



Association of
Title IX Administrators

Title IX Decision-Making for Higher Education

Training and Certification Course

WELCOME!

- Please log in to your ATIXA Event Lobby to access the training slides, supplemental materials, and to log your attendance.
- The ATIXA Event Lobby can be accessed by scanning the QR code or by visiting **www.atixa.org/atixa-event-lobby**.
- You will be asked to enter your registration email to access the Event Lobby.
- Links for any applicable training evaluations and learning assessments are also provided in the ATIXA Event Lobby.
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Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is **never** to be construed as legal advice or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, any applicable state or local laws, and evolving federal guidance.

Content Advisory

The content and discussion in this course will necessarily engage with sexual harassment, sex discrimination, violence, and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

Introduction



The primary focus of this course is necessary skill-building to successfully serve as a decision-maker in the Title IX Formal Grievance Process or other similar processes.



Decision-makers must understand their role, apply policy with analytical precision, make determinations based on relevant and reliable evidence, and prevent and recognize bias and conflicts of interest.



Our goal is to help Title IX Decision-makers take on their role with confidence.

Title IX Compliance Overview

Title IX

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.”

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)



Scope

Title IX

Sex Discrimination

Disparate Treatment

Program Access

Retaliation

Sexual Harassment

Quid Pro Quo

Domestic Violence

Hostile Environment

Stalking

Sexual Assault

Dating Violence

* 2020 Regulations only apply to Sexual Harassment

Sex Discrimination Definitions

Disparate Treatment: occurs when an institutional policy, practice, or procedure (or an agent thereof) **intentionally** discriminates

Disparate Impact: occurs when an institutional policy, practice, or procedure (or an agent thereof) **unintentionally** discriminates

- A policy may be intended to be neutral as written, but it may be applied in a discriminatory manner



Sexual Harassment Model Definitions

Quid Pro Quo

- An employee of the Recipient
- Conditions, implicitly or explicitly, 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 (SPOO)**
- that it effectively denies a person equal access to the Recipient's education program or activity

Sexual Assault Model Definitions

Rape

- Penetration, no matter how slight,
- of the vagina or anus of a person,
- with any body part or object, or
- oral penetration
 - of a sex organ of the Complainant, or
 - by the Respondent's sex organ, or
 - by a sex-related object
- without the consent of the Complainant,
- including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental or physical incapacity

Sexual Assault Model Definitions, Cont.

Incest: Sexual intercourse between persons related to each other within the degrees wherein marriage is prohibited by state law

Statutory Rape: Sexual intercourse with a person who is under the statutory age of consent

Fondling

- The intentional touching of the clothed or unclothed genitals, buttocks, groin, breasts, or other body parts of the Complainant by the Respondent
 - Without the consent of the Complainant
 - For the purpose of sexual degradation, sexual gratification, or sexual humiliation
- Or the Respondent directing or causing the Complainant's intentional touching of the Respondent's clothed or unclothed genitals, buttocks, groin, breasts, or other body parts
 - Without consent of the Complainant
 - For the purpose of sexual degradation, sexual gratification, or sexual humiliation

Interpersonal Violence Model Definitions

Dating Violence: Violence committed by a person

- Who is/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 consideration of the length of the relationship, the type of relationship, and the frequency of interactions between the persons in the relationship

Domestic Violence: 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, or
- By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
- By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of the state

Stalking

- Engaging in a course of conduct,
- Directed at the Complainant, that
 - would cause a reasonable person to fear for that person's safety or the safety of others, or
 - suffer substantial emotional distress

Other ATIXA Model Policy Definitions

- Consent
- Retaliation
- Common additional offenses
 - Sexual Exploitation
 - Harm/Endangerment
 - Intimidation
 - Hazing
 - Bullying

Title IX Grievance Process Overview

Essential Compliance Elements

The requirements to **Stop, Prevent, and Remedy** guide institutions in their compliance work

