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Title IX Administrators

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Title IX Decision-Making for Higher Education

Training and Certification Course

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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.

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Introduction

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The primary focus of this course is necessary skill-building to successfully serve in a decision-making role in the Title IX Formal Grievance Process.

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.

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2024 Title IX Regulations Vacated

All federal funding recipients are now subject to the 2020 Title IX Regulations

- **January 9, 2025:** a federal district court in Kentucky vacated the 2024 Title IX Regulations in their entirety; other federal courts have followed suit
  - The 2024 Title IX Regulations are now vacated (null and void) and **not** in effect for **any** state, institution, or school
- Institutions must revert to **2020-compliant** policies and procedures for Title IX cases
- Ensure compliance with all 1975 and 2020 regulatory requirements

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Department of Education (ED) Updates

- Department changes include:
  - Significant staffing reductions
  - Closure of 7 of 12 OCR regional offices
  - Federal funding and oversight shifts
- Executive Order (EO): *Improving Education Outcomes by Empowering Parents, States, and Communities* (3/20/25)
  - Directed the Secretary of Education to "facilitate closure of the Department" and "return authority to the States and local communities"
- Civil Rights enforcement remains in ED's Office for Civil Rights (OCR), but other agencies (e.g., Health and Human Services (HHS) and Department of Justice (DOJ)) appear to be ramping up enforcement in certain areas
- Increased focus on Title VI

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Dear Colleague Letter (02/04/25)

ED released a Title IX-focused Dear Colleague Letter (DCL) on 02/04/25

- OCR will enforce the 2020 Regulations, not 2024
- Institutions must immediately shift open investigations to use 2020 Regulations
- OCR will enforce *Defending Women from Gender Ideology* EO
  - Quoting the EO, OCR will:
    - "'enforce all sex-protective laws to promote [the] reality' that there are 'two sexes, male and female,' and that '[t]hese sexes are not changeable and are grounded in fundamental and incontrovertible reality.'"

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Executive Order re: Sex and Gender

Defending Women from Gender Ideology Extremism and restoring Biological Truth to the Federal Government **(01/20/25)**

- Defines sex as a binary concept – man or woman
- All agencies must ensure that intimate spaces are designated by sex, not gender identity
- Limited *Bostock v. Clayton County*'s holding, says it only applies to Title VII
  - Dept of Justice issued guidance on 02/12/25 that *Bostock* does not apply to Title IX
- Prohibits federal funds and grants from promoting gender ideology
- Revokes all Biden administration EOs addressing gender identity
- Directs OCR to prioritize investigations/litigation to enforce rights and freedoms to binary nature of sex
- Does not address sexual orientation
- Courts initially paused enforcement, but the EO is now in full effect

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Executive Order re: Gender and Athletics

Keeping Men Out of Women's Sports **(02/05/25)**

- Prohibits transgender women from playing women's sports
  - Cited as necessary for "safety, fairness, dignity, and truth"
- Applies definitions from *Defending Women from Gender Ideology* EO
- Threatens withdrawal of federal funds
- Will use Title IX to enforce on a prioritized basis
- Seeks to eliminate Olympic competition based on gender identity or testosterone reduction
- Does not prohibit transgender men from participation
- Subject of active and rapid enforcement by Federal government

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Rescinded Prior Guidance

Rescinds all guidance documents inconsistent with the EO or subsequent guidance including:

- White House Toolkit on Transgender Equality
- 2024 Title IX Regulations: Pointers for Implementation
- ED Toolkit: Creating Inclusive & Nondiscriminatory School Environments for LGBTQ Students
- Supporting Intersex Students
- Supporting Transgender Youth in School
- Letter of Educators on Title IX's 49th Anniversary
- Confronting LGBTQ Harassment in Schools
- Enforcement of Title IX - Based on Sexual Orientation and Gender Identity in light of *Bostock v. Clayton County*
- AG's memorandum "Application of *Bostock v. Clayton County* to Title IX"
- EEOC's "Enforcement Guidance on Harassment in the Workplace"

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Title IX Compliance Overview

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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)

Title IX has always mandated a response to sex discrimination, however the 2020 Title IX Regulations **only** apply to sexual harassment complaints

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Essential Compliance Elements

The requirements to **Stop, Prevent,** and **Remedy** guide Title IX Coordinators (TIXCs) in their compliance work

1

STOP discriminatory conduct

2

PREVENT recurrence, on both individual and institutional levels

3

REMEDY the effects of discrimination for individuals, for the community, and on an institutional level

