

# **TIX DECISION-MAKER AND APPEALS TRAINING:**

**AUGUST 7, 2020 Virtual Training  
SESSION 4  
presented by  
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# WHO ARE DECISION-MAKERS?

- **Individuals or panels that hold the authority to determine whether or not a policy was violated.**
- **Determine appropriate remedies and corrective action/sanctions.**
- **TIXC or Investigator SHALL NOT serve as a Decision-Maker.**
- **Decision-Maker may be a school level administrator, or a district-level official.**

# DECISION-MAKER TRAINING REQUIREMENTS

- **Receive annual training on the following in accordance with 2020 Regs.:**
  - **Definition of sexual harassment, sex-and-gender-based discrimination, misconduct (sexual assault, dating violence, domestic violence, stalking)**
  - **Definition of retaliation, due process, remediation, supportive and interim measures, long-term remedies**
  - **Scope of recipient's education programs and activities**
  - **How to conduct an investigation and grievance process including hearings, appeals, informal resolutions**
  - **How to serve impartially avoiding prejudgment of facts, conflicts of interest, and bias**
  - **Training on technology to be used in live hearing**
  - **Training in issues of relevance, questions, and evidence, and the creation of and investigation report that fairly summarizes relevant evidence**

# PANEL or SINGLE: DECISION-MAKER

- Three-member administrator panel (or a pool of panelists) that uses a majority vote, with the Chair appointed from among the three panelists.
- Chair or Single Decision-Maker Model should ensure the Chair or DM possesses specific training, including managing advisors, controlling and understanding evidence, understanding relevance, and facilitating questions.

# APPOINTMENT: DECISION-MAKER

**TIXC carefully vet who will serve as Decision-Maker by using background checks, application process, review social media, previous employment, professional and/or academic publications, advising roles, external activities. WHY ???**

# HEARINGS: K-12 APPLICABILITY

- **2020 REGS recognizes that live hearings, and more importantly, cross-examination may not be workable in K-12 setting and allow K-12 to choose to offer or not offer live hearings.**
- **Absent 2020 Regs, state law or a CBA may require a formal hearing.**
- **Currently, Due Process protections require a “Goss” hearing for suspensions of more than 10 days and/or expulsion level offenses. K-12 recipient could join Title IX Hearing and “Goss”**
- **Due process protections for special education students often include specific procedural requirements for an opportunity for a “hearing” or a determination of whether a student’s conduct may be a manifestation of their disability.**
- **Outside required Due Process “hearings” K-12 recipients may elect to include a hearing for Title IX matters, but are not required.**

# DUE PROCESS REQUIREMENTS: ABSENT A HEARING

- **Decision-Maker MUST provide an opportunity for the parties to respond to the investigation report in writing and ask any relevant follow-up questions through the decision-maker.**
- **Occurs By:**
  - Allowing parties to submit written questions
  - Providing each party with the answers provided; and
  - Allowing for any additional, limited follow-up questions by each party
- **Decision-Maker MUST ask each party and any witnesses relevant questions and follow-up questions, including those challenging credibility, which a party wants asked of any party or witnesses.**
- **Decision-Maker would make decisions about relevance or probative value of any written questions and may decide to exclude questions determined to be irrelevant, but MUST explain to the party proposing questions any decision to exclude questions as irrelevant.**
- **Decision-maker REQUIRED to provide rationale for their decision on the record.**

# **RECIPIENT SCHOOL: PROVIDES A LIVE HEARING**

- **Decision-Maker facilitates the hearing process, including permitting the party's advisor (not the parties) to ask the other part(ies) and any witnesses all relevant questions and follow-up questions, including those challenging credibility.**
- **A party can request the hearing take place with parties located in separate rooms with technology enabling the Decision-Maker and parties to simultaneously see and hear the party or witness answering the questions.**
- **Before a question is answered, the Decision-Maker MUST determine the relevance of the questions, and explain, in the record, any decision to exclude questions as not relevant.**
- **Live hearing MUST be audio or audiovisual recorded and made available to the parties for review.**

# Decision-Maker Questioning: Limit on Prior Sexual Behavior Evidence

- **With or without a hearing, all questioning must exclude irrelevant information about the reporting party's sexual predisposition or prior sexual behavior, unless, information offered to prove someone other than responding party committed the alleged conduct, or when the information concerns specific incidents of reporting party's sexual behaviors with respect to responding party, and is offered to prove consent.**

# DECISION-MAKER: SELF-RECUSAL

A Decision-Maker shall perform a self-check that there are not any conflicts or interest or disqualifying bias against any party involved in the assigned case.