1

STOP discriminatory conduct

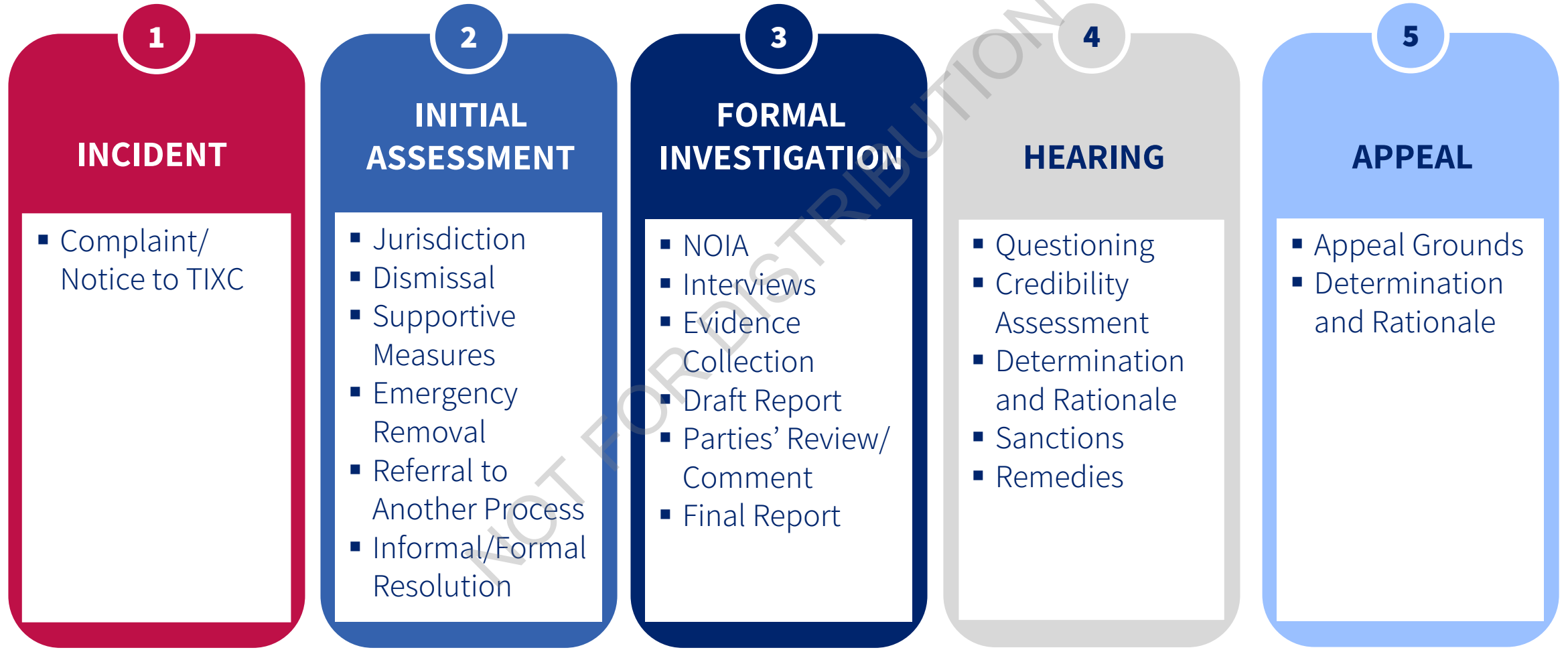
2

PREVENT recurrence, on both individual and institutional levels

3

REMEDY the effects of discrimination, on both the individual and institutional levels

Title IX Grievance Process Overview



Investigation Steps

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Determine Basis for Investigation
4. Notice of Investigation and Allegations (NOIA)
5. Establish Investigation Strategy
6. Formal Comprehensive Investigation
7. Draft Investigation Report
8. TIXC Reviews Draft Report and Evidence
9. Parties Review Draft Report and Evidence
10. Final Investigation Report

INCIDENT INVESTIGATION SUMMARY

Incident Date:	
Review Date:	
by:	
t Summary:	
Root Causes:	

Decision-Making Under the 2020 Regulations

- Decision-maker (DM) could be a single person or a panel (typically three)
 - Conducted by institutional community members (typically faculty or staff) or external contractors
- All institutions must hold a live hearing
 - DM can ask relevant questions
 - Advisors can ask relevant questions on behalf of parties
- Title IX Coordinator (TIXC) and Investigator may not serve as DM for the same complaint

Decision-Maker Role and Responsibilities

Activity: Ranking Priorities

Decision-Maker Role and Responsibilities

Rank your top three responsibilities as a Decision-maker

Finding the
truth

Providing a
just result

Providing an
educational process

Making a safe
community

Upholding the
institution's policy

Ensuring a fair
process

Protecting the
institution from
liability

Punishing
wrongdoing

Decision-Making Oversight

Title IX Coordinator

- Oversees process and serves as resource
- Facilitates scheduling and communication
- Ensures sanction compliance
- Implements remedies
- Provides institutional memory and precedent information
- Trains and appoints DMs
- Maintains institutional records

Decision-Maker(s)

- Facilitates Decision-making process, including questioning
- Determines relevance
- Assesses credibility
- Makes a finding of fact
- Determines whether policy was violated
- Assigns sanctions (if applicable)
- Writes determination rationale

Decision-Maker Responsibilities

- DMs have **no side**, other than the **integrity of the process**
- DM must have a thorough understanding of:
 - Institutional policy and procedures, including the investigation process
 - Whether the determination is for an alleged incident(s), a pattern, or a culture/climate complaint, and what findings are necessary based on that footing
 - Best practices for asking relevant questions
 - Decision-making procedures and management
 - How to weigh and apply evidence to policy by the standard of evidence
 - How to analyze credibility
 - How to make determinations, decide sanctions/remedies, and write a rationale

Decision-Maker's Role in Ensuring Due Process

Due Process



Title IX regulatory requirements



Fundamental fairness concepts (private institutions)
Constitutional Due Process concepts (public institutions)



Institutional policies and procedures

Procedural Due Process

- Decision-makers have an opportunity to cure process deficiencies
 - Important to have thorough understanding of policies and procedures
- Institutions owe parties:
 - Consistent, thorough, and procedurally sound review of all allegations
 - Substantial compliance with written policies and procedures
 - Policies and procedures that afford sufficient rights and protections to satisfy mandates of all applicable laws
 - Ex: Clear, written notice of the allegations
 - Ex: Opportunity to present witnesses, evidence, and be heard by DM
- DMs should raise any concerns to TIXC

Due Process in Decision-Making

A decision must:

- Be appropriately impartial and fair; both in finding and sanction(s)
- Be neither arbitrary nor capricious
- Be based on a fundamentally fair rule or policy
- Be made in good faith
- Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence



Identifying and Preventing Conflicts of Interest or Bias

Conflicts of Interest and Bias

- DM must **not have a conflict of interest or bias** for or against the following:
 - Complainants, generally
 - Respondents, generally
 - Parties involved in a complaint
 - Subject matter or details of the complaint itself
- Consider a perception of a conflict or bias, even if none exists in fact
 - Not required, but TIXC may choose to substitute a DM based on perception alone
- DMs should also be attentive to conflicts of interest or bias in other parts of the process

What's the Difference?