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Title IX Applicability

- Education program or activity in the United States
- Control over the Respondent
- Control over the context of the alleged behavior
- Applies to both student and employee complaints

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Scope

Title IX

Sex Discrimination

- Disparate Treatment
- Program Access and Equity

Retaliation

Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

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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

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Hostile Environment Sexual Harassment

- 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

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Sexual Harassment Definitions

- *Quid Pro Quo*
- Hostile Environment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

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ATIXA Model Policy Definitions

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

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Title IX Grievance Process

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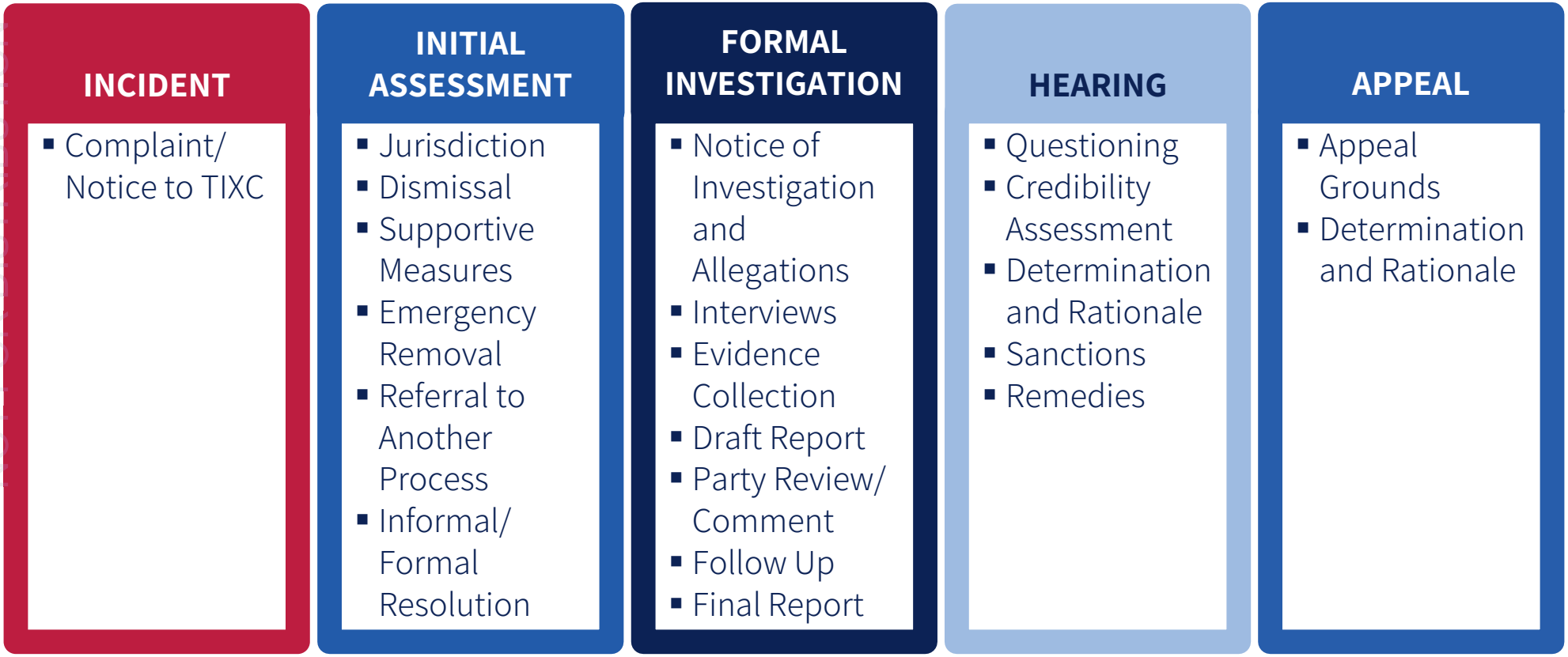
Title IX Grievance Process Overview



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Prompt and Fair Resolution

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Prompt Resolution

- Complete without undue delay
- Title IX Regulations do not define “prompt”
  - 60-90 business days is a good guide
- Grievance process may take longer than expected
  - Anticipate, mitigate, and document delays
  - Communicate with parties regarding delays

Fair Resolution

- Ensure that all parties have opportunity to fully participate in the grievance process
- All Title IX team members must operate without bias and/or conflict of interest

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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