TIXC should engage in discussion with Decision-Maker upon assignment to prevent any conflicts of interest.

# DECISION-MAKER DUTIES

- Review the investigation report prior to the questioning period/hearing and prepare questions for each of the parties
- Facilitate questioning in lieu of a hearing if specified by procedures, including collecting questions for the parties and witnesses from each of the parties.
- Document questions that were deemed not relevant during the questioning period and the rationale for those decisions.
- If applicable, facilitate hearing procedures:
  - Document questions intended for parties/witnesses who were not present for hearing
  - Document questions which were asked and a party/witness declined to answer
  - Document questions that were deemed not relevant or inappropriate during questioning period.

# DECISION-MAKER DUTIES: WRITTEN DETERMINATION

**Provide a written determination to parties, and their parent/guardian (if a minor), simultaneously. Written determination MUST include:**

- **Identification of allegations potentially constituting sexual harassment;**
- **A description of procedural steps taken from receipt of complaint through determination, including any notifications to parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearing held;**
- **Findings of fact support determination;**
- **Conclusions regarding application of code of conduct to facts'**
- **Statement of, rationale for, the result as to each allegation, including a determination regarding responsibility, any sanctions the school imposes on responding party, any remedies provide to reporting party deigned to restore access to education program or activity; and**
- **School procedures and permissible bases for parties to appeal.**

# **WRITTEN DETERMINATION: REQUIREMENTS CONT.**

- **Requirements include all findings of cases in which Respondent is an employee, as well as, for students.**
- **Decision-Maker uses applicable Standard of Evidence (POTE or C&C) must issue a written determination regarding responsibility for each section of the policy alleged to been violated.**
- **Level of detail in the written determination requires a high degree of training, skill, and time to ensure the written determination is drafted properly to meet all the required elements.**

# **WRITTEN DETERMINATION: POTENTIAL CONFLICT OF INTEREST**

**If TIXC and/or legal counsel are involved in drafting of these outcomes, they should take care to preserve the independence of the decision-maker or hearing panel. Otherwise, the recipient risks challenges about a conflict of interest.**

# **WRITTEN DETERMINATION: NOTIFICATION TO PARTIES**

**2020 Regs require the recipient to provide written determination (s) to all parties simultaneously.**

## **Different Ways to Achieve Simultaneous Notice:**

- 1. Decision-Maker/Hearing Panel or TIXC announces decision to parties in person, while sharing written determination at the same time.**
- 2. Sending emails at the same time.**
- 3. Separate but simultaneous notifications are made in person to each party by appropriate administrators in different locations or by phone/technology.**

# WRITTEN DETERMINATION: SHIFT K-12

- While hearings optional for K-12, written determinations are required.
- Although school administrators accustomed to documenting disciplinary outcomes, degree of specificity requires much more details both in terms of written determination and investigation materials that are the bases for rationale and decision.
- Explanations in written determinations require policy analysis, evidence evaluation, and credibility assessment.
- Written determinations typically are from 1-5 pages, but may vary based on a case's complexity.

# WRITTEN DETERMIANTION: FERPA IMPLICATIONS

- Written Determination, including outcome and rationale of the decisions, including sanctions, provided simultaneously to both parties is a radical departure for normal K-12 practices.
- Many K-12 recipients viewed FERPA as setting an outright bar to sharing any information with Complainant about any sanctions imposed on Respondent.
- Title IX overrides FERPA in the event of a conflict, therefore, K-12 is required to provide both parties simultaneously the written determination with outcomes, rationale, and sanctions.