Conflict of Interest

- Refers to situations in which:
 - An **actual** (or perceived) clash,
 - Between the DM's role and
 - A current or previous relationship/situation with one of the parties
 - That prevents neutrality or objectivity
 - **Example:** A Residence Life Director serving as DM for a complaint filed by one of their Resident Assistants

Bias

- Refers to prejudice for or against **a person or group**, or an unwillingness/inability to be influenced by factual evidence
- A preference or tendency to like or dislike
- Implicit or explicit
- Can be intentional, but generally unintentional or at least unconscious
- **Example:** A DM who believes Respondents cannot be trusted to tell the truth

Conflicts of Interest

- Evaluated on a case-by-case basis
- Simply knowing a student or employee is **not** enough to generate a conflict of interest, as long as objectivity is not compromised
 - Previously disciplining a student or employee is likewise **not** enough
- DM must bring potential conflicts to the TIXC's attention
 - Parties may also do so
 - TIXC will make a recusal determination, or a DM may recuse themselves
 - Policy may have a recusal provision

Bias

- Formed from stereotypes, societal norms, experiences, expectations of the people around the DM
- Bias can be a significant problem for DMs
 - Can affect our perceptions of Complainants **and** Respondents
 - Common pre-conceptions about Complainants and Respondents
 - Can affect our perceptions of others within the process or associated with the process
- DM role requires us to recognize potential bias and mitigate its effects

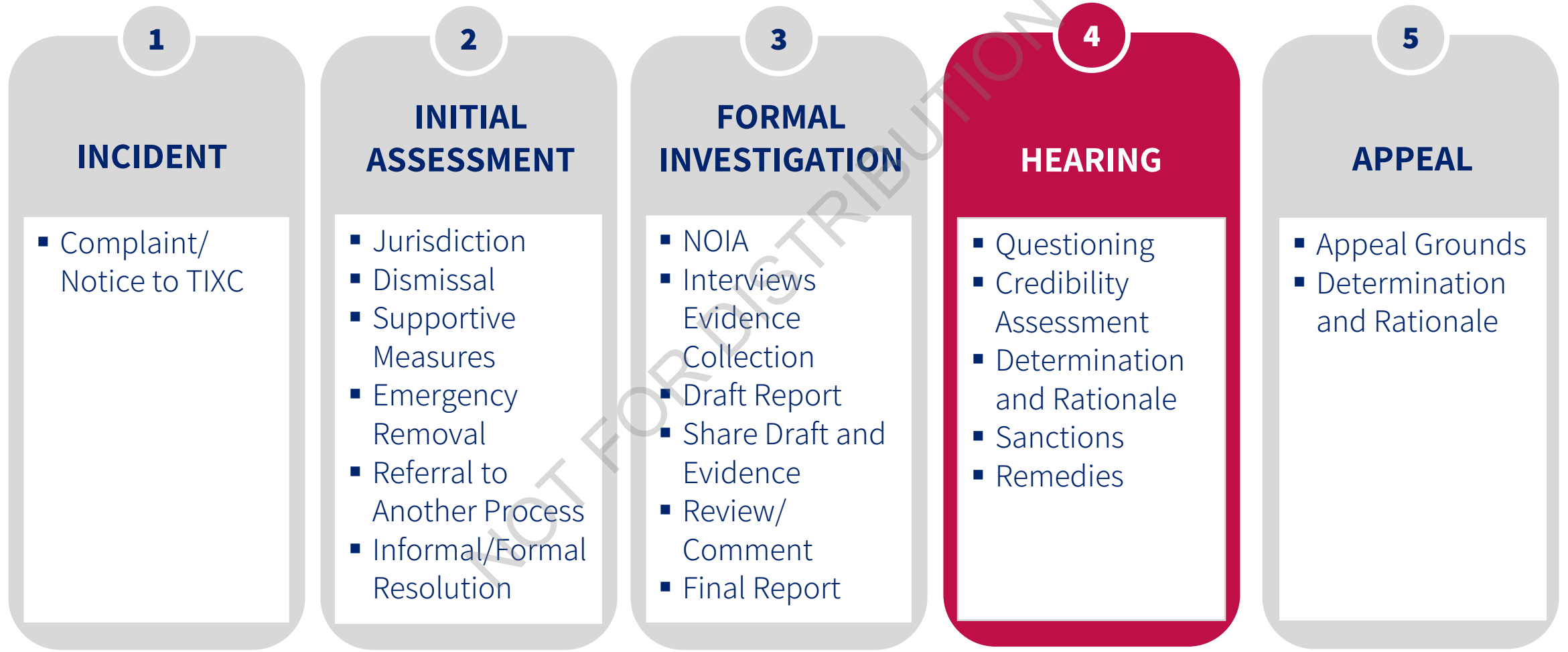
Identifying and Correcting Bias

Strategies to mitigate bias:

- Consider hearing panels vs. individual DM
- Institutional policy should define the process and circumstances by which a party may seek to recuse a DM
- Ask panel members to review each other's questions in advance
- Comply with institutional policy and procedure
- Identify evidentiary gaps and seek relevant evidence to fill gaps
- Review rationale as part of all panel members' responsibilities
- Ensure TIXC reviews the rationale

