Investigation Foundations for Higher Education
Training and Certification Course
Please log in to your ATIXA Event Lobby each day to access the course slides, supplemental materials, and to log your attendance.

The ATIXA Event Lobby can be accessed by the QR code or visiting [www.atixa.org/atixa-event-lobby](http://www.atixa.org/atixa-event-lobby) in your internet browser.

Links for any applicable course evaluations and learning assessments are also provided in the ATIXA Event Lobby. You will be asked to enter your registration email to access the Event Lobby.

If you have not registered for this course, an event will not show on your Lobby. Please email events@atixa.org or engage the ATIXA website chat app to inquire ASAP.
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 sex- and gender-based harassment, discrimination, and 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.
Education Civil Rights Overview
Education Civil Rights Laws

Title VI of the Civil Rights Act
Title VII of the Civil Rights Act
Title IX of the Education Amendments of 1972
Americans with Disabilities Act
Section 504 of the Rehabilitation Act
Section 304 of the Violence Against Women Act
Civil Rights Equity

- Civil rights laws are equity laws
- Equity refers to the understanding that not all individuals have access to the same resources and opportunities
  - Equity focuses on providing support and resources to reduce disparities in access to the education program
  - Civil rights laws seek to remedy the inequities discrimination and harassment create
Essential Compliance Elements

The requirement to **Stop, Prevent, and Remedy** guides University response in its equity and compliance.

1. **STOP** discriminatory conduct
2. **PREVENT** recurrence, on both individual and University levels
3. **REMEDY** the effects of discrimination, for both individual and community
Act reasonably to **STOP** discrimination
Act reasonably to **PREVENT** recurrence
Act equitably to **REMEDY** effects

**PROCESS**

**INVESTIGATION**

**REMEDIES**

**THOROUGH**

**PROMPT**

**Act reasonably to STOP discrimination**

**RELIABLE**

**EFFECTIVE**

**Act reasonably to PREVENT recurrence**

**IMPARTIAL**

**EQUITABLE**

**Act equitably to REMEDY effects**
Discrimination

- Inequitable treatment on the basis of a protected characteristic.
- Discrimination often takes the form of decisions made regarding an individual or individuals.
  - Admissions/employment
  - Benefits/services
  - Participation
Harassment

- Unwelcome conduct on the basis of a protected characteristic.
- Harassment often takes the form of interpersonal conduct.
  - Hostile environment
  - Violent
  - Humiliating
  - Abusive
Retaliation

Retaliation means intimidation, threats, coercion, or discrimination against any person by a(n):

- Student, employee, University, or person authorized by the University to provide some sort of aid, benefit, or service,
- For the purpose of interfering with any civil right or
  - Because the person has:
    - Made a report or complaint,
    - Testified, assisted, or participated or refused to participate in any civil rights process.
Title IX Overview
Who is the Title IX Coordinator (TIXC)?
- Role mandated by Title IX regulations
- Oversees institutional Title IX compliance
- Responsibilities fall into two categories:
  - Responding to reports or complaints of sexual harassment and sex discrimination
  - Leading efforts to ensure gender equity across the entire institution
Title IX Scope

Sex Discrimination
- Sex/Gender Discrimination
- Program Inequity

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

Retaliation
Title IX Scope

- Education program or activity
- Control over the Respondent
- Control over the context of the behavior
- Applies to both student and employee complaints
Sexual Harassment Definitions

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

- 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
Civil Rights Investigations Overview
Civil Rights Investigations Overview

- Investigations focus on gathering all available and relevant information.
- The institution is responsible for gathering evidence—not the parties.
Bias and Conflicts of Interest

- Investigators must not have a conflict of interest or bias for or against the following:
  - Complainants
  - Respondents
  - Specific individuals involved with a complaint
  - Subject matter or details of the complaint itself
- Remember, Investigators have no “side” — their investment is in the integrity of the process
ATIXA’S Recommended Formal Grievance Process
Formal Grievance Process Overview

1. INCIDENT
   • Complaint/Notice to TIXC

2. INITIAL ASSESSMENT
   • 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. DECISION-MAKING
   • Questioning
   • Credibility Assessment
   • Determination & Rationale
   • Sanctions
   • Remedies

5. APPEAL
   • Appeal Grounds
   • Determination & Rationale
Title IX Grievance Process Overview

- Title IX investigations may examine allegations of sexual harassment, sex discrimination, or program inequity
- ATIXA’s recommended investigation process is comprised of 10 steps over three phases:
  - Pre-investigation
  - Investigation
  - Post-investigation
- Not all phases involve the Investigator
- TIXC is responsible for Title IX Investigator oversight and supervision
Investigation Oversight and Supervision

TIXC responsibilities include:

- Appointing Investigators and ensuring training
- Helping Investigators to strategize
- Ensuring timeline compliance
- Overseeing recordkeeping
- Serving as primary point of contact for parties
Title IX Grievance Process Overview

Prompt Resolution
- Complete without undue delay
- Title IX regulations do not define “prompt”
  - 60 business days is a good guide
  - Investigations vary widely in complexity and pacing
- Grievance process may take longer than expected
  - Anticipate, mitigate, and document delays
  - Communicate with parties regarding delays