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Formal Investigation

The G.A.S. Framework describes the work of the Investigator to prepare for decision-making

The burden to gather evidence is on the institution, not the parties

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Parties' and Advisors' Review of Report and Evidence File

- Draft investigation report and directly related evidence must:
  - Be sent simultaneously to each party and their Advisor(s) in an electronic format or hard copy
  - Include evidence upon which the Recipient does not intend to rely
  - Include exculpatory and inculpatory evidence
- Investigator must:
  - Allow 10 days for written response
  - Consider parties' feedback and incorporate where appropriate
- Investigator sends the final investigation report to the parties and Advisors for review at least 10 days prior to the hearing

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Decision-Making Under Title IX

- 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
- TIXC and Investigator may not serve as DM for the same complaint

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Decision-Maker Role and Responsibilities

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Activity: Ranking Priorities

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Decision-Maker Responsibilities

Rank the top three responsibilities as a DM

Find the truth	Provide a just result	Provide an educational process	Make a safe community
Uphold the school/district's policy	Ensure a fair process	Protect the school/district from liability	Punish wrongdoing

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Decision-Making Oversight

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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

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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
  - Evidence: how to weigh it and apply it to institutional policy by the standard of evidence
  - How to analyze credibility
  - How to make determinations, decide sanctions/remedies, and write a rationale

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Decision-Maker's Role in Ensuring Due Process

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Due Process

Title IX regulatory requirements

Fundamental fairness concepts (private institutions)

Constitutional Due Process concepts (public institutions)

Institutional policies and procedures

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Due Process in Procedure

- Consistent, thorough, and procedurally sound review of all allegations
- Substantial compliance with written policies and procedures
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws
  - Clear, written notice of the allegations
  - Opportunity to present witnesses, evidence, and be heard by DM

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Parties' Rights in the Grievance Process

- Receive detailed, written Notice of Investigation and Allegations (NOIA)
  - Include information about the Formal Grievance Process
  - Provide sufficient time to prepare for any initial interview
- Be accompanied by Advisor of their choice
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Present witnesses, including expert witnesses
- Present inculpatory and exculpatory evidence
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare

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Parties' Rights in the Grievance Process, Cont.

- Inspect and review directly related evidence and investigation report
- Opportunity to propose questions for other parties and witnesses
  - To Investigator(s) during the investigation
  - Through Advisor during a live hearing
- Opportunity to appeal the determination
- Reasonable expectation of privacy
- Respondent presumed not responsible until a determination is made
- Written outcome notification

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Notice of Investigation and Allegations

- The Notice of Investigation and Allegations (NOIA) is critical to fundamental fairness and due process
- The NOIA lists the rights of the parties in the grievance process, in addition to:
  - A description of the alleged conduct and relevant policy provisions
  - Known details of allegations, such as identities of the parties
  - The date and location of the alleged conduct
  - Information about grievance procedures
  - Available Informal Resolution (IR) options
  - Presumption of non-responsibility
  - Prohibition on retaliation and false statements
- May need to update NOIA during process

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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

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Identifying and Preventing Conflicts of Interest or Bias

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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 with 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

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What's the Difference?

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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

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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

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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

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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 gap
- Review rationale as part of all panel members' responsibilities
- Ensure TIXC reviews the rationale

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Decision-Making Phase: Skills and Practical Application

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Decision-Making Overview

INCIDENT	INITIAL ASSESSMENT	FORMAL INVESTIGATION	HEARING	APPEAL
▪ Complaint/ Notice to TIXC	▪ Jurisdiction ▪ Dismissal ▪ Supportive Measures ▪ Emergency Removal ▪ Referral to Another Process ▪ Informal/ Formal Resolution	▪ Notice of Investigation and Allegations ▪ Interviews ▪ Evidence Collection ▪ Draft Report ▪ Party Review/ Comment ▪ Follow Up ▪ Final Report	▪ Questioning ▪ Credibility Assessment ▪ Determination and Rationale ▪ Sanctions ▪ Remedies	▪ Appeal Grounds ▪ Determination and Rationale

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Skills: Working with Advisors

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Working with Advisors

- Parties have the right to be accompanied by an Advisor of their choice
  - Could be an attorney, but need not be
- Parties may request that the institution provide an Advisor for hearing
  - Institution may choose to appoint earlier in process
- At the parties' request, an Advisor may participate in cross examination, even if the party does not attend
- DM may establish ground rules for participation if they do not interfere with any party rights; must be for both equally
- Set and communicate reasonable expectations for Advisor participation

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Skills: Materials Review

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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

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Review Policy Elements and Procedures

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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

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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

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Skills: Understanding Evidence

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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

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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

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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?