Decision-Making Phase: Skills and Practical Application

Decision-Making



Skills: Materials Review

Initial Materials Review

- DMs should review all available documentation and evidence prior to making a determination
- Review should consist of:
 - Complaint
 - NOIA
 - Applicable policies
 - Relevant and directly related evidence
 - Investigation report
- Consider conducting multiple reads



Review Policy Elements and Procedures

Policy

- What policies are alleged to have been violated?
- What are the elements of those policies?
 - DMs will weigh and apply relevant evidence to determine whether a policy violation occurred

Procedures

- Review decision-making procedures to refresh previous training
- Note any procedural questions to ask the TIXC/legal counsel

Materials Review

ATIXA recommends reviewing materials multiple times, focusing on areas of consistency and inconsistency:

- **Consistency review:** note all areas of information consistency/alignment
 - No additional verification or questioning is likely needed on these issues
 - Begin to identify pieces of evidence that address the various policy elements
- **Inconsistency review:** identify information inconsistencies/disparities
 - DM compiles any remaining questions
 - DM identifies the pieces of evidence that address the various policy elements
 - DM's primary focus is resolving contested facts where possible

Skills: Understanding Evidence

Primary Questions for Decision-Makers

1

Is this information
relevant?

2

Is this information
credible?

3

Will we rely upon it as
evidence supporting a
rationale?

Understanding Evidence

DM must evaluate all relevant evidence

- **Evidence** is any kind of information presented to help determine what occurred
- **Relevant evidence** is evidence that tends to prove or disprove the underlying allegations
 - Included in the investigation report
- **Directly related evidence** is connected to the complaint, but is neither inculpatory nor exculpatory
 - Included in the evidence file



A Deeper Dive into Relevant Evidence

- Evidence is generally considered **relevant** when it helps determine:
 - Whether the Respondent violated policy, and/or
 - The credibility of any evidence, including a party or witness statement
- The Investigator initially evaluates relevance, but the DM ultimately decides
- All relevant evidence must be objectively evaluated and considered
 - **Inculpatory:** tending to suggest a finding of responsible
 - **Exculpatory:** tending to suggest a finding of not responsible
- Parties may dispute the Investigator's initial relevance determinations in the decision-making phase

Privileged and Medical Information

A party must provide permission to obtain and/or include:

- Evidence protected under a legally recognized privilege
- Records made or maintained by:
 - Physician
 - Psychiatrist
 - Psychologist

NOT FOR DISTRIBUTION



Relevant Evidence Exclusions

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct; or
 - Specific incidents of the Complainant's prior sexual behavior with respect to the Respondent offered to prove consent
- Exclusions apply even if admitted/introduced by the Complainant
- Exclusions do **not** apply to Respondent's prior sexual behavior or predisposition, which are admissible if relevant

Types of Relevant Evidence

Documentary Evidence	Supportive writings or documents
Electronic Evidence	Photos, text messages, and videos
Real Evidence	Physical objects
Direct or Testimonial Evidence	Personal observation or experience
Circumstantial Evidence	Not eyewitness, but compelling
Hearsay Evidence	Statement from outside the interview presented as truthful
Character Evidence	Evidence of a person's character or character traits

Evidence Authentication

Evidence authentication attempts to ensure that the evidence is genuine and credible

- Investigator should authenticate evidence, but sometimes the DM will
- Examples of authentication:
 - Verifying text messages by collecting texts from all involved parties
 - Collecting photographic evidence after it is referenced in an interview
 - Establishing chain of custody for a piece of physical evidence



Other Evidence Considerations

- No restriction on parties discussing complaint or gathering evidence, but parties can be restricted from sharing materials
- Expert witnesses
- Parties seeking to introduce new evidence in the DM phase or at the hearing
 - Consult with the TIXC



Skills: Credibility Assessment

Party and Witness Credibility

- **Credibility** impacts likeliness
 - Would a reasonable person do the same?
 - Are there more likely alternatives?
- **Credibility Assessment** involves evaluating whether evidence is believable and reliable
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Note:** Memory errors alone do not necessarily diminish witness credibility, nor does some evasion



Credibility Considerations

- Assessing and determining credibility is an important DM role
- Credibility is often a function of **corroboration and consistency**
- Credibility does **not** necessarily equate to honesty or truthfulness:
 - Believability does not equal truthfulness
- Credibility impacts the **reliability of evidence and its weight**
- Specific credibility issues that a DM may consider:
 - Relationships between the parties and witnesses
 - Whether a witness was exposed to information (e.g., in the case of a parent/guardian, Advisor) that may have influenced their testimony

Credibility Factors

Corroboration

- Aligned testimony and/or physical evidence

Inherent Plausibility

- “Does this make sense?”
- Be careful of bias influencing concept of “logical”

Motive to Falsify

- Do they have a reason to lie?

Past Record

- Is there a history of similar behavior?

