a aila le to t e arties for ins ection and re ie .
- arties m st attend earin , ot er ise

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LIVE HEARING (CONT.)

- st allo li e cross-e amination to e cond cted e cl si el eac art us Ad isor (se arate rooms still allo ed)
- @ estions come from Ad isors, anel (if an), and C air

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BIAS, CONFLICTS OF INTEREST, & RECUSAL

CONFLICT OF INTEREST, OBJECTIVITY, & BIAS

- E istin mandate for im artial resol tions it fair roced res
  - Im artial, o œecti e, n iased, ne tral, inde endent
  - at do eac of t ese mean and o do e rin t ese alities to o r decision-ma in ?
- e lations ro i it conflicts-of-interest or ias it Coordinators, In esti ators, and Decision-ma ers a ainst arties enerall or an indi id al art
  - at creates a conflict?
    - Ho can o ass re t at o donut a e one?
  - Has o r instit tion i en o s fficient inde endence?

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BIAS

- Amon t e most si nificant ro lems for Decision-ma ers
- Bias can re resent an aria le t at im ro erl infl ences a decision
- Forms of ias and req dice t at can im act decisionsY
  - re-determined o tcome
  -

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BIAS (CONT.)

- Forms of ias and req dice t at can im act decisionsY
  - Not sta in in oneus lane
  - Im ro er a lication of instit tional olicies or roced res
  - Confirmation ias
  - Im licit ias

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BIAS AND CONFLICT OF INTEREST

- T es of conflicts/ ias Y
  - earin too man ats in t e rocess
  - Le al co nsel as In esti ator or Decision-ma er
  - Decision-ma er o is not im artial
  - Biased trainin materials j reliance on se or ender stereot es
- im l no in a st dent or an em lo ee is t icall not s fficient to create a conflict of interest if o œcti it not com romised
-

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RECUSAL

- Conflict of interest mi t necessitate rec sal, or art ma re est it
- Identif and train an alternate Decision-ma er/C air
- roced res s o ld define t e rocess and circ mstances ic a art ma see to rec se a Decision-ma er
- T icall t e Title IX Coordinator determines et er rec sal is necessar
- If o feel o cannot ear a case im artiall , notif Title IX Coordinator immediatel

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PREPARING FOR THE HEARING

MUST DO: PREP FOR THE HEARING

All Decision-Makers Must Review:

- ritten Notice of Alle ations (NOIA)
- olic (olicies) alle ed to a e een iolated
  - at does it ta e to esta lis a olic iolation?
  - Identif t e elements of eac alle ed offense
  -

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PREPARING QUESTIONS

Write down the following as a reminder:

- at do I need to no ?
- do I need to no it?
  - Does t e estion elicit information rele ant to et er a olic iolation occ rred?
- at is t e est a to as t e estion?
- o is t e est erson to et t is information from? T e in esti ator? A art ? A itness?

en dealin it conflictin or contested testimon a l a credibility analysis (co ered later).

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QUICK TIPS ON HEARING LOGISTICS

THE HEARING: GENERAL LOGISTICS

- ecordin
  - Ho , om, etc.
  - ed ndant de ices?
- Attendance arties and itnesses
- Location and room set-
  - Comfort items (ater, tiss es, meals if needed)
  - ri ac concernsj so nd mac ine
- eatin arran ements
- aterials
- Access to administrati e s ort if needed (ones, co iers, email)
- Ad isors
- arties and itnesses aitin to testif
- Brea s
- se of A/
- aitin for a decision

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HEARING DECORUM

- Be rofessional, t not e la erl or q d e-li e
  - T is is not co rt + t is is an administrati e rocess at a sc ool
  - o are not cross-e aminin or interro atin , o are stri in to determine et er t e es ondent(s) iolated instit tional olic
- Be res ectf l
  - Tone, manner, estionin
  - arcasm or ein snide is ne er a ro riate
  - aintain o r com os rejne er allo emotion or fr stration to s o
  - De-escalate or ta e rea s if emotions/tensions are r nnin i

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THE HEARING

Tips for Hearing Officers/Decision-Makers:

- eco ni e t e need for fle i ilit it t e order of statements and estionin , de endin on t e circ mstances.
- Be familiar it o r institit tionus earin roced resj re ie a ain efore eac earin .
- If a roced ral estion arises t at m st e addressed immediatel , ta e a s ort rea to see clarification.

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THE HEARING

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

- Determine t e rele ance and a ro riateness of estions. a se after eac estion to ; r le[on rele ance. st state rationale for t e record.
- en necessar , t e c air ro ides directi es to disre ard a estion or information deemed irrele ant, a si e, or nd l re etiti e
- ana e Ad isors as necessar , incl din cross-e amination
- aintain t e rofessionalism of all Hearin Officers/Decision-a ers
- eco ni e ositional a t orit

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EVIDENCE

- No restriction on arties disc ssin case or at erin e idence
- E al o ort nit toY
  - resent itnesses, incl din e erts
  - resent e idence
  - Ins ect all e idence, incl din e idence not sed to s ort determination
- No limits on t es/amo nt of e idence t at ma e offered