# WHO ARE APPEAL DECISION-MAKERS?

- An Appeal Decision-Maker may be an individual or a panel and cannot have been involved in the case up to the point of receiving the appeal request.
- Appeal Decision-Maker(s) MUST be trained and free from conflicts of interest of disqualifying bias for or against any party involved in the incident.
- Appeal Decision-Maker(s) are often principals or district-level administrators, but when long-term suspension, expulsion, or employment termination involved, Appeal Decision-Maker may be the school board. Ensure all individuals trained in procedural requirements mandated under the new TIX Regs.

# APPEAL REQUIREMENTS

- TIX 2020 Regs require school/district to offer an appeal to the parties, and require that parties possess an equal opportunity to appeal.
- TIX 2020 Regs require specific grounds for appeal found in 34 CFR §106.45b(8) and require these grounds incorporate in school policy and procedure.
- Upon receipt of appeal, the Appeal Decision-Maker **MUST** notify the other part(ies) that appeal submitted.
- Each party afforded a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome. Quick turnaround expected and timeframe of 3-5 days best practice. Allow for responsive appeals.
- Best Practice= Decision-Maker submits a written response addressing an appeal that alleges process errors occurring during the questioning/hearing portion of the case resolution and/or any issues appealed regarding how Decision-Maker reached his/her decision. **(Response MUST be shared with the parties)**

# APPEAL GROUNDS

## §106.45b(8)

**Recipients MUST offer both [all] parties an appeal from a determination of responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein.**

### **Grounds for Appeal:**

- A. Procedural irregularity that affected outcome;**
- B. New evidence that was not reasonably available at the time of the responsibility determination or dismissal, that could affect the outcome; and**
- C. TIXC, investigator(s), 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 of the matter.**

# APPEAL GROUND: DISCRETIONARY §106.45B(8)

- TIX 2020 Regs ALLOW recipients to offer additional bases for appeal on the basis of sanctions.
- However, if recipient chooses to allow appeal ground afforded to all parties.

# APPEAL TIMEFRAMES

- Recipients should require appeal requests submitted in writing to TIXC or other appropriate administrator within a specified period of time.
- Best Practice: Timeframe somewhere between 7-10 calendar days upon receipt of written determination, with extensions permitted for reasonable cause.
- ED does not take a position on calendar or business days, but recipient should use whatever convention they currently use to define days in policy to ensure consistency.

# APPEAL GATEKEEPER

- Recipients can choose to appoint an appeals gatekeeper that reviews the request for appeal to determine if it is timely and whether one of the grounds of appeal exists.
- Other recipients use the Appeal Decision-Maker to make the decision. Gate-Keeper may also be the Chair of the Appeal Panel.
- Either approach, appeal grounds vetted, timeliness assessed, and request for appeal either denied or granted and appeal then forwarded to Appeal Decision-Maker for consideration.

# APPEAL GATEKEEPER: TRAINING

## Appeal Decision-Maker MUST understand:

- Deference to original decision, making changes to findings only when **CLEAR ERROR**, and making changes to sanctions/remedies **ONLY** if a compelling reason to do so.
- Remand, rather than changing the outcome, is always best practice.
- Appeals are **NOT** a “do over” of the original substantive determination. Appeal should be confined to review of written record and written documents submitted by parties, investigators, and/or decision-maker.

# APPEAL GATEKEEPER: TRAINING

- **Do NOT substitute Appeal Decision-Maker's judgment for the judgment of the original Decision-Maker, especially on matters of credibility where Appeal Decision-Maker did not possess opportunity to assess credibility in person.**
- **If appeal uncovers material procedural errors or new evidence, best practice is to remand the matter to the original investigator or decision-maker for reconsideration.**

# APPEAL DECISION-MAKER DUTIES

- Upon a complete review of all information submitted in support of the appeal, the Appeal Decision-Maker issues a written determination to all parties and their parent/guardian simultaneously.
- Written determination includes the result of the appeal and the rationale for the result.
- Provide equitable appeal process.
- Self-Check for conflict of interest or bias.
- Receive training on any technology used at a live hearing.