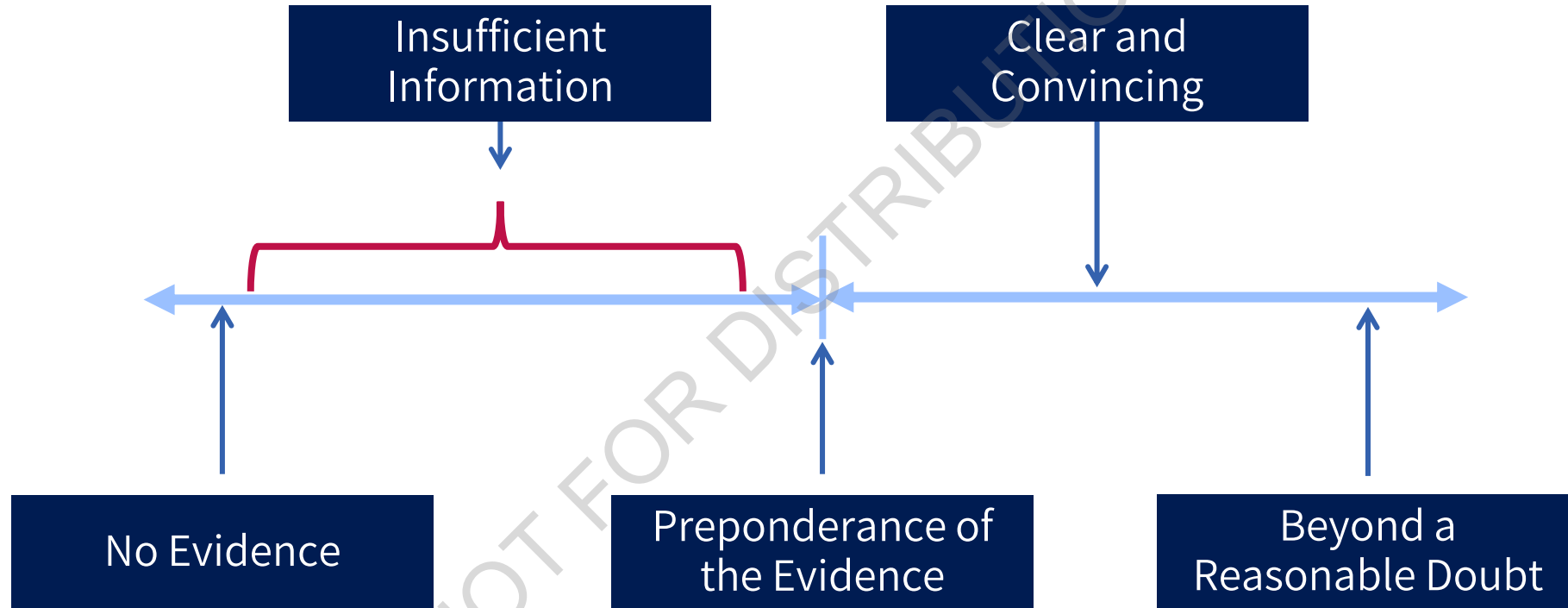
Demeanor

- Do they seem to be lying or telling the truth?



Skills: Weighing and Analyzing Evidence

Standard of Evidence



- **Preponderance of the Evidence** is the most common industry standard
- Standard of Evidence must be consistent for **all** formal complaints of sexual harassment

Applying Facts to Policy

- DM must **presume the Respondent is not in violation** unless and until the standard of evidence is met
- The DM **analyzes facts against each policy element** to determine whether the Respondent violated policy
 - Written rationale will have to cite to specific evidence supporting conclusion
- Assess credibility of evidence and evidentiary weight
 - Assess statements as factual, opinion-based, or circumstantial
- Apply evidentiary standard to determine if policy has been violated
- Based only upon evidence in the investigation report or presented at the hearing

Step One: Parsing the Policy

A key part of weighing and analyzing evidence is identifying the elements of each policy provision:

- **Stalking:**
 - Engaging in a course of conduct,
 - Directed at the Complainant,
 - That would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress

Step Two: Applying Facts to Policy

Map relevant and credible facts to the applicable policy element

Policy Element:

- Engaging in a course of conduct

Facts:

- Complainant asserts Respondent followed Complainant to an off-campus party on October 1
- Respondent came to Complainant's residence hall room three times between October 5 and October 12
- Respondent denies following Complainant on October 1
- Witness corroborates Respondent knocked on Complainant's door several times in one week

Step Two: Applying Facts to Policy

Map relevant and credible facts to the applicable policy element

Policy Element:

- Directed at the Complainant:
 - That would cause a reasonable person to **fear for their safety**

Facts:

- Complainant alleged Respondent pounded on his door and yelled until an RA told her to leave
- Complainant alleged Respondent sent texts suggesting she was following him, and he should fear her
- Respondent produced texts that do not support Complainant's characterization
- RA witness asserts "pounded on his door and yelled" is an exaggeration

Skills: Analyzing Consent Evidence Using the Consent Construct

ATIXA Model Policy Consent Definition

- **Consent** is not defined by the Title IX Regulations, but institutions are required by law to provide a definition (some states prescribe a definition applicable in that state)
- **ATIXA's Definition:**
 - Informed, knowing, and voluntary (freely given)
 - Active (not passive)
 - Creates mutually understandable permission regarding the conditions of sexual activity
 - No means no, but nothing also means no; Silence and passivity do not equal consent
 - To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
 - Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally
 - Consent to one form of sexual activity does not necessarily imply consent to other forms of sexual activity

The Consent Construct

1. **Force:** Did the Respondent use force to obtain sexual or intimate access?
2. **Incapacity:** Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. 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 each specific sexual or intimate act that took place as it took place?

Force

Did the Respondent use force to obtain sexual or intimate access?

Physical Violence:

- Hitting, restraint, pushing, kicking, etc.