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UNDERSTANDING EVIDENCE

- T e formal federal r les of e idence do not a l in Title IX earin s, t r les crafted OC for Title IX cases do
- If t e information el s to ro e or dis ro e a fact at iss e, it s o ld e admitted
- If credi le, it s o ld e considered
  - E idence is an ind of information resented it t e intent to ro e at too lace
  - Certain t es of e idence ma e rele ant to t e credi ilit of t e itness, t not to t e alle ed olic iolation directl

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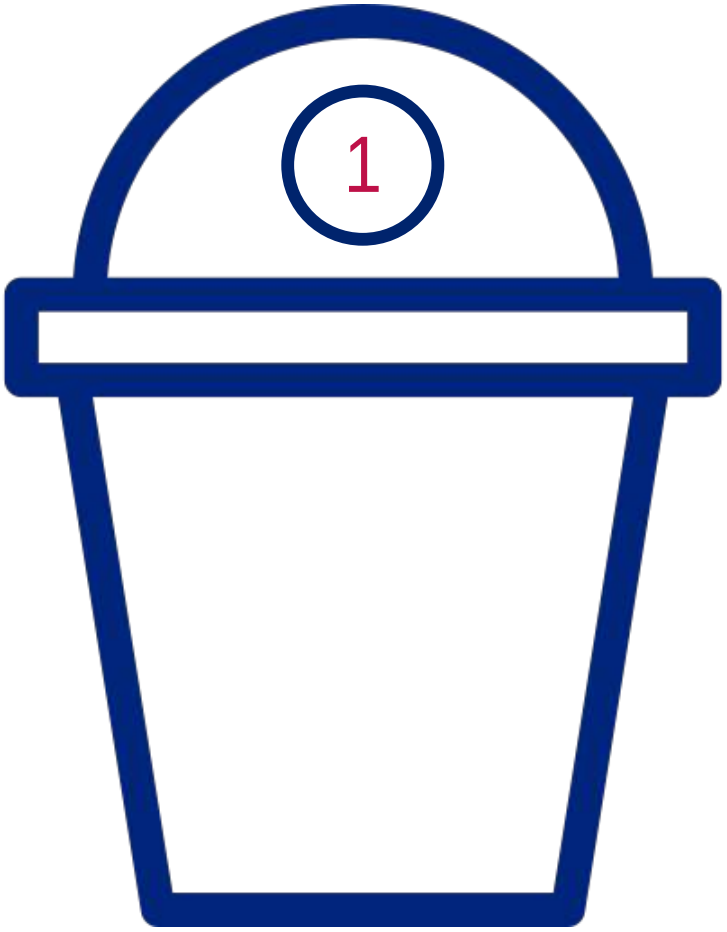
BUCKET 1: RELEVANT EVIDENCE



- E idence is rele ant en it tends to ro e or dis ro e an iss e in t e com laint
- arties ma ma e case to In esti ators/Decision-ma ers t at t is e idence s o ld e s ifted to B c et 2 or 3
- Once finali ed, t is e idence s o ld e ro ided to t e arties/Ad isors/Decision-ma ers it in t e in esti ation re ort ia sec re tec nolo

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RELEVANCE

- E idence is enerall considered relevant if it as al e in ro in or dis ro in a fact at iss e, and rele ance means t e e idence ma e relied on t e Decision-ma er
  - e ardin alle ed olic iolation and/or
  - e ardin a art or itnessus credi ilit
- T e In esti ator ill a e made initial rele ance ; decisions[incl din e idence in t e in esti ation re ort
- ele ance is ltimatel to t e Decision-ma er, who is not bound by the Investigator's judgment
- All rele ant e idence m st e o œcti el e al ated and considered + ot inc l ator and e c l ator

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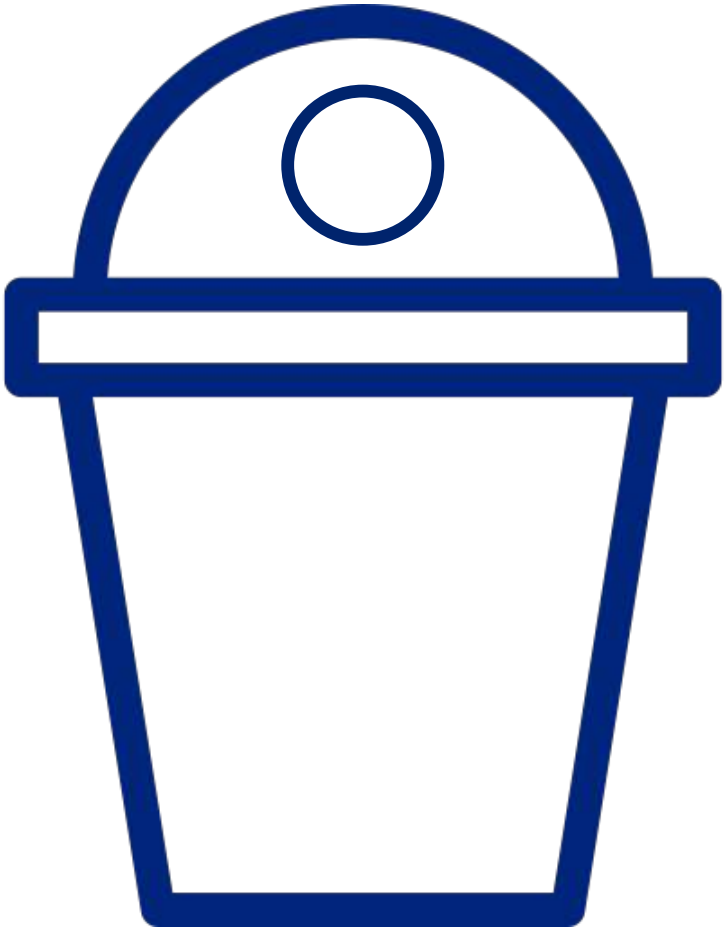
BUCKET 2: DIRECTLY RELATED, BUT NOT RELEVANT EVIDENCE