# FINALIZING SANCTIONS AND REMEDIES

- TIX 2020 Regs states the determination on responsibility becomes final:
  - A. On the date recipient provides the parties with written determination of the result of an appeal, if appeal is filed; or
  - B. Or if no appeal is filed, the date on which the appeal would no longer be considered timely.

# **2020 REGULATIONS SUBSTANTIVE TRAINING REQUIREMENTS: DECISION-MAKER AND APPEAL DECISION-MAKER**

## **Annual Training on following areas:**

- **Definition of Sex Harassment, Sex and Gender-Based Disc., (sexual assault, dating and domestic violence, and stalking),**
- **Jurisdiction**
- **Formal Investigation and Grievance Procedures**
- **Remediation (long-term measures)**
- **Supportive Measures**
- **Informal Resolution**
- **Retaliation**
- **Technology at hearings**
- **Impartiality, bias, prejudice, and conflict of interest**
- **Relevance of questions and evidence, credibility**
- **Creation of written determination**

# §106.30-Sexual Harassment

- **§106.30 – SEXUAL HARASSMENT:** Acts of sexual harassment may be committed by any person upon any other person, regardless of sex, sexual orientation, and/or gender identity of those involved. Sexual harassment is an umbrella category includes the offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking, defined as:  
**Conduct on the basis of sex that satisfies one or more of the following:**

# §106.30-Sexual Harassment

- **Quid Pro Quo**
  - An **employee** of recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- **“Hostile Environment”**
  - Unwelcome conduct determined by a **reasonable person** to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the recipient's educational program or activity.

# §106.30-Sexual Harassment

- **Sexual assault, defined as:**
  - Sex Offenses, Forcible:** Any sexual act directed against another person, **without the consent** of the Complainant including instances where the Complainant is **incapable of giving consent**.
  - Forcible Rape:** Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.

# §106.30-Sexual Harassment

- **Forcible Sodomy:** Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- **Sexual Assault With An Object:** To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against their will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# §106.30-Sexual Harassment

- **Forcible Fondling:** The touching of the private parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against the person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# §106.30-Sexual Harassment

- **Sex Offenses, Nonforcible: Nonforcible Sexual Intercourse.**
  - Incest:** Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by Ohio law.
  - Statutory Rape:** Nonforcible sexual intercourse with a person who is under the statutory age of consent which is 16 yrs. old in the state of Ohio.

# §106.30-Sexual Harassment

## Dating Violence

- **Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with the consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition-**
  - **Dating violence includes, but it not limited to, sexual or physical abuse or the threat of such abuse.**
  - **Dating violence does not include acts covered under the definition of domestic violence.**

# §106.30-Sexual Harassment

**Stalking: Engaging in a course of conduct directed at a specific person that would cause a reasonable person to-**

- Fear for the person’s safety or the safety of others; or
- Suffer substantial emotional distress.
- For the purposes of this definition-
  - Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property.
  - Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
  - Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

# §106.30-Sexual Harassment

## Domestic Violence

### **A felony or misdemeanor crime of violence committed-**

- By a current or former spouse or intimate partner of the Complainant;
- By a person with whom the Complainant shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
- By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws in Ohio;
- By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Ohio.

\*\*\*Domestic Violence requires Complainant and Respondent must be current or former spouses or have an intimate relationship...cannot be two people living together as roommates.\*\*\*

# JURISDICTION

- 2020 Regs define “**education program or activity**” as locations, events, or circumstances over which the recipient exercised **substantial control** over both the **Respondent** and the **context** in which the sexual harassment occurs.
- Regulations limit jurisdiction to conduct that occurred in the United States.
- Jurisdiction is about the nexus to the educational program, not to a physical location.