Equitable Resolution
- Treat all parties equitably
- Ensure that all parties have opportunity to fully participate
Title IX Grievance Process Overview

Rights of the parties during the grievance process:

▪ Present witnesses

▪ Present inculpatory and exculpatory evidence

▪ Discuss the allegations under investigation without restriction

▪ Gather and present relevant evidence without restriction

▪ Be accompanied by Advisor of their choice

▪ Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare

▪ Inspect and review directly related evidence and investigation report
Investigation Overview

10 Steps of Investigations:
1. Receive Notice/Complaint
2. Initial Assessment & 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 & Evidence
10. Final Investigation Report

© 2023 Association of Title IX Administrators
Pre-Investigation
Pre-Investigation Steps

1. Notice/Complaint
2. Initial Assessment & Jurisdiction Determination
3. Determine Basis For Investigation
Step 1: Notice/Complaint

- Institution receives a report, knowledge, or complaint of alleged harassment or discrimination
- TIXC is point person to receive reports and complaints, including referrals from mandated reporters
- **Report**: Any information that indicates a potential policy violation
- **Formal Complaint**: A written request for the institution to initiate its Formal Grievance Process
  - Signed by the Complainant
  - Could be signed by the TIXC
Step 2: Initial Assessment & Jurisdiction Determination

TIXC or designee will perform several steps including:

- Outreach and Intake to potential Complainant
- Jurisdictional Assessment
- Signing a Formal Complaint (if applicable)
  - Pattern, Predation, Threat, Violence, Weapons, Minors, Employee Respondent, Complainant not P/ATP
- Supportive Measures
- Emergency Removal or Administrative Leave (if applicable)
- Dismissal (if applicable)
- Pursuing Informal Resolution (if applicable)
Title IX Jurisdictional Assessment

- TIXC is responsible for conducting an initial assessment to determine Title IX jurisdiction:
  - Does the alleged conduct, if proven, meet one of the definitions of Title IX sexual harassment or sex/gender discrimination?
  - Who is the Complainant?
  - Who is the Respondent?
  - Does the institution have control over the context of the alleged behavior?
- If an allegation falls outside Title IX jurisdiction, the institution may proceed under another policy (i.e., student conduct)
Informal Resolution

- Title IX permits voluntary Informal Resolution (IR)
- Not available for employee-on-student sexual harassment
- IR is not defined by regulations
- Available at TIXC’s discretion, at any time prior to a final determination
- Investigators should consult with TIXC to determine whether an investigation will proceed while IR is pursued
- IR facilitators must receive training, be free of bias or conflicts of interest
  - ATIXA recommends IR Facilitators not serve in any other roles for the same complaint
Step 3: Determine a Basis for Investigation

There are three bases for civil rights investigations:

- **Incident:** a specific incident or period
  - May involve one or multiple alleged violations
    - Sexual Harassment or Retaliation
    - Disparate Treatment or Disparate Impact

- **Pattern:** repetitive or similar behaviors or targets by the same Respondent over a period
  - Tend to involve multiple Complainants

- **Climate/Culture:** discriminatory policies, processes, and environments
  - 1975 regulatory framework
  - May have no identifiable Respondent
Investigation Scope

- TIXC determines the scope of the investigation
- **Scope** refers to the allegations, timeframes, and parties subject to the investigation
- Considerations:
  - Allegations outside of jurisdiction
  - Individual vs. Group
  - Multiple Complainants or Respondents
  - Counter-complaints
- May need to adjust scope during process
Investigation
Investigation

1. INCIDENT
   - Complaint/Notice to TIXC

2. INITIAL ASSESSMENT
   - 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. DECISION-MAKING
   - Questioning
   - Credibility Assessment
   - Determination & Rationale
   - Sanctions
   - Remedies

5. APPEAL
   - Appeal Grounds
   - Determination & Rationale
Investigation Steps

1. Receive Notice/Complaint
2. Initial Assessment & 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 Draft Report & Evidence Review
10. Final Investigation Report
Step 4: Notice of Investigation and Allegations

- The Notice of Investigation and Allegations (NOIA) letter is sent to all parties simultaneously.
- The NOIA includes:
  - Notice of the allegations and known details, such as identities or the parties
  - A description of the alleged conduct and relevant policy provisions
  - The date and location of the alleged conduct
  - Information about grievance procedures
  - Any Informal Resolution options
Step 4: Notice of Investigation and Allegations

The NOIA must outline the parties’ rights in the Formal Grievance Process:

- To present witnesses
- To present inculpatory and exculpatory evidence
- To freely discuss the allegations
- To be accompanied by an Advisor of their choice
- To receive written notice of all details and purpose, with sufficient time to prepare, of any investigation interview or other meeting they are requested to attend
- To review all relevant and directly related evidence before the investigation report is finalized
Step 4: Notice of Investigation and Allegations

The NOIA must also include:

- Presumption that Respondent is not responsible
- Include or reference current policy and procedures
- A statement that retaliation is not permitted
- Reference to any code of conduct provisions (student or employee) regarding consequences for knowingly providing false statements
- The NOIA must be updated if additional allegations arise or change during the investigation
Recordkeeping
Recordkeeping