- E idence is directl related en it is connected to t e com laint t is neit er inc l ator nor e c l ator and ill not e relied on in t e in esti ation re ort

- arties ma ma e case to In esti ators/Decision-ma ers t at t is e idence s o ld e s ifted to B c et 1 or 3

- Once finali ed, t is e idence s o ld e ro ided to t e arties/Ad isors/Decision-ma ers in a se arate file ia sec re tec nolo

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OTHER EVIDENCE MAY BE DIRECTLY-RELATED

Directly-related Evidence:

- Connected to t e com laint t is neit er inc l ator nor e c l ator and ill not e incl ded it in t e in esti ation re ort
- Comes to Decision-ma er(s) re- earin iaY
  - B c et 1Y(t e in esti ation re ort) j or
  - B c et 2Ye idence file of at is considered directl -related
- Ho do o andle records t at com ine elements of ot rele ant and directl -related e idence?
- ile t e In esti ator as initiall sorted t e e idence into t ese c ets, t e Decision-ma er ma es t e final allocation of at e idence ill e relied on and at ill not.

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UNDERSTANDING EVIDENCE

Decision-maker(s) may consider and assign weight to different types of evidence, when relevant and credible:

- Doc mentar e idence (e. ., s orti e ritin s or doc ments)
- Electronic e idence (e. ., otos, te t messa es, and ideos)
- eal e idence (i.e., sical o ects)
- Direct or testimonial e idence (e. ., ersonal o ser ation or e erience)
- Circ mstantial e idence (i.e., not e e itness, t com ellin)

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UNDERSTANDING EVIDENCE (CONT.)

Decision-

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ADDITIONAL EVIDENCE RESTRICTIONS IN TITLE IX REGULATIONS

Additional permissions (from the party) required for:

- ecords made or maintained aY
  - sician
  - s c iatrist
  - s c olo ist
- @ estions or e idence t at see disclos re of information rotected nder a le all reco ni ed ri ile e m st not e as ed it o t ermission
  - T is is com le in ractice eca se o onut no to as for ermission nless o as a o t t e records first

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ADDITIONAL EVIDENCE CONSIDERATIONS IN HEARINGS

- In t e Title IX earin , B c et y1 and B c et y2 e idence is often ; admitted[in t e sense t at it is not e cl ded and/or Decision-ma ers are not s ielded from earin / no in it
- ome e idence can e e cl ded, or itnesses can e directed to ans er certain estions
- Ho e er, t e Decision-ma ers and/or C air need to determine et er t e e idence can and ill e relied on if it is introd ced
  - T ere ill e a decent amo nt of tr in to ; n ear[/disre ard at is introd ced, eca se e en t o o no it, o canut consider it

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RELEVANCE EXERCISES

- I an and J anita

CASE STUDY: IVAN & JUANITA

- J anita, a fres man mem er of t e omens soccer team, made a Title IX com laint directl to t e Title IX Coordinator.

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CASE STUDY: IVAN & JUANITA

- I an told t e in esti ator t at e elie es J anita is lo in t e ole matter o t of ro ortion.
- He admits to creatin t e oto for a class roqect. He re orts Y
  - ; It as onl meant to e a qp e. I ne er t er name on it, so atus t e i deal? T is is a or of art t at I created for m class, not a orn ict re or an t in . I onl s o ed m art or , ic t e a is rotected t e First Amendment, to a fe of m teammates. I no m ri ts er ell since m dad is a la er. In fact, t e First Amendment states t at ; Con ress s all ma e no la res ectin an esta lis ment of reli ion, or ro i itin t e free e ercise t ereof j or a rid in t e freedom of s eec , or of t e ress j or t e ri t of t e eo le eacea l to assem le, and to etition t e o ernment for a redress of rie ances.[

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CASE STUDY: IVAN & JUANITA

- I an stated t at e s o ed t e oto to a co le of teammates t did not send t e email.
- T e email acco nt is for official team siness. T e coac es and ca tains a e t e ass ordj one ca tain as s ared it roadl it all t e seniors on t e team.
- T e in esti ator also cons lted it Jo n an , assistant director of information tec nolo .
- Jo n as a le to confirm t at someone sin t e com ter la com ter sent t e ict re from t e menus soccer team email acco nt.

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CASE STUDY: IVAN & JUANITA

- T e ict re as inserted into t e email ia a flas dri e and e as na le to determine ic st dent ad lo ed in.
- Jo n recei ed I anus consent to ins ect is la to . T e oto as on is ard dri e t as not sent o t ia email

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CASE STUDY: IVAN & JUANITA

o are t e C air of t e Hearin anel. o m st determine et er t e s ecific iece of e idence is rele ant.

tartin it e idence from t e in esti ation re ort. Is it rele ant t atY

1.