# **JURISDICTION: MANDATORY DISMISSAL**

- i. If conduct did not occur against a person in the United States; and/or**
- ii. At the time of the filing of a formal complaint, a Complainant is not participating or attempting to participate in the education program or activity of recipient; and/or**
- iii. Conduct did not occur in recipient's education program or activity, and/or**
- iv. Conduct alleged does not constitute sexual harassment as defined by 106.30, even if proved.**

**\*\*Upon dismissal, recipient MUST promptly send written notice of dismissal and reasons simultaneously to the parties.\*\***

# JURISDICTION: DISCRETIONARY DISMISSAL

- i. Any time during investigation or hearing, a Complainant notifies the TIXC in writing that Complainant would like to withdraw the formal complaint or any allegations therein;**
- ii. Respondent is no longer enrolled or employed by the recipient; or**
- iii. Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to formal complaint or allegations.**

# FORMAL INVESTIGATION

## Notice of Investigation and Allegation

### Notice of Investigation and Allegation (NOIA)

- Identities of parties involved (if known)
- Specific policy sections alleged to be violated
- Conduct considered sexual harassment/discrimination/retaliation
- Date(s) of alleged incident(s)
- Location(s) of alleged incident(s)
- Statement Respondent presumed “not responsible” until determination made via grievance process
- Statement parties entitled to an advisor of choice, attorney
- Expectation of truthfulness and consequences of false statements or submitting false information

**\*\*\*include process that allows a party to raise a conflict of interest and request the reason for said conflict\*\*\***

# FORMAL INVESTIGATION

## Notice of Investigation/Meeting

### Notice of Investigation/Meeting

- Date
  - Time
  - Location
  - Participants
  - Purpose of Interview/Meeting
- \*\*\*NOI MUST be provided for each interview/meeting\*\*\***

# FORMAL INVESTIGATION: “due process” Requirements

- 2020 Regulatory changes focus on providing “due process” protections for Respondents.
- Treat Complainants and Respondents Equitably
- Allow parties to present and suggest witnesses and submit inculpatory and exculpatory evidence
- Complete an objective evaluation of relevant evidence.
- Presumption Respondent not responsible until determination made at conclusion of grievance process.
- Burden of proof and collection of evidence on recipient.
- No restriction on party’s ability to discuss allegations, gather, and present evidence.
- Regulations acknowledge legal rights parents/guardians to file complaint on behalf of a party.

# EFFECTIVE INVESTIGATIONS: Civil Rights Investigation Model

- **Active** investigation and **strategic** gathering of evidence
- **Thoroughness** of investigation is critical part of grievance process and assists decision-maker
- Emphasize **transparency**, communication, and fairness.
- Investigation grounded in concepts of **neutrality** and **equity** (Equitable Process= Goal)
- Enhanced **due process** protections built into the grievance process

# SUPPORTIVE MEASURES

- Previously, “interim measures” goal was to restore and preserve access while investigation and resolution process occurred.
- Supportive measures may also be instituted as “remedies” after a final resolution.
- Supportive Measures: “Non-disciplinary, non-punitive individualized services offered as **appropriate, as reasonably available**, and without fee or charge to the complainant or respondent before or after the filing of the formal complaint or where no formal complaint is filed.

# REMEDIATION

- **TIX requires remediation to the community and the complainant throughout and possibly after the process.**
- **Supportive Measures form of remediation.**
- **Post-determination remedies may include the “supportive measures”, and at that point, can be disciplinary or punitive and need not avoid burdening the Respondent, assuming Respondent found to violated policy.**

# INFORMAL RESOLUTION

- **2020 Regs shift from 2011 DCL by permitting use of alternative resolution procedures in cases of sexual assault (all §106.30 offenses) such as mediation and/or restorative practices.**
- **Occurs when parties AGREE to resolve the report informally rather than formal investigation and resolution and when TIXC can support resolution informally by providing agreed-upon remedies to resolve situation.**
- **“at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication.”**

# INFORMAL RESOLUTION PERMITTED:

- Formal Complaint filed
  - Process **MAY** be used at any point prior to reaching a determination of responsibility
  - Parties provide voluntary, written consent to use informal process
  - Parties provided written notice includes:
    - Reported misconduct/allegations;
    - Requirements of IR process, including circumstances, when once completed, it precludes parties from changing their minds and reverting back to grievance procedure;
    - Right of withdrawal by any party and resume formal grievance process;
    - Any consequences resulting from participating in the process, including resulting sanctions, as well as records maintained, could be shared; and
    - Whether resolution would be binding on the parties.
- \*\*\*NOT PERMITTED Student/Employee cases \*\*\*\*\***