- Investigator is responsible for developing and maintaining an **Investigation File** through the duration of the investigation

- Investigation File includes:
  - Copies of the policies and procedures in place at the time of the incident(s) and at the time of the investigation
  - Original NOIA and any subsequent NOIA updates
  - File for each party and witness
    - Approved interview transcripts
    - Associated evidence (e.g., screenshots, written statements)
    - Correspondence with the Investigator(s)
Recordkeeping

- Investigation File includes:
  - Collected evidence and evidence log
  - Background information (education, employment, etc.)
  - Witness flowcharts
  - Contact log
  - Investigator notes
  - Timelines for incident and investigation
  - Investigation Report

- Investigation File becomes part of the **Comprehensive Complaint File**

- Title IX-related records must be maintained for a minimum of **seven years**
Contact Log

- All forms of contact with any party, witness, or third party regarding the complaint or associated needs
- Date, time, method of contact, topics discussed, determinations, and any agreed upon action steps for each interaction related to the Complaint
# Contact Log Example

## Contact Log

Staff Member: Alicia Harrison  
Date(s) for Communication Log: January 2023 to March 2023

### Communications Log

<table>
<thead>
<tr>
<th>DATE</th>
<th>TIME</th>
<th>NAME OF CONTACT</th>
<th>TYPE OF COMMUNICATION (EMAIL, PHONE, IN PERSON)</th>
<th>COMMUNICATION NOTES</th>
<th>RESOLUTION PROVIDED AND FOLLOW-UP NEEDED</th>
</tr>
</thead>
<tbody>
<tr>
<td>01/25/2023</td>
<td>1:00pm</td>
<td>Sam Smith</td>
<td>Phone</td>
<td>Discussed getting emails from IT</td>
<td>Received emails from IT on 01/25/2023</td>
</tr>
<tr>
<td>01/27/2023</td>
<td>2:00pm</td>
<td>Sally Harris</td>
<td>Email</td>
<td>Sent an email to Complainant to schedule interview.</td>
<td>Scheduled interview with Complainant for 01/29/2023.</td>
</tr>
<tr>
<td>01/29/2023</td>
<td>3:00pm</td>
<td>Sally Harris</td>
<td>In Person</td>
<td>Investigation Interview</td>
<td>Interviewed Complainant – send transcript to Complainant for verification.</td>
</tr>
</tbody>
</table>
Evidence Log

- All evidence gathered with:
  - Description
  - Date of receipt
  - Source,
  - Method of receipt

- Any evidence verification/authentication information
# Evidence Log Example

**EVIDENCE LOG**

Staff Member: Alicia Harrison  
Date(s) for Communication Log: January 2023 to March 2023

<table>
<thead>
<tr>
<th>DATE OF RECEIPT</th>
<th>SOURCE</th>
<th>METHOD OF RECEIPT</th>
<th>TYPE</th>
<th>DESCRIPTION</th>
<th>AUTHENTICATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>01/25/2023</td>
<td>Sam Smith</td>
<td>Email</td>
<td>Security video footage; Thumb drive</td>
<td>Elevator video footage from 12/10/22 9:10 pm to 10:10 pm</td>
<td>Closed circuit from Public Safety</td>
</tr>
<tr>
<td>01/27/2023</td>
<td>Sally Harris</td>
<td>Social Media Screenshot</td>
<td>Social media screenshot</td>
<td>Post made from 12/10/22 by Respondent at 9:22 pm</td>
<td></td>
</tr>
<tr>
<td>01/29/2023</td>
<td>Sally Harris</td>
<td>In Person</td>
<td>Call record</td>
<td>Phone call log from Complainant’s phone carrier</td>
<td>Copy of the phone record from the Complainant’s record</td>
</tr>
</tbody>
</table>
Investigation Timeline

- Investigators begin documenting an investigation timeline upon assignment of the formal complaint

- The comprehensive timeline should include:
  - Dates of all significant investigation steps
  - Dates of all meetings and interviews
  - Evidence collection and review periods
  - Report writing and review periods
Investigation Strategy and Interviews
Step 5: Establish Investigation Strategy

Investigator(s) consult with TIXC to strategize and plan the investigation:
- Elements of the specific policy provision(s) alleged to have been violated
- Challenges with the type of complaint and the parties involved
- Preliminary undisputed and disputed facts and their significance
- Initial witnesses and interview order
- Other types of possible evidence and the plan to acquire such evidence
- Anticipated obstacles and obstructions
- A working timeline for the investigation
Step 5: Establish Investigation Strategy

- Planning considerations:
  - Process delays
  - Coordination with law enforcement
  - Interview sequencing
  - Evidence collection
  - Anticipate obstacles/obstructions
  - Counter-complaints
  - Sharing information with parties and witnesses during the investigation
Process Delays

- Investigations must be completed within a reasonably prompt timeframe; avoiding undue delays
  - Investigations must proceed during academic breaks
  - Investigators should consult with TIXC if circumstances cause more than a short process delay
- Provide parties with written notice and rationale for any delays
- Parties may request reasonable extensions on a case-by-case basis
  - Grant or deny extensions equitably
  - Extensions must be documented
Coordinating with Law Enforcement