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Skills: Determining Relevance

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Relevance

- 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
- In the decision-making phase parties may dispute the Investigator's initial relevance determinations

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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

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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

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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

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Other Evidence Considerations

- No restriction on parties discussing case 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

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Skills: Credibility Assessment

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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

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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

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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?

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Skills: Analyzing Consent Evidence using the Consent Construct

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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

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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?

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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)

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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 a disability or health condition

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Evidence of Incapacity: Potential Context Clues

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

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

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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

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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

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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

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Skills: Weighing and Analyzing Evidence

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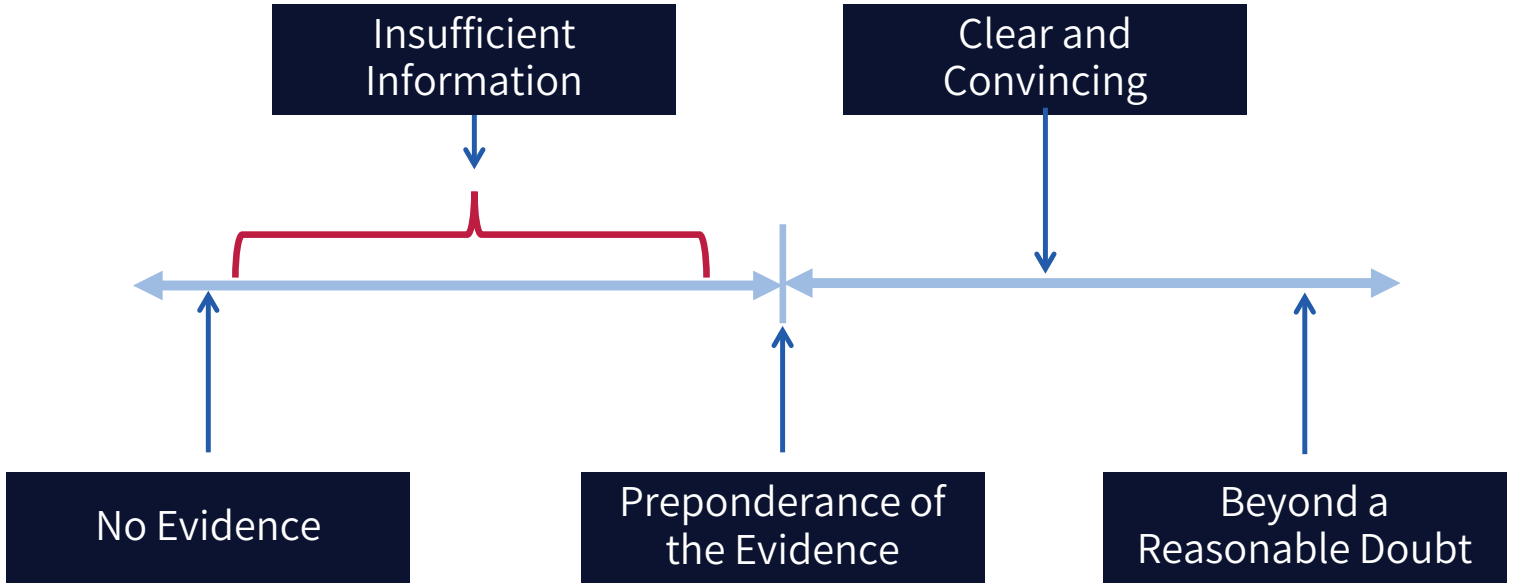
Standard of Evidence



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

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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

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DM Questioning Goals

- May ask questions to ensure a **comprehensive** understanding of information and evidence gathered during the investigation:
  - Including asking additional questions about relevant evidence regarding what happened during the incident(s)
  - DM does not have to ask questions but must have the opportunity to do so
    - If necessary to assess credibility, DM should ask
- **DM should use questions to:**
  - Resolve conflicting information as it relates to the policy elements
  - Elicit details, eliminate vagueness, fill in gaps

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New Witnesses or Information

- Parties should provide all evidence to the Investigator prior to the completion of the Final Investigation Report
- When new relevant evidence or witnesses are presented during the live hearing, they should be admitted to the record, if:
  - All parties and DM assent to inclusion without remanding the Formal Complaint back to the Investigator,
  - Evidence is not duplicative of evidence already included, **and**
    - New evidence was either not reasonably available prior to the conclusion of the Final Investigation Report, **or**
    - The failure to provide it in a timely manner was not the result of bad faith by the parties, witnesses, or others

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New Witnesses or Information, Cont.