Threats:

- Objective and subjective analysis of the viability of the threat

Intimidation:

- Implied threat that menaces and/or causes reasonable fear

Coercion:

- Unreasonable amount of pressure for sexual access (Consider: isolation, frequency, intensity, and duration)

Incapacity

Was the Complainant incapacitated?

- **Incapacitation:** a state where an individual cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent:
 - Unable to understand who, what, when, where, why, or how
 - Incapacity ≠ impaired, drunk, intoxicated, or under the influence
 - Insufficient situational awareness
 - Lack of consequential awareness
 - Blackout and incapacity are **not** synonymous:
 - Blackout means memory is not formed
 - Incapacitation is about decision-making capacity
 - Incapacity could be the result of substance use, disability, or a health condition

Evidence of Incapacity: Potential Context Clues

- Slurred speech
- Scent of alcohol on the breath
- Shaky equilibrium; disorientation
- Passing out/unconsciousness
- Throwing up
- Outrageous/unusual behavior
 - Requires prior knowledge

**Incapacitation determination is made contextually,
in light of all the available relevant evidence**



Incapacity Analysis

- If the Complainant **was not** incapacitated, move to the Consent Analysis
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know, **AND**
 - The Respondent would not have **reasonably known** of the Complainant's incapacity = no policy violation, move to Consent Analysis
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it** = policy violation
 - The Respondent **should have known it** = policy violation

Note: The Respondent's own intoxication cannot be used as a reason they did not know of the Complainant's incapacity

Prior Knowledge Construct

- Did the Respondent previously know the Complainant?
 - If so, was the Complainant acting differently than in previous similar situations?
- Evaluate what, if anything, the Respondent observed the Complainant consuming or ingesting
 - Use a timeline analysis
- Determine if the Respondent provided any substances to the Complainant
- Pace of consumption and amount of consumption can both be relevant

Consent Analysis

What **clear words or actions** gave the Respondent permission for each specific sexual or intimate act that took place as it did?

- Evaluate relevant sexual or intimate pattern or history between the parties
- Consider whether verbal and/or non-verbal cues were present during any acts or portion of the encounter that the parties agree were consensual
 - Contemporaneous communication
- Critical to gather evidence regarding detailed and specific intimate behaviors
- Analysis has objective and subjective elements

Skills: Analyzing Evidence for Fondling Allegations

Sexual Degradation

ATIXA Model Definition:

- Refers to conduct that reduces a person to a sexual object, demeans them on the basis of sex, or portrays them as inferior, subservient, or lacking dignity because of a person's sex or sexual characteristics
- Key aspects include the reduction or objectification of a person's sense of value, not just making the person feel embarrassed
- May manifest as:
 - Verbal
 - Physical/Positional
 - Behavioral/Role-Based
 - Body-Based

Sexual Gratification

- ATIXA suggests the following decisional rubric for assessing when it is reasonable to find that the contact in question is **NOT** for purposes of sexual gratification:
 - The contact can be proven inadvertent
 - The contact is for a legitimate medical (or other privileged) purpose and thus is conduct for which consent should have been sought and obtained by the provider
 - The contact involves a Respondent who is pre-sexual, based on maturity/age (thus their intent is not sexual)
 - The contact involves a Respondent who cannot developmentally understand sexual contact or that their contact is sexual
 - The contact is something like butt-slapping on a team and is both minimal and unlikely to have sexual motivation or purpose, as shown by the context of the act(s)

Sexual Humiliation

ATIXA Model Definition:

- Refers to conduct that causes embarrassment, shame, or loss of dignity through sexualized means
- Sexual humiliation typically involves verbal, physical, or psychological acts that target a person's sense of dignity, self-worth, or bodily autonomy, while being tied to sexual activity, sexuality, or sexual identity
- May manifest as:
 - Verbal
 - Exposure-Based
 - Situational
 - Social

Fondling Analysis

- Requires a three-part analysis:
 1. Was the touching unwelcome?
 2. Was the touching (or attempted touching) intentional?
 3. If yes, was the intent of the touching for the purpose of sexual degradation, sexual gratification, or sexual humiliation?
- When the touching is of a non-private body part, the analysis must also consider how the contact was sexualized (i.e., sexual in nature) as non-private body parts are not inherently sexual

Analysis Considerations

Aspect	Sexual Degradation	Sexual Humiliation
Key Distinction	Objectification & dehumanization are central	Embarrassment & ridicule are central
Core Focus	Lowering status, stripping away respect, or objectifying someone	Shame, embarrassment, ridicule, or being made to feel foolish/exposed
Emotional Impact	Creates feelings of worthlessness or being “less than	Creates feelings of shame or awkwardness
Verbal Examples	Calling someone demeaning names (“slut,” “whore”), referring to them as an object or “thing”	Mocking sexual performance, laughing at size or appearance, teasing in embarrassing ways

Analysis Considerations, Cont.