- Law enforcement may also be investigating one or more of the allegations in the Title IX investigation
- Law enforcement may request that the institution pause or stop its investigation; however, the Title IX investigation cannot be unreasonably delayed
- Pausing for a reasonable time to permit law enforcement to gather evidence is permissible
- Criminal investigation cannot substitute for the Title IX investigation
Interview Sequencing

- Conduct interviews as promptly as possible to capture fresh recollections (but not before NOIA)
- Identify an initial witness list and solicit additional witness suggestions from parties and other witnesses
- Investigator retains discretion to determine whether a suggested witness has relevant information
  - When unsure, err on the side of conducting the interview
Evidence Collection

- Active process to gather evidence
- Identify potential sources of information
- Document efforts to gather, even when not successful
Respondents may file a **counter-complaint** of sexual harassment or sex discrimination against the Complainant if there is Complainant conduct that they wish to report.

Reporting other alleged misconduct (e.g., drug dealing, academic misconduct) is not considered a counter complaint.

May occur prior to, during, or after the investigation of the original complaint.
Information Sharing

- Information sharing practices must balance transparency, privacy, and strategy, as well as the parties’ rights
- Witnesses may have limited or no knowledge about the complaint itself
- Witnesses may or may not know the parties or other witnesses
- Some information sharing will be necessary
- The parties will have access to all relevant and directly related information at the conclusion of the investigation
Formal Investigation
Step 6: Formal Comprehensive Investigation

- Thorough
- Reliable
- Impartial
- Prompt
- Fair
- Equitable
Party and Witness Investigation Concerns

Confidentiality vs. Privilege vs. Privacy

1. **CONFIDENTIALITY**
   Those who receive reports from students (and sometimes employees) and need not report to the TIXC

2. **PRIVILEGE**
   A legal obligation, such as an attorney giving advice in an attorney/client relationship or clergy providing pastoral advice

3. **PRIVACY**
   Only disclosing the allegations to those who need to know, but cannot guarantee confidentiality
Working with Advisors

- Parties have the right to be accompanied by an Advisor of their choice
- “Of choice” truly means anyone
- Investigators may establish participation ground rules, if applied equitably
- Parties may request that the institution provide an Advisor for hearing
  - Institutions may choose to appoint earlier in process
- Advisors may ask questions of the other party and any witnesses on behalf of the party they advise during live hearings
Pre-Interview Planning

- Before scheduling interviews, consider:
  - Interview location
  - Interview scheduling constraints
  - Interview participants
  - Interview preparation

- Must provide written notification to parties with sufficient time to prepare
  - Date, time, location, participants, and purpose

- Cannot mandate participation in interviews

- It can be beneficial to conduct interviews in person, when possible, but videoconferences are common

- Investigator should always prepare initial questions in advance, but remain flexible
Building Rapport

- GOAL: Interviewee trusts that you are neutral and impartial
- Investigators can help set the tone for a productive interview
- Maintain professionalism
- Provide transparency about expectations and the process
- Balance neutrality with compassionate approach
- Ask questions in a straightforward, non-judgmental manner
- Follow up in a timely manner, if necessary
- Use a trauma-informed approach to working with all parties and witnesses
Trauma-Informed Practices

- **Trauma** is exposure to an event or events that create a real or perceived threat to life, safety, sense of well-being and bodily integrity
  - Acute, chronic, or complex
  - Neurological, biological, psychological, social, and emotional impacts
  - Developmental, intergenerational, historical, secondary, vicarious, or collective
  - Responses to trauma can vary, depending on a variety of factors
- Provide all persons with support that makes TIX services and processes accessible, including those who may have experienced trauma
Impacts of Trauma

Emotional

Physical

Worldview

Behavioral
Trauma-Informed Practices

- Key principles of trauma-informed practice:
  - Safety
  - Trustworthiness and transparency
  - Collaboration and mutuality
  - Empowerment, voice, and choice
  - Cultural, historical, and gender issues

- ATIXA Position Statement: Application of trauma-informed practices in our field has gotten way ahead of the actual science
  - ATIXA Recommendation: Incorporate trauma-informed investigation and interviewing methods without compromising gathering credible, relevant evidence
  - Trauma-informed practices should not significantly influence evidence evaluation
“The Spiel”

- Establishing rapport creates a conducive interview environment
- “The Spiel” helps an interviewee to understand the Investigator’s role and the process

- Investigator introduction and role
- Purpose of investigation
- Role of the Advisor
- Interview questions
- Notetaking practices
- Commitment to privacy

- Witness-specific information
- Post-interview steps
- Interview expectations
- Relevant policies
- Acknowledge difficulty
- Retaliation reminder
Interviewing Skills

- Investigators build and improve skills over time and with practice:
  - Appropriate questioning
  - Body language and non-verbal communication
  - Active listening
  - Seeking clarification
  - Identifying gaps
Questioning Considerations

- An interview is a conversation designed to elicit information in a non-accusatory manner.
- Start with broad questions, but focus on timelines and details as well.
- Explore all gaps in information; answer all questions.
- Ask purposeful questions:
  - What do I need to know?
  - Why do I need to know it?
- Use policy definitions to inform questions.
- Avoid unnecessary repetition or traumatic re-triggering.
- Choose or blend effective questioning strategies/methodologies.
Questioning Tips