- If the criteria are not met, but the evidence is materially relevant, the DM has discretion to:
  - Delay the hearing
  - Remand the Formal Complaint back to the Investigator for further investigation or analysis
  - Allow the parties time to review and comment on the new evidence
- If the evidence is deemed not relevant, the DM may proceed with the hearing without allowing the new evidence

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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,
  - On the basis of sex,
  - 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

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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

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Step Two: Applying Facts to Policy, Cont

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 her door and yelled" is an exaggeration

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Skills: Making Findings, the Final Determination, and Sanctioning

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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

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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 the evidence has been considered

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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

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Sanctions and Remedies

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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

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Determining Sanctions

- Primary purpose should 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

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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

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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

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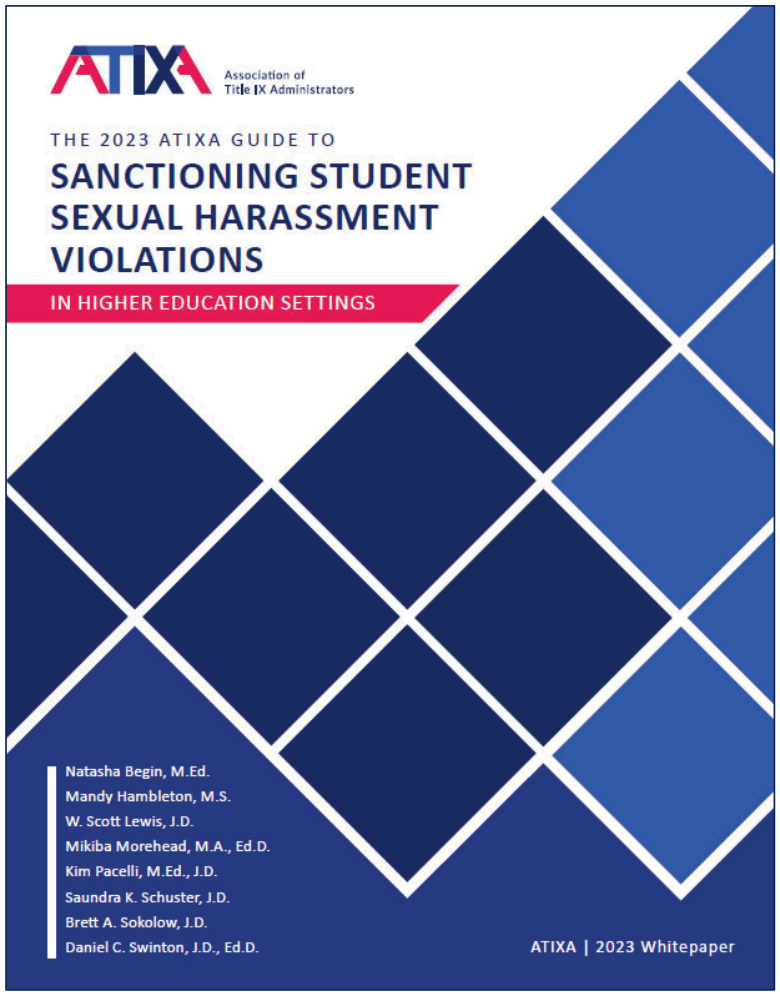
Sanctioning Pitfalls

- 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



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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

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Appeals

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Appeal Overview

INCIDENT	INITIAL ASSESSMENT	FORMAL INVESTIGATION	HEARING	APPEAL
▪ Complaint/ Notice to TIXC	▪ Jurisdiction ▪ Dismissal ▪ Supportive Measures ▪ Emergency Removal ▪ Referral to Another Process ▪ Informal/ Formal Resolution	▪ Notice of Investigation and Allegations ▪ Interviews ▪ Evidence Collection ▪ Draft Report ▪ Party Review/ Comment ▪ Follow Up ▪ Final Report	▪ Questioning ▪ Credibility Assessment ▪ Determination and Rationale ▪ Sanctions ▪ Remedies	▪ Appeal Grounds ▪ Determination and Rationale

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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

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Appeal Grounds

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, DM that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

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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

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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)

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Recordkeeping and Documentation

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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

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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

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Questions?

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