# RETALIATION CLAIMS

- **Retaliation** protected activity under Title IX
- **2020 Regs § 106.71** extended retaliation claims, therefore, Complainants and Respondents can bring retaliation claims. Now responding to a complaint is a protected activity.
- Retaliation claim, unlike establishing sexual harassment, retaliation requires proving a motive of the intent to retaliate.
- Need to determine if a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

# RETALIATION CLAIMS

## INFERENCE OF RETALIATION ELEMENTS:

- Did the individual engage in protected activity?
- Was the individual subsequently subjected to adverse action?
- Do circumstances suggest a connection between protected activity and adverse action?
- If these elements are not shown, claim fails.
- Is there a stated non-retaliatory reason for adverse action?
- Evidence that stated legitimate reason is a pretext?

# TECHNOLOGY

Decision-Maker and Appeal Decision-Maker  
MUST be trained on any technology used within  
hearings and/or appeals.

# UNDERSTANDING EVIDENCE: RELEVANCE

- If the information is considered **relevant** to prove or disprove a fact or issue, it should be considered.
- If information is credible, it should be considered (credibility determined by decision-maker)
- Evidence is any kind of information presented with the intent to prove what took place.
- Certain types of evidence may be relevant to the credibility of parties or witnesses, and some to potential policy violations (include, but distinguish)
- Look for evidence of prior planning

# UNDERSTANDING EVIDENCE

- Assign weight to evidence based on:
  - Direct** or **Testimonial evidence** (personal observation or experience)
  - Documentary evidence** (supportive writings or documents)
  - Real evidence** (physical object)
  - Circumstantial evidence** (not eyewitness-compelling)
  - Character evidence** (generally not relevant or acceptable)

# STANDARD OF EVIDENCE

OCR recently reversed 20 yrs. of guidance that now permits recipients to choose between Preponderance of Evidence (POTE) and a more stringent standard- Clear and Convincing (C & C).

Recipient **MUST** consistently apply the chosen standard to all grievance processes addressing sexual harassment that involved students and/or employees.

Review Collective Bargaining Agreement language

# CREDIBILITY

- **Assessing credibility is to assess the extent to which one can rely on a witness or party testimony to be accurate and helpful in your understanding of the case.**
- **Credibility NOT synonymous with truthfulness, although assessing a person's reasons to distort the truth is important.**
- **Memory errors do not necessarily destroy a witness/party's credibility, nor does some evasion or misleading responses.**
- **Refrain from focusing on irrelevant inaccuracies and inconsistencies.**

# FACTORS TO CONSIDER FOR CREDIBILITY

**Pay attention to the following factors:**

- **Demeanor:** nonverbal language, demeanor issues should be your cue to ask more questions not make assumptions
- **Non-Cooperation:** Look for short, abrupt answers or refusal to answer. Ok to ask, “You seem reluctant to answer these questions-can you tell me why?”
- **Logic/Consistency:** Ask yourself, “Does this make sense?”
- **Primary factors:** corroboration and consistency

# **MAKING CREDIBILITY DETERMINATIONS**

- ❖ **Look at consistency of story- substance and chronology of statements also if there are other exact stories**
- ❖ **Consider inherent plausibility of all info given**
- ❖ **Major inconsistencies likely detract from credibility, don't get hung on on minor inconsistencies**
- ❖ **Look for the amount of detail (facts) provided, factual detail should be assessed against general allegations, accusations, excuses or denials that have no supporting detail.**
- ❖ **Corroborating information/evidence supports credibility and can be important**

# MAKING CREDIBILITY DETERMINATIONS

- ❖ **Sharing information immediately following an incident supports credibility**
- ❖ **Motivation to lie, exaggerate, or distort information should be assessed when there are differences in what was reported by each of the parties**
- ❖ **Pay attention to “excuses” for reported behavior, i.e. “I didn't know it was wrong,” “She/He was flirting and sitting on everyone’s lap.”**