- Listen carefully
- Seek to clarify terms that have multiple meanings
  - “We hooked up” or “She was acting weird”
- Avoid:
  - Accusatory or argumentative questions or tone
  - Confusing questions
  - Blaming questions
  - “Double-barreled” questions
  - Evaluative responses
  - Sanitizing language (use the terms used by the interviewee)
Consent Construct: Three Questions

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

2. Was the Complainant **incapacitated**?
   a. If so, did the Respondent know, or
   b. Should the Respondent have known that the Complainant was incapacitated

3. 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?
Interview Challenges: Resistance, Reluctance, and Lying

- Offer a reminder of Investigator’s role as a neutral fact-gatherer
- Maintain rapport and avoid accusation
  - “Help me understand…”
  - “I think I’m missing something…”
  - “Can you tell me more about that?”
- Use language mirroring
- Allow opportunity for interviewee to restate
- Review retaliation, amnesty policies, expectation of truthfulness
Final Questions for Interviews

- “Is there anyone else that you think we should talk to?”
- “Are there any questions you expected that we didn’t ask?”
- “Is there anything else you think we need to know?”
- FOR THE PARTIES: “Are there any questions that you would like us to ask any other witness or the other party(ies)?”
- Document questions and answers provided
- Keep a running list of the questions suggested/requested by each party
  - Whether and when the question was asked
  - Rationale for not asking any question(s) based on irrelevance or impermissible evidence
Interview Documentation and Review

- Maintain interview transcripts or written summaries
  - **Transcript**: word-for-word documentation of a recorded interview
  - **Summary**: Investigator’s summation all information gathered during entire interview (may be several paragraphs or pages, depending on interview length)
- Recording is an increasingly common practice
- Parties and witnesses should be invited to review their interview transcript/summary
  - Verify accuracy, clarify where needed, and provide additional information
Understanding Evidence

- Duty to collect and objectively evaluate all evidence that is relevant to the complaint

- **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
  - Inculpatory and exculpatory evidence

- **Directly related evidence** is connected to the complaint, but is neither inculpatory nor exculpatory
Standard of Evidence

- Two options:
  - Preponderance of the evidence
  - Clear and convincing evidence
- Standard of evidence must be consistent for all formal complaints of sexual harassment in all policies
- Must apply the same standard for complaints against students and employees, including faculty
- Investigator must be familiar with the standard in institutional policy
- ATIXA recommends the preponderance of the evidence standard
Preponderance of the Evidence is the current industry standard.
# Types of Evidence

<table>
<thead>
<tr>
<th>Type of Evidence</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documentary Evidence</td>
<td>Supportive writings or documents</td>
</tr>
<tr>
<td>Electronic Evidence</td>
<td>Photos, text messages, and videos</td>
</tr>
<tr>
<td>Real Evidence</td>
<td>Physical objects</td>
</tr>
<tr>
<td>Direct or Testimonial Evidence</td>
<td>Personal observation or experience</td>
</tr>
<tr>
<td>Circumstantial Evidence</td>
<td>Not eyewitness, but compelling</td>
</tr>
<tr>
<td>Hearsay Evidence</td>
<td>Statement from outside the interview presented as truthful</td>
</tr>
<tr>
<td>Character Evidence</td>
<td>Evidence of a person’s character or character traits</td>
</tr>
</tbody>
</table>
Specific Evidence Issues: Privileged and Medical Information

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

▪ Evidence protected under a legally recognized privilege

▪ Records made or maintained by:
  ▪ Physician
  ▪ Psychiatrist
  ▪ Psychologist
Specific Evidence Issues: Rape Shield Provision

- 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
  - If offered to prove consent with respect to prior consent with the Respondent.
- Even if admitted/introduced by the Complainant.
- Does not apply to Respondent’s prior sexual behavior or predisposition.
Credibility

- **Credibility** is largely a function of corroboration and consistency

- **Credibility Assessment** involves evaluating the extent to which evidence is believable and reliable (accurate or truthful)
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies

- **Note:** memory errors alone do not necessarily diminish witness credibility, nor does some evasion
Credibility Assessment

Consider the following elements to establish credibility:

- **Corroborating Evidence**: evidence that can be verified by an independent and objective individual

- **Inherent Plausibility**: information that is believable on its face

- **Motive to Falsify**

- Additional elements that investigators should consider, but are commonly less probative are:
  - **Past Record**
  - **Demeanor**
Evidence Authentication

- Not all evidence has the same degree of credibility
  - Less credible evidence may be less reliable evidence
- Investigator should seek the highest quality evidence available
- Investigators should try to authenticate all evidence provided
  - Check for possible fabrication of evidence
  - Corroborate information between witnesses
  - Try to obtain complete, rather than partial, records when possible
Step 7: Draft Investigation Report

- Title IX requires a written investigation report that fairly summarizes all relevant evidence and the investigation.
- ATIXA recommends sharing draft report in Step 8 when the parties are entitled to review the evidence.