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CASE STUDY: IVAN & JUANITA

Consider et er t e follo in ieces of e idence, if art of t e fact- attern ori inall ro ided from t e in esti ation re ort, o ld e rele antY

1. J anitaus Ad isorus da ter is in t e same art class it I an and stated t at s e ne er ad an assi nment li e t at for class.
2. I anus friend, Alan, states t at J anita is reall not ot ered t e oto eca se e as o ser ed occasions ere J anita flas ed er reasts at I an a fe

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CASE STUDY: IVAN & JUANITA

3. I anus i sc ool soccer coac as re ared a ritten c aracter reference for I an, ic states t at e as an standin mem er of is i sc ool team and comm nit , a fo r- ear leader on t e s ad, and ol nteered man times at t e local CA o t ro ram.
4. I an stated t at at t e time t at t e email as sent, e as

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RELEVANT OR DIRECTLY RELATED?

A Com lainant rites in er formal com laint t at s e as een e eriencin si nificant mental ealt iss es since ein se all assa lted, incl din T D (self-dia nosis). es ondent mentions t is at t e earin , to ar e t at one of t e reasons Com lainant li el mis ercei ed t e incident as non-consens al is eca se s e as a self-admitted istor of serio s mental ealt concerns.

RELEVANT? DIRECTLY RELATED? NEITHER?
WHICH AND WHY?

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RELEVANT OR DIRECTLY RELATED?

Com lainant states in er o enin statement at t e earin t at s e did not consent to se it es ondent. e adds t at one of t e reasons s e did not consent and o ld not a e consented is eca se rior to t e incident, s e as a ir in and ad ne er ad se efore.

RELEVANT? DIRECTLY RELATED? NEITHER?
WHICH AND WHY?

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DECISION-MAKING SKILLS, PART TWO

- elia ilit /Credi ilit
- Cross-E amination
- Anal in t e Information

QUESTIONING & CROSS-EXAMINATION

- T e li e earin re irement for i er ed cation allo s t e arties to as (direct and) cross-e amination estions of t e ot er art and all itnesses t ro t eir res ecti e Ad isors
- c cross-e amination m st e cond cted directl , orall , and in real time t e art us Ad isor and ne er a art ersonall
- ermit rele ant estions and follo - estions, incl din t ose c allen in credi ilit
- Decision-

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QUESTIONING & CROSS-EXAMINATION (CONT.)

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- If a art or itness does not s mit to li e cross-e amination t e ot er art us Ad isor d rin t e earin , t e Decision-ma er(s) m st not rel on any statement of t at art or itness (from t e in esti ation or earin) in reac in a determination re ardin res onsi ilit
  -

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QUESTIONING & CROSS-EXAMINATION (CONT.)

- T e Decision-ma er(s) cannot dra an inference a o t t e determination re ardin res onsi ilit ased solel on a art us or itnessus a sence from t e li e earin or ref sal to ans er cross-e amination or ot er estions.
  - at is an inference?
  - Ho does it or ?

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UNDERSTANDING CREDIBILITY IN THE DECISION PROCESS

CREDIBILITY

Inherent Plausibility

- ; Does t is ma e sense?[
- Be caref l of ias infl encin sense of ; lo ical[

Motive to Falsify

- Do t e a e a reason to lie?

Corroboration

- Ali ned testimon and/or sical e idence

Past Record

- Is t ere a istor of similar e a ior?

Demeanor (use caution!)

- Do t e seem to e l in or tellin t e tr t ?

Enforcement G idance on icario s Em lo er Lia ilit for nla f l Harassment er isors

EEOC (1999)

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility

- Does at t e art descri ed ma e sense?
  - Consideration of en ironmental factors, tra ma, relations i s
- Is it elie a le on its face?
- ; la si ilit [is a f nction of ; li eliness.[
  - o ld a reasona le erson in t e same scenario do t e same t in s? or not?
  - Are t ere more li el alternati es ased on t e e idence?

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

- Is t e art us statement consistent it t e e idence?
- Is t eir sical location or ro imit reasona le?
  - Co ld t e a e eard at t e said t e eard?
  - ere t ere ot er im ediments? (e. ., dar ness, o str ctions)
- Ho ood is t eir memor ?
  - Tem oral ro imit ased on a e of alle ations
  - ; I t in , [; Ium rett s re, [; It o ld ma e sense [

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FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

- Does t e art a e a reason to lie?
- atus at sta e if t e alle ations are tr e?
  - T in academic or career im lications
  - ersonal or relations i conse ences
- at if t e alle ations are false?
  -

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

- tron est indicator of credi ilit
- Inde endent, o œcti e a t entication
  - art sa s t e ent to dinner, ro ides recei t
  - art descri es te t con ersation, ro ides screens ots
- Corro oration of central s. en ironmental facts
- Not sim l ali nment it friendl itnesses

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

-

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FACTORS TO CONSIDER FOR CREDIBILITY

Past Record

- Is t ere e idence or records of ast miscond ct?
- Are t ere determinations of res onsi ilit for s stantiall similar miscond ct?
- C ec record for ast alle ations
  - E en if fo nd ; not res onsi le, [ma e idence attern or rocli it
- ritten/ er al statements, re-e istin relations i
- se ca tion j ast iolations do not mean c rrent iolations

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FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