# COMMON ERRORS IN ASSESSING CREDIBILITY

- **Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety**
- **Misplaced emphasis on inconsistency of information provided by interviewee**
- **Confusion about memory (effect of stress and emotion may lead to enhancement or memory or disruption of encoding and retrieval processes)**
- **Misplaced focus on status of parties (no scientific studies support notion of neurobiological response differences between Complainant and Respondent)**
- **Bias in interviews (presumptions of guilt can influence credibility assessments)**

# CREDIBILITY: CORROBORATING EVIDENCE

- **Strongest indicator of credibility**
- **Corroboration of central vs. environmental facts**
- **Not simply alignment with friendly witnesses**
- **Contemporaneous with witness accounts**
- **Be aware of allegiances (friends, teammates, groups, etc.)**
- **Independent, objective authentication**
  - Party said they went to dinner and provides receipt
  - Party describes text conversation, provides texts or screenshots

# CREDIBILITY: INHERENT PLAUSIBILITY

- **Does what the party describe make sense**
- **Is testimony believable on its face**
- **“plausibility” is a function of “likeliness”**
  - **Would a reasonable person in same situation do the same thing?**
  - **Are there more likely alternatives based on the evidence.**
  - **Is party’s statement consistent with the evidence?**
  - **Is their physical location or proximity reasonable?**
  - **Could a party/witness have heard what they said they heard?**
  - **How good is their memory? (“I think”, “I am pretty sure”)**

# CREDIBILITY: MOTIVE TO FALSIFY

- **Does party/witness reason to lie?**
- **What's at stake if the allegations are true? (academic, extracurricular implications or personal relationship consequences)**
- **What if allegations are false? (other pressures on Complainant-failing grades, dramatic changes personal/social life)**
- **Reliance on written document during testimony**

# CREDIBILITY: PAST RECORD

- **Is there evidence or records of past misconduct?**
- **Are there determinations or responsibility for substantially similar conduct?**
- **Check record for past allegations (even if “not responsible” may be evidence of pattern or proclivity)**
- **Written/verbal statements, pre-existing relationship**

# CREDIBILITY: DEMEANOR

- **Is the party uncomfortable, uncooperative, resistant?**
- **Certain lines of questioning- agitated, argumentative**
- **Look for indications of discomfort or resistance**
- **Make a note to dive deeper, discover source**
- **BE CAREFUL – Humans excellent at picking up non-verbal cues and terrible at spotting liars**

# PREVENT BIAS

- **Self-Recusal Process**
- **Process for Parties to raise bias or conflicts**
  - Replace personnel
  - Redo portions of grievance process
- **TIXC Oversight**
  - Regular Check ins
  - Report Review
  - Strategize with Investigator
  - Insulate against external/internal pressures
- **Internal Appeal Function/Ground for Appeal**

# BIAS & PREJUDICE

- **Procedure:**
  - Exclusion of evidence
  - Failure to follow procedures
  - Burden of proof on Respondent
- **Biased Training Materials**
- **Insufficient Training**
- **Bias due to internal/external pressures (politics, lawsuits, identity parties/parents)**
- **Conflicts of Interest**

# BIAS & PREJUDICE

- **Conscious vs. Unconscious**
- **Social & Cultural Capital**
- **Stereotyping**
- **Cultural competence**
- **Social Justice**
- **Multi-Partiality**

# **BIAS & HOT BUTTON ISSUES**

- **Sexual Orientation**
- **Gender, transgender, and gender identity**
- **Race**
- **Ethnicity**
- **Religion**
- **Political Views**
- **Athletes**
- **Drug/Alcohol Use**
- **Prior Student Conduct Unrelated or No Prior Conduct**

# Conflict of Interests

- **Conflicts of Interests create role confusion and compromise impartiality and objectivity**
- **Simply knowing a student/employee or previously disciplining party is not typically sufficient to create a conflict of interest**
- **Types of Conflicts**
  - Wearing too many hats
  - Legal Counsel
  - Non-impartial appellate decision-maker(s)

# QUESTIONS

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THANK YOU