G.A.S. Framework

- **Gather** Evidence
- **Assess** Credibility and Evidence
- **Synthesize** Areas of Dispute and Agreement
Investigation Report Elements

Comprehensive investigation report typically includes:

- Complaint and party information
- Jurisdiction
- Scope
- Applicable policies
- Investigation timeline
- Summary of evidence
- Analysis
  - Credibility Assessment
  - Disputed and non-disputed facts
- Conclusion
- Appendices
Investigation Report Steps

Draft Investigation Report

TIXC/Legal Counsel Review Draft Investigation Report

Parties and Advisors Review Draft Investigation Report

Final Investigation Report
Step 8: Report Review

- TIXC and/or legal counsel reviews draft investigation report prior to providing it to the parties
- Reviewer(s) identifies gaps, logic leaps, typographical errors, and substantive issues
- Reviewer(s) should not rewrite any section of the report but can ask questions and provide suggestions
- Investigator should review and incorporate helpful edits and suggestions
- Institutions may elect to complete this review after the parties’ review or have two separate TIXC/legal counsel reviews
Step 9: Parties and Advisors Review Draft Investigation Report

- Draft report and directly related evidence must:
  - Be sent to each party and Advisor 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
    - Document rationale for not making recommended changes as appropriate
Step 10: Final Investigation Report

- Institutions determine the final investigation report review process
  - Once finalized, the investigation report is distributed simultaneously to the parties and their Advisors
  - The Title IX office provides the report to the Decision-maker(s)
- Parties and Advisors will be sent the final investigation report for review at least 10 days prior to the hearing
Decision-Maker Mission and Role
Decision-Making Oversight and Supervision

The Title IX Coordinator (TIXC) responsibilities include:

- Appointing Decision-makers (DMs)
- Properly training DMs or ensuring they are trained
- Serving as a resource to DMs on process and procedures
- Ensuring timeline compliance
- Reviewing DM work to ensure thoroughness
- Overseeing recordkeeping
- Serving as primary point of contact for parties
Decision-Maker Role and Responsibilities

- 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-Maker Role and Responsibilities

- 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-Maker Training Requirements

Many Title IX training requirements are covered in this course:

- Definition of sexual harassment
- Scope of the institution’s education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Issues of relevance for investigations and hearings

Required training that is not covered in this course:

- Use of any technology to be used at a hearing
Decision-Maker Role and Responsibilities

- Decision-makers 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 you are addressing an alleged incident(s), a pattern, or a culture/climate complaint, and what findings are necessary based on that footing
  - Best practices for asking good questions
  - Decision-making procedures and management
  - Evidence and 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
Decision-Maker Skill Sets

Decision-makers need to be an organized manager and multi-tasker with:

- Effective questioning skills
- Strong writing skills
- Subject matter expertise
- Analytical skills
Analyzing Consent
Definitions: Consent

- **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**: Was force used by the Respondent 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

**Note**: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant’s incapacity

3. **CONSENT**: What clear words or actions by Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?
Force

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

Physical Violence:
• Hitting, restraint, pushing, kicking, etc.

Threats:
• Objective and subjective analysis of the viability of the threat (true threat if public)

Intimidation:
• Implied threat that menaces and/or causes reasonable fear

Coercion:
• Unreasonable amount of pressure for sexual access (isolation, frequency, intensity, and duration)
Incacity

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
Incapacity

- What was the reason for incapacity?
  - Alcohol or other drugs (prescription or non-prescription)
  - Mental/cognitive impairment
  - Injury
  - Asleep or unconscious
- Blackouts are frequent issues
  - Blackout ≠ incapacitation (automatically)
    - Partial blackout must be assessed as well
  - Memory absent, but verbal and motor skills may still function
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 or 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 (reasonable person) = policy violation.
  - The Respondent’s own intoxication cannot be used as a defense.
Prior Knowledge Construct

- Did the Respondent previously know the Complainant?
  - If so, was the Complainant acting differently than previous similar situations?
- Evaluate what, if anything, the Respondent observed the Complainant consuming
  - Use a timeline analysis
- Determine if the Respondent provided any substances to the Complainant
Consent Analysis

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

- 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
Conflicts of Interest and Bias
Conflicts of Interest and Bias

- Decision-makers must **not have a conflict of interest or bias** for or against the following:
  - Complainants, generally
  - Respondents, generally
  - The 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
What’s the Difference?

**Conflict of Interest**
- Conflicts of interest refer 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
  - Ex: A residence life professional staff member deciding a complaint filed by a current Resident Assistant on their building staff

**Bias**
- 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
- Ex: A faculty member 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 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
  - Policy may have a recusal provision
Bias

- Bias can be a significant problem for DMs
  - Explicit or implicit
  - The often implicit and unconscious nature can lead to unexpected outcomes
- Formed from stereotypes, societal norms, cultural experiences, expectations of the people around you
- 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 it and mitigate its effects
# Manifestations of Bias

<table>
<thead>
<tr>
<th>Pre-determined outcome</th>
<th>Political bias</th>
<th>Intervention from senior-level admin</th>
<th>Group think</th>
</tr>
</thead>
<tbody>
<tr>
<td>Improper application of policies</td>
<td>Confirmation bias</td>
<td>Implicit bias</td>
<td>Animus</td>
</tr>
<tr>
<td>Attribution Bias</td>
<td>Appearance Bias</td>
<td>Affinity Bias</td>
<td>Halo/Horn Effect</td>
</tr>
</tbody>
</table>
Identifying and Correcting Bias