- BE E CA EF L
  - H mans are e cellent at ic in non- er al c es
  - H mans are terri le at s ottin liars
- Is t e art ncomforta le, ncoo erati e, resistant?
- Certain lines of estionin + a itated, ar mentati e
- Loo for indications of discomfort or resistance
- a e a note to di e dee er, disco er so rce

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CREDIBILITY IN THE HEARING

- Distin is erformance/ resentation s ills from elie a ilit

- E idence re irin a credi ilit assessment s o ld e e amined in a earin
  - F ndamental to d e rocess
  - Facm TTm(l)-4(l)-4( )-1(m)7(a)-3( )1(ro61.2029 ma)-3( )1(ro6

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POLICY DEFINITIONS

- e al Harassment (m rella cate or)
  - e al Harassment (offense)
  - @ id ro @ o e al Harassment
  - e al Assa lt
  - Datin iolence
  - Domestic iolence
  - tal in
- etaliation

SEXUAL HARASSMENT POLICY

Title IX re lations re ire eac eci ient to a e an m rella se al arassment olic and define se al arassment as cond ct on t e asis of se t at satisfies one or more of t e follo in Y

- Quid Pro Quo YAn em lo ee of t e eci ient conditionin t e ro ision of an aid, enefit, or ser ice of t e eci ient on an indi id al s artici ation in n elcome se al cond ct.
- Hostile Environment Y n elcome cond ct determined a reasona le erson to e so se ere and er asi e, and o ecti el offensi e (OO) t at it effecti el denies a erson e al access to t e eci ient s ed cation ro ram or acti it
  - Ed cation ro ram or acti it means em lo ment, too x

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HOSTILE ENVIRONMENT: "SEVERE"

- sical cond ct is more li el to e se ere it o t need for re etition
  - e al assa lt and man datin /domestic iolence cases are almost al a s s fficientl se ere
  - Ot er sical cond ct t at does not meet t e §106.30 definitions for se al assa lt or datin /domestic iolence ma also rise to t e le el of ; se ere[
- Consider t e circ mstances (e. ., a ilit for Com lainant to esca e t e arassment)
- Assess et er accom anied t reats or iolence
- Assess et er t ere as a de ree of em arassment or miliation

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

T ere as een an increasin iss e of conflatin discomfort or ein offended it t e i er standard of se al arassment. T ere is a i ar for meetin t is definition.

The circumstances to consider include:

- T e nat re, er asi eness, and se erit of t e cond ct
-

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

- et er cond ct as directed at more t an one erson.
- et er a reasona le erson o ld see/e erience/determine t e cond ct to e OO?
  - at does it mean to e a reasona le erson? o is?
  -

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PUTTING IT ALL TOGETHER: HOSTILE ENVIRONMENT SEXUAL HARASSMENT

- T e role of t e Decision-ma er is to determine et er all t e elements of a ostile en ironment are resent.
  - e ires a ; totalit of t e circ mstances[anal sis, ic is t e e role for t e Decision-ma er.
  - en cond ct does not meet t e elements, and a l in t e standard of e idence, t en t e es ondent is ; not res onsi le.[
  - Hostile en ironment cases ma often t erefore lend t emsel es to informal resol tion rocesses and ma not ltimatel come efore Decision-ma ers, nless t e are connected to ot er forms of se al

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PUTTING IT ALL TOGETHER: HOSTILE ENVIRONMENT SEXUAL HARASSMENT (CONT.)

- emem er t at t e se , ender identit , ender e ression, and/or se al orientation of t e indi id als do not matter in o e a l t e rele ant e idence to t e olic elements.

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CONSENT

- Informed, no in , and ol ntar (freel i en)
- Acti e (not assi e)
- Creates m t all nderstanda le ermission re ardin t e conditions of se al acti it
- No means no, t not in also means no. ilence and assi it do not e al consent.
- To e alid, consent m st e i en immediatel rior to or contem oraneo sl it t e se al or intimate acti it
-

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OVERVIEW OF THE THREE QUESTIONS

1. as force sed t e es ondent to o tain se al or intimate access?

2. as t e Com lainant inca acitated?
   a. If so, did t e es ondent no , or
      . o ld t e es ondent a e no n t at t e Com lainant as inca acitated

3. at clear ords or actions t e Com lainant a e t e es ondent ermission for eac s ecific se al or intimate act t at too lace as it too lace?

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FORCE

1. Was force used by the Respondent to obtain sexual or intimate access?

- Beca se consent m st e ol ntar (an act of free ill), consent cannot e o tained t ro se of force
- Consider t e im act of o er d namics

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FORCE (CONT.)

Types of force to consider:

- **Intimidation:** an implied threat that menaces and/or causes reasonable fear.
  - This requires the same threat analysis as above
- **Coercion** + the application of an unreasonable amount of pressure for sexual access
  - Consider isolation, frequency, intensity, and duration

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INCAPACITY

2. Was the Complainant incapacitated?

- Inca acit ≠ im aired, dr n , into icated, or nder t e infl ence.