Aspect	Sexual Degradation	Sexual Humiliation
Physical Examples	Forcing someone to crawl, kneel, or serve like a pet; spitting on them as a show of dominance	Forcing someone into silly or awkward sexual positions, making them act in a ridiculous way
Exposure Examples	Treating the person as furniture, a tool, or a disposable body part	Public nudity or forced sexual exposure designed to embarrass
Social Angle	Degradation often emphasizes hierarchy, dominance, and loss of status	Humiliation often involves ridicule or laughter, sometimes in front of others/publicly

Fondling Considerations for Decision-Makers

- Not all touching of a private body part is a sexual trespass
- Must become skilled at parsing out the policy (i.e., definition of fondling)
- In addition to the three-part intent analysis, there will need to be a thorough consent analysis:
 - The presence of force may be an indicator of sexual degradation
 - Incapacity may be a factor when determining sexual humiliation
- Consent analysis must be both subjectively and objectively applied

Skills: Making Findings, the Final Determination, and Sanctioning

Finding vs. Determination

Finding

Whether the conduct occurred,
by the standard of evidence

Final Determination

Whether the conduct that is
proven to have occurred violates
policy

Written Determination Standards

- Cogent explanation of facts
- Evidence relied upon/not relied upon and why
- Evidence that was unavailable and why
- Whether presumption of innocence was overcome
- Credibility assessment and explanation
- Rationale explains how DM got from the allegation to the final determination, and also offers rationale for any sanctions implemented

Determination Process Overview

- Anticipate having to concretely articulate the rationale for and evidence supporting all conclusions
- Parse the policy again; review the elements that comprise each allegation
- Determine credibility of evidence and assess statements as factual, opinion-based, or circumstantial
- Determine whether it is more likely than not that policy has been violated
 - Or use school/district standard of evidence
- Ensure an impartial decision

Withhold judgment until all evidence has been considered

Making a Finding and Final Determination

- Finding(s) must be based upon information gathered during the investigation and decision-making phases only
 - No outside information should influence decision-making
- Separate the **determination** from the **sanction**:
 - Do not use impact-based rationales for policy violation findings and determinations
 - Use impact-based rationales for sanctions only
 - Impact is **not** relevant to the policy violation question
 - Same with prior misconduct, unless a pattern is alleged/proven
- Institutions can identify a separate individual to determine sanctions **OR** permit the DM to determine sanctions, if any

Sanctions and Remedies

Sanctions

- **Goal:** stop, prevent, and remedy
- Only implemented after a determination of responsibility
- Nexus between sanctions and misconduct
- TIXC does not issue sanctions but oversees the process
- TIXC assures sanction compliance
 - Failure to comply could lead to discipline

Remedies

- **Goal:** preserve or restore access to education program and activity
- May be implemented before or after a determination
- TIXC determines remedies that are equitable and not clearly unreasonable given the circumstances
- TIXC ensures remedies are implemented for both Complainant and community

Determining Sanctions

- Primary purpose should be to stop, prevent, and remedy the discrimination
 - Each sanction should have a rationale
- DM may consider:
 - Nature and severity of the conduct, including the circumstances surrounding the violation
 - Aggravating or mitigating circumstances
 - Precedent, prior misconduct, proven pattern (if alleged), acceptance of responsibility, collateral violations, or multiple violations
 - The Respondent's disciplinary history
 - The need for sanctions or other responsive actions to stop, prevent, and remedy the discrimination, harassment, and/or retaliation
 - The impact on the parties
 - Any other information deemed relevant by the DMs

Common Student Sanctions

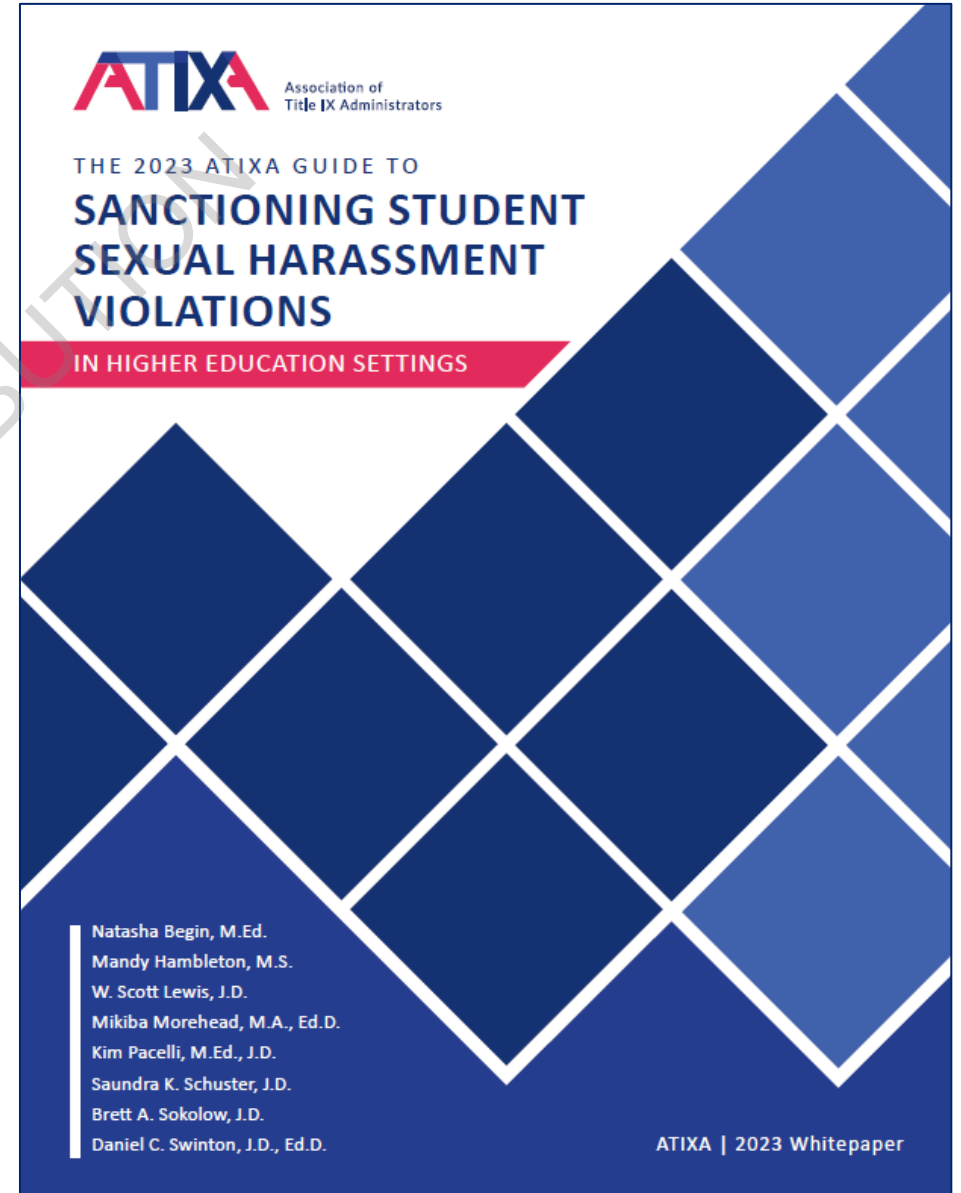
- Warning (preferably written)
- Probation
- Loss of privileges
- Counseling
- No contact order
- Residence hall relocation, suspension, or expulsion
- Limited access to campus
- Service hours
- Online education
- Alcohol and drug assessment and counseling
- Discretionary sanctions
- Parental notification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