- Strategies to mitigate bias:
  - Hearing panels vs. individual DM
  - Panel members review each other’s questions
  - Compliance with institutional policy and procedure
  - Evidence mapping to prevent evidentiary gap filling
  - All panel members review the rationale
  - Be conscious of your bias
    - Counteract them and ensure they do not influence your decision
Due Process
Due Process

- Title IX regulatory requirements
- Fundamental fairness concepts (private institutions)
  Constitutional Due Process concepts (public institutions)
- Institutional policies and procedures
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 and evidence and be heard by the Decision-maker
Due Process in Decision-Making

A decision must:

- Be appropriately impartial and fair (both finding and sanction)
- Be neither arbitrary nor capricious
- Be based on a fundamentally fair rule or policy
- Be made in good faith (i.e., without malice, ill-will, conflict, or bias)
- Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence
Due Process in the Grievance Process

Rights of the parties during the Title IX grievance process:

▪ Present witnesses, including expert witnesses
▪ Present all inculpatory and exculpatory evidence
▪ Discuss the allegations under investigation without restriction
▪ Gather and present relevant evidence without restriction, including expert sources
▪ Be accompanied by and confer with Advisor of choice
▪ Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
Due Process in the Grievance Process

Rights of the parties during the Title IX grievance process, continued:

- Inspect and review directly related evidence and investigation report
- Conduct cross-examination, if desired, through the Advisor
- Right to explanation of any ruling that a question is not relevant
- See/hear all evidence the DM may rely upon in their decision
  - Right to review and comment on that evidence to the DM
- Access to recording of any hearing
- Receive a written rationale explaining the basis for the DM’s decision
- Appeal
Notice of Investigation and Allegations

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

1. INCIDENT
   • Complaint/Notice to TIXC

2. INITIAL ASSESSMENT
   • 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
Materials Review

- Review the complaint file, including:
  - Complaint
  - Written Notice of Investigation and Allegations (NOIA)
  - Applicable policies
  - Investigation report and appendix
- Review carefully and thoroughly
- May require multiple reads
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 your training
  - Note any procedural questions to ask the TIXC/legal counsel
Parsing the Policy
Parsing the Policy

Identify the elements of each policy provision:

- 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 education program or activity
Parsing the Policy: Answers

Identify the elements of each policy provision:

▪ Unwelcome conduct
▪ determined by a reasonable person to be so severe, and pervasive, and objectively offensive
▪ that it effectively denies a person equal access to the recipient's education program or activity
Parsing the Policy

Identify the elements of each policy provision:

- Stalking, defined as: engaging in a course of conduct on the basis of sex directed at the Complainant that would cause a reasonable person to fear for the person’s safety or the safety of others or suffer substantial emotional distress
Parsing the Policy: Answers

Identify the elements of each policy provision:

- Stalking, defined as:
  - engaging in a course of conduct
  - on the basis of sex
  - directed at the Complainant
  - that would cause a reasonable person to
  - fear for the person’s safety or
  - the safety of others or
  - suffer substantial emotional distress
Other Hearing Preparation

- Confirm the file is complete
- Discuss any hearing logistics or questions with Chair or TIXC
- Prepare questions in advance
  - Areas of inconsistency or disputed information
- If part of a panel, consider meeting to:
  - Prepare questions and discuss question asking
  - Conduct a final review of policies and procedures
  - Strategize for hearing
- Other elements of hearing preparation are covered in Live Hearings course
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
- DM may establish participation equitable ground rules, as long as they do not interfere with any party rights
- Set and communicate reasonable expectations for Advisor participation
Skills: Understanding Evidence
Understanding Evidence

The 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

- **Directly related evidence** is connected to the complaint, but is neither inculpatory nor exculpatory
## Types of Evidence

<table>
<thead>
<tr>
<th>Type of Evidence</th>
<th>Description</th>
</tr>
</thead>
<tbody>
<tr>
<td>Documentary Evidence</td>
<td>Supportive writings or documents</td>
</tr>
<tr>
<td>Electronic Evidence</td>
<td>Photos, text messages, and videos</td>
</tr>
<tr>
<td>Real Evidence</td>
<td>Physical objects</td>
</tr>
<tr>
<td>Direct or Testimonial Evidence</td>
<td>Personal observation or experience</td>
</tr>
<tr>
<td>Circumstantial Evidence</td>
<td>Not eyewitness, but compelling</td>
</tr>
<tr>
<td>Hearsay Evidence</td>
<td>Statement from outside the interview presented as truthful</td>
</tr>
<tr>
<td>Character Evidence</td>
<td>Evidence of a person’s character or character traits</td>
</tr>
</tbody>
</table>
Primary Questions for Decision-Makers

1. Is this information relevant?
2. Is this information reliable?
3. Will we rely upon it as evidence supporting a rationale?
Relevance

Is this information relevant?
Relevance

- Evidence is generally considered **relevant** when it helps determine:
  - Whether the allegations occurred as described in the complaint
  - Whether the policy was violated based on findings of fact
- 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
Specific Evidence Issues: Privilege 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
Specific Evidence Issues: Rape Shield Provision