- at as t e stat s of t e Com lainant in terms of Y
  - it ational a areness
  - Conse ential a areness

- at as t e reason for inca acit ?
  - Alco ol or ot er dr s (rescri tion or non-rescri tion)
  - ental/co niti e im airment
  - Inq r
  - Aslee or nconscio s

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BEHAVIORAL CUES

Evidence of incapacity context clues:

- l rred s eec
- T e smell of alco ol on t e reat in com ination it ot er factors
- a e ili ri mjst m lin
- assin o t
- T ro in
- A earin disoriented
- nconscio sness
- Kno n lac o t
- O tra eo s or n s al e a ior (re ires rior no led e)

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INCAPACITY ANALYSIS

- If t e Com lainant **was not** inca acitated, mo e on to t e Consent Anal sis.
- If t e Com lainant **was** inca acitated, tY
  - T e es ondent did not no it, AND
  - T e es ondent o ld not a e reasona l no n it' olic not iolated. o e to Consent Anal sis.
- If t e Com lainant **was** inca acitated, andY
  - T e es ondent **knew it or caused it** ' olic iolation

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QUESTIONING SKILLS & GUIDELINES

QUESTIONING

- T e oal of estionin in t e earin is to ens re t at as Decision-ma er, o nderstand information and e idence contained in t e re ortY
  - ele ant e idence a o t at a ened d rin t e incident
  - An related e ents
  - An corro oratin information
- se o r estions to elicit details, eliminate a eness, fill in t e a s ere information seems to e missin
- o r oal is notY
  - atisf in o r c riosit
  - C asin t e ra it into onderland
- Do not e ect t e ; Gotc a[moment. T at is not o r role. o are not rosec torial.

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IF YOU STILL HAVE TO ASK A QUESTION, ASK YOURSELF

- Is the answer already in the report or documentation I have been provided?
  - If not, not? (As t e In esti ator t is)
  - o still ill need to as it a ain t ee t e re ort in mind
- What do I need to know?
  - o is t e est erson to as t is of?
    - s all it ill e t e In esti ator, first, and t en t e ori inal so rce, if a aila le
    - It ma e ood to as t e In esti ator if t e as ed it alread and at ans er t e re io sl recei ed

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IF YOU STILL HAVE TO ASK A QUESTION, ASK YOURSELF (CONT.)

- Why do I need to know it?
  - If it is not oin to el o decide et er a olic as iolated or not and o can e lain o , t en it is not a ood estion (t o o ma not no t is ntil o ear t e ans er).
- What is the best way to ask the question?
- Are you the best person to ask this question?

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ASKING GOOD QUESTIONS

- Generall se o en-ended estions (tell s%, o%, at%, o %)
- Tr to a oid close-ended estions (Did o %, ere o %)
- Donut as Com o nd @ estions
  - ;I a e t o estionsj First,%, econd,%[
-

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QUESTIONING SKILLS

- Listen caref ll and ada t follo - estions.
- or from o r re ared o tline t sta fle i le.
- ee to clarif terms (en t e re ort is silent) t at can a e m lti le meanin s or a s ectr m of meanin s s c as ; oo ed ,[; dr n ,[; se ,[; acted eird,[; s etc ,[or ; ad a fe drin s.[
- Be co ni ant of t e difference et een at as ; eard[(earsa), at can e ass med (circ mstantial), and at as ; itnessed[(facts).
- Be a are of o r o n od lan a e. ta ne tral, e en if o ear somet in o distr st or disli e.

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QUESTIONING TIPS

- estate/s mmari e at as said. Hel s alidate t at o are

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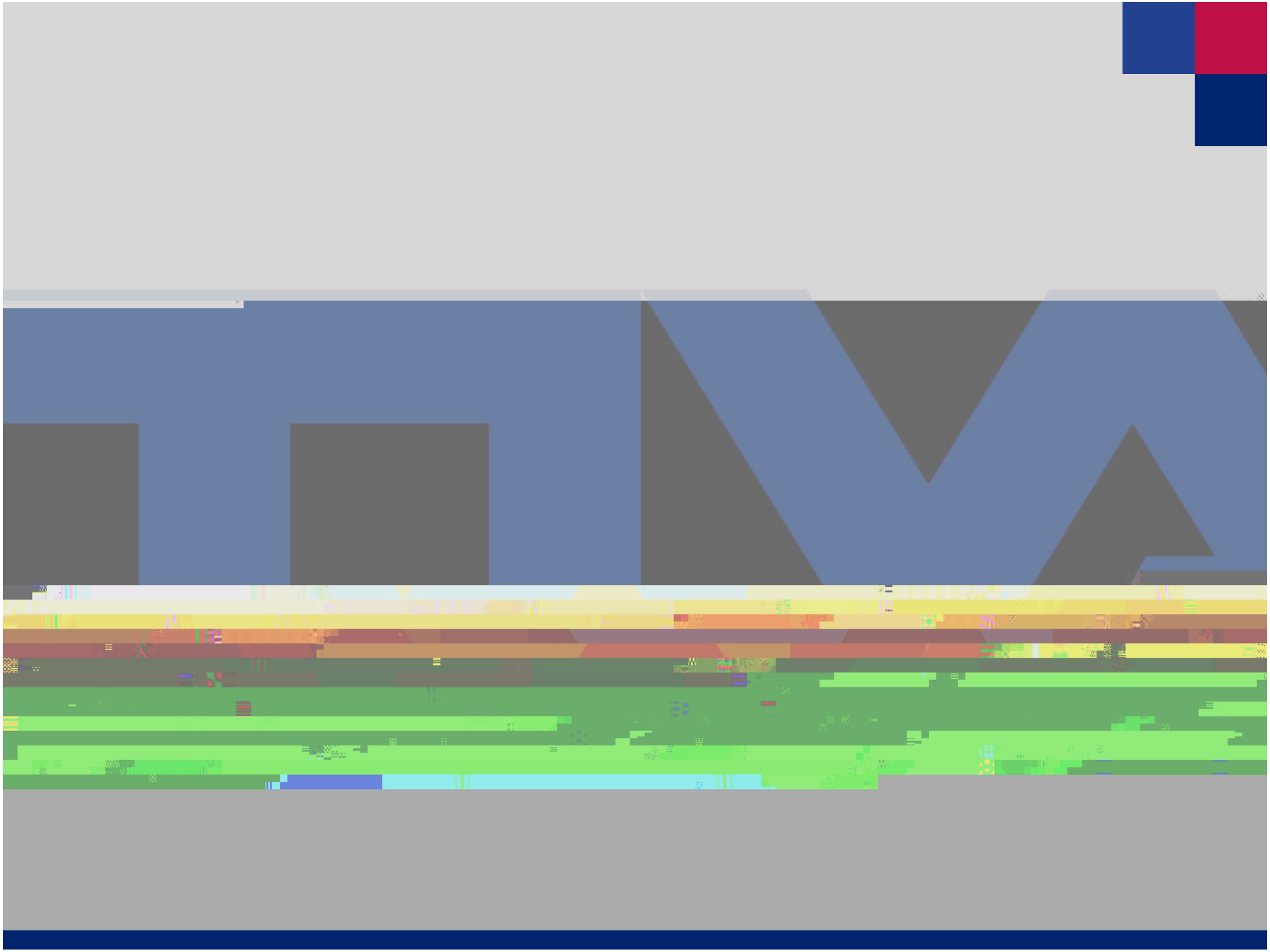