Common Employee Sanctions

- Warning (preferably written)
- Probation
- Performance improvement/management process
- Training
- Counseling
- Loss of privileges
- Reduction in pay
- Loss of annual raise
- Discretionary sanctions
- Loss of supervisory or oversight responsibilities
- Paid or unpaid leave
- Suspension
- Termination

Sanctioning Pitfalls

- Failure to stop, prevent, and remedy
- Conflating the finding, the determination, and the sanctioning
- Unwillingness to expel, suspend, or terminate
- Inconsistent or disparate sanctions for similar behavior
- Failure to consider aggravating or mitigating circumstances
- Lockstep or prescribed sanctioning; failing to address incident-specific circumstances



Written Determinations

Written Determination

- Authored by Decision-maker(s)
- TIXC/Legal counsel reviews
- TIXC communicates to the parties simultaneously in writing
 - No FERPA concerns

Finality

- On the date the Recipient provides a written appeal determination
 - OR the date when an appeal would no longer be timely

Written Determination Elements

- Applicable policy
- Procedural steps from complaint through determination
- Statement of and rationale for the result of each specific allegation
- Finding and Final Determination
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal

Appeals

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Appeals

1

INCIDENT

- Complaint/
Notice to TIXC

2

INITIAL ASSESSMENT

- Formal Complaint
- Jurisdiction
- Dismissal
- Supportive Measures
- Emergency Removal
- Referral to Another Process
- Informal/Formal Resolution

3

FORMAL INVESTIGATION

- NOIA
- Interviews
- Evidence Collection
- Draft Report
- Share Draft & Evidence
- Review/
Comment
- Final Report

4

HEARING

- Questioning
- Credibility Assessment
- Determination & Rationale
- Sanctions
- Remedies

5

APPEAL

- Appeal Grounds
- Determination & Rationale

Appeal Process

Institution must offer a fair appeal process

- Policy must include grounds and process for appeal
- Institution must provide information about the appeal process in writing to parties and Advisors
- One level of appeal is best practice
- Typically, document-based review for error only; not a new consideration
- Deference is given to the original DM

Grounds for Appeal

Must offer appeals on the following grounds:

- 1 Procedural irregularity that affected the outcome of the matter
- 2 New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter
- 3 Conflict of interest or bias by the TIXC, Investigator, or DM that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

Appeal Decision-Maker

The Appeal Decision-maker:

- Cannot be TIXC or serve another role in the same complaint resolution
- Makes determination on a party's request for an appeal
- Reviews written submissions from parties
- May review investigation report or evidence gathered during investigation/decision-making phase
- May speak with Investigator, DM, parties, and/or witnesses
- **Review of complaint should be limited to the grounds noted in the appeal request**
- Draft a written determination that outlines the rationale for the outcome

Appeal Determinations

Appeal Decision-maker must complete a written determination with rationale

- Determinations may include:
 - **Upholding** the original determination and sanctions (if any)
 - **Remanding** the complaint back to the DM for reconsideration or to the Investigator for further investigation
 - **Modifying** the original determination and/or sanctions (if any)
 - **Overturning** the determination (not recommended)

Recordkeeping and Documentation

Recordkeeping

- DM must compile all documentation related to the decision-making process, typically with the TIXC, including:
 - **Timeline** of decision-making process
 - **Interactions** and pre-hearing meetings with parties, other DMs, TIXC, etc.
 - **Determination** with any associated sanctions and/or remedies
 - **Rationales** for all determinations
 - **All work product** from the DM process
- TIXC is responsible for maintaining complaint files for a minimum of seven years



Decision-Maker Notes and Drafts

- Decision-making creates opportunities to generate paperwork and paper trails
- Be judicious with notetaking, annotating, draft writing, and communication
- Anticipate that the parties could see DM work product:
 - Student FERPA inspection and review rights
 - Employee rights to personnel records
 - Litigation
- TIXC should provide guidance and clear expectations about saving work product, including personal notes

Questions?

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