- 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
- Even if admitted/introduced by the Complainant.
- Does not apply to Respondent’s prior sexual behavior or predisposition, which are admissible if relevant.
Other Evidence Considerations

- No restriction on parties discussing case or gathering evidence, but we can restrict parties from sharing materials
- Expert witnesses
- Parties seeking to introduce new evidence in the DM phase or at the hearing
  - Consult with the TIXC
Credibility Assessment

Is this information reliable?
Credibility Considerations

- Assessing and determining credibility is an important role for DM
- Credibility does not necessarily equate to honesty or truthfulness
  - Believability does not equal truthfulness
  - Not judging character
  - Not calling people liars
- Credibility is typically useful in determining findings of fact, which in turn help determine policy violations
Evidence Authentication

- Authenticating evidence seeks to prove that the evidence is genuine and credible
  - Investigator should authenticate evidence, but sometimes 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
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 Assessment

- Inherent Plausibility
- Corroboration and Consistency
- Motive to Falsify
- Past Record
- Demeanor
Weighing and Analyzing Evidence

What evidence is relied upon in making a determination?
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
Example: Applying Facts to Policy

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 the person’s safety or the safety of others or
  - suffer substantial emotional distress
Example: Applying Facts to Policy

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
Example: Applying Facts to Policy

Policy Element:
- Would cause a reasonable person to fear for the person’s safety

Facts:
- Complainant alleged Respondent pounded on her door and yelled until an RA told him to leave
- Complainant alleged Respondent sent texts suggesting he was following her, and she should fear him
- Respondent produced texts that do not support Complainant’s characterization
- RA witness asserts “pounded on her door and yelled” is an exaggeration
Additional Considerations

- Separate the “Finding” from the “Sanction”
  - Do not use impact-based rationales for findings
  - Use impact-based rationales/evidence for sanctions only
  - Same with prior misconduct, unless a pattern is charged/proven
- Do not “heighten” the evidentiary standard when anticipating a severe sanction
Determining Sanctions
Determining Sanctions and Remedies

After making a determination of responsibility, decide sanctions and remedies

- Nexus between sanctions and misconduct
- Sanctions must be proportionate to the severity of the violation, taking progressive sanctions/history into account

1. **STOP** discriminatory conduct
2. **PREVENT** recurrence, on both individual and institutional levels
3. **REMEDY** the effects of discrimination, for both the individual and the community
Sanctions and Remedies

**Sanctions**

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

**Remedies**

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

- DM may consider:
  - Impact statements from the parties
  - Precedent, prior misconduct, proven pattern (if charged), attitude, collateral violations, or multiple violations
  - Aggravating or mitigating circumstances
- Primary purpose should not be developmental or educational, but equitable and remedial
- Each sanction must have a rationale
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 Determination
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
Written Determinations

**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 overcome
- Credibility assessment and explanation
- Rationale explains how you got from the allegation to the final determination, and offers rationale for any sanctions implemented, as well
Appeals
Appeals

1. INCIDENT
   - Complaint/Notice to TIXC

2. INITIAL ASSESSMENT
   - Jurisdiction
   - Dismissal
   - Supportive Measures
   - Emergency Removal
   - Referral to Another Process
   - Informal/Informal 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
Appeals

Institutions 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, Decision-Maker that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds
Appeals

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 Decision-maker for reconsideration or to the Investigator for further investigation

  ▪ **Modifying** the original determination and/or sanctions (if any)

  ▪ **Overturning** the determination (not recommended)
Appeals

Appeal Decision-maker may be an individual or a panel

- Cannot be the Title IX Coordinator
- Cannot be the Investigator or Decision-maker in the original grievance process
- Recipient may have a pool of Decision-makers who sometimes serve as hearing or appeal Decision-makers
- Recipient may have dedicated Appeal Decision-makers
Questions?
LIMITED LICENSE AND COPYRIGHT. By purchasing, and/or receiving, and/or using ATIXA materials, you agree to accept this limited license and become a licensee of proprietary and copyrighted ATIXA-owned materials. The licensee accepts all terms and conditions of this license and agrees to abide by all provisions. No other rights are provided, and all other rights are reserved. These materials are proprietary and are licensed to the licensee only, for its use. This license permits the licensee to use the materials personally and/or internally to the licensee’s organization for training purposes, only. These materials may be used to train Title IX personnel, and thus are subject to 34 CFR Part 106.45(b)(10), requiring all training materials to be posted publicly on a website. No public display, sharing, or publication of these materials by a licensee/purchaser is permitted by ATIXA. You are not authorized to copy or adapt these materials without explicit written permission from ATIXA. No one may remove this license language from any version of ATIXA materials. Licensees will receive a link to their materials from ATIXA. That link, and that link only, may be posted to the licensee’s website for purposes of permitting public access of the materials for review/inspection, only. Should any licensee post or permit someone to post these materials to a public website outside of the authorized materials link, ATIXA will send a letter instructing the licensee to immediately remove the content from the public website upon penalty of copyright violation. These materials may not be used for any commercial purpose except by ATIXA.