QUESTIONING ACTIVITY

Refer back to the Ivan and Juanita case and develop possible questions for the following:

- @ estions for t e In esti ator
-

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MAKING A DECISION

OVERVIEW OF THE DELIBERATION PROCESS

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DELIBERATIONS

General Information

- st ro ide detailed, ritten t e rationale for and e idence s ortin its concl sions
- it a anel, t e C air m st e a otin mem er
- T icall , t ere is no s ecific order in ic alle ations m st e addressed. en in do t, start it t e most serio s.
- C air s o ld ens re t at all ie oints are eard
- Ne trali e an o er im alances amon anel mem ers, artic larl ased on t eir osition at t e instit tion
- Ens re an im artial decision t at is free of s stanti e ias

Withhold judgment until all the evidence has been considered.

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DELIBERATIONS

Foundations for Decisions

- Decisions m st e ased onl on information/e idence in t e in esti ation re ort or resented at t e earin
- Do not t rn to an o tside ; e idence[
- are t e olic . Assess e identiar ei t. eas re it t e follo in estions Y
  - Is t e estion ans ered it fact(s)?
  - Is t e estion ans ered it o

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SANCTIONING IN SEXUAL MISCONDUCT CASES

Title IX and case law require:

- Decision-ma er s o ld also decide sanction if

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COMMON STUDENT SANCTIONS

- arnin
- ro ation
- Loss of ri ile es
- Co nselin
- No contact
- esidence all relocation, s s ension, or e lsion
- Limited access to cam s
- er ice o rs
- Online ed cation
- arental notification
- Alco ol and dr assessment, and co nselin
- Discretionar sanctions
- Colle e s s ension
- Colle e e lsion

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WRITTEN DETERMINATIONS

Decision-maker/Chair issues a detailed, written determination regarding responsibility that includes the following:

- olicies alle ed to a e een iolated
- A descri tion of t e roced ral ste s ta en from t e recei t of t e formal com laint t ro t e determination incl din Y
  - An notifications to t e arties, inter ie s it arties and itnesses, site isits, met ods sed to at er ot er e idence, and earin s eld
- tatement of and rationale for t e res lt as to eac s ecific alle ation.
  - o ld incl de findin s of fact and concl sions

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WRITTEN DETERMINATIONS

Decision-maker/Chair issues a detailed, written determination regarding responsibility that includes the following (cont.):

- anctions im osed on es ondent (if an)
- et er remedies desi ned to restore or reser e e al access to t e ed cation ro ram or acti it ill e ro ided t e eci ient to t e Com lainant
- roced res and ases for an a eal

The Decision-maker should author the written determination.

- a follo a tem late ro ided t e Title IX Coordinator

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WRITTEN DETERMINATIONS: LOGISTICS

- T e ritten determination s o ld e ro ided to t e arties sim ltaneo sl .
- T e determination ecomes final eit er on t e date t at t e eci ient ro ides t e arties it t e ritten determination of t e res lt of t e a eal, or if an a eal is not filed, t e date on ic an a eal o ld no lon er e considered timel .
- FE A cannot e constr ed to conflict it or re ent com liance it Title IX.
- ill t is letter e re ie ed t e Title IX Coordinator and/or le al co nsel?

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APPEALS

- Elements nder t e 2020 e lations
- Gro nds for A eal
- rocess Flo c art
- Ot er ATIXA ecommendations

BASES FOR APPEAL

- Title IX e lations s ecif t ree ases for a ealY
  - roced ral irre larit t at affected t e o tcome
  - Ne e idence t at as not reasona l a aila le en t e determination of res onsi ilit as made t at co ld affect t e o tcome
  - Title IX Coordinator, in esti ator, or Decision-ma er ad a eneral or s ecific conflict of interest or ias a ainst t e Com lainant or es ondent t at affected t e o tcome. eci ients ma offer a eals e all to ot arties on additional ases.

- eci ients ma offer additional ases for a eal so lon as t e are offered e all to ot arties

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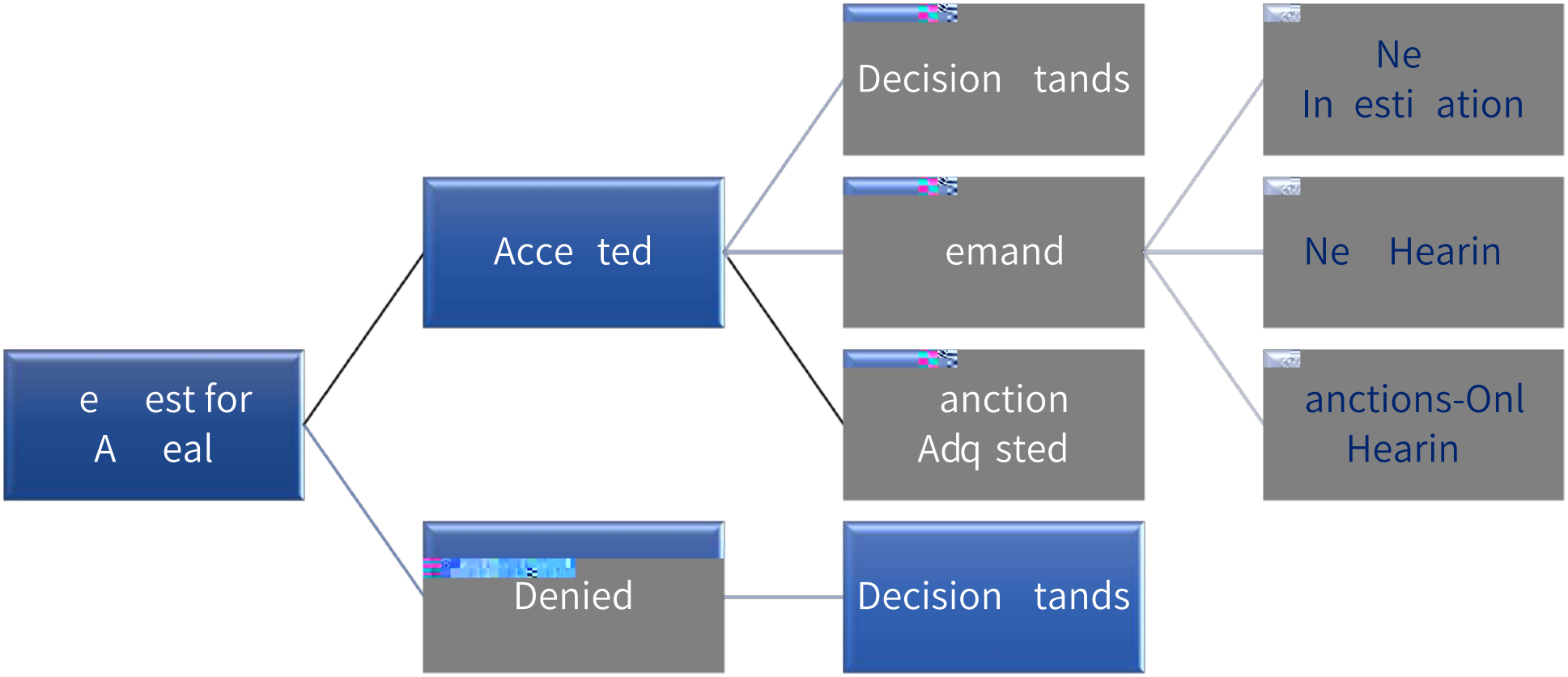
APPEALS: THE PROCESS



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APPEAL RESPONSE

- en an a eal is filed, t e eci ient m st notif t e ot er art and im lement a eal roced res e all for all arties
- Gi e t e arties a reasona le, e al o ort nit to s mit a ritten statement in s ort of, or c allen in , t e o tcome
- T e C air ma e called on t e A eal Decision-ma er to inform t e a eal rocess

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APPEALS: OTHER ATIXA RECOMMENDATIONS

- One le el of a eal
- ort indo to re est an a eal
  - a al a s rant an e tension if necessar
- Doc ment- ased and recordin re ie
  - NOT de no o
  - In ot er ords, not a ; second- ite of t e a le
- Deference to ori inal earin a t orit

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RECORDKEEPING AND DOCUMENTATION

- Certain records m st e created, retained, and a aila le to t e arties for at least se en earsY
  - e al arassment in esti ation incl din an res onsi ilit determination, an disci linar sanctions im osed, and an remedies im lemented
  - An a eal and related res lt(s)
  - An informal resol tion im lemented
  - An s orti e meas res im lemented
  - For each formal complaint, must document the basis for why the institutional response was not deliberately indifferent

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RECORDKEEPING AND DOCUMENTATION (CONT.)

- For eac concl sion, m st doc ment t e rationale for its determination
- st doc ment meas res ta en to reser e/restore access to ed cation ro rams/acti it

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Questions?