



Association of
Title IX Administrators

Idaho State Department of Education

Post-Investigation Complications

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Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, 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.



POST-INVESTIGATION ISSUES

FAILURE TO FOLLOW POLICY

Don't

- Fail to read the implicated policy(ies).
- Fail to understand the procedure's requirements.
- Materially deviate from the institution's written procedures.
- Use the incorrect policy/procedure for the investigation.

Do

- Read the policy and procedures prior to commencing an investigation.
- Understand what is required under the procedures.
- Use the policy in place at the time of the incident and the procedures in place at the time the complaint was filed.

FAILURE TO DOCUMENT INVESTIGATION

Don't

- Fail to maintain adequate records.
- Fail to document investigative activities such as phone calls.
- Fail to provide the comprehensive case file to the TIXC.
- Fail to create an investigation timeline.
- Fail to document the source of the evidence obtained.

Do

- Maintain a communication log of all contacts.
- Document all investigation activities.
- Understand the requirements of the institution's record retention policy.
- Get interviewee verification of transcripts/notes.
- Maintain complete and detailed notes.
- Think about who may view your file (*e.g.*, judges, public).

FAILURE TO USE MODELS OF PROOF

Don't

- Fail to identify implicated policy provisions.
- Misunderstand the scope of the investigation.
- Misapply policy definitions (*i.e.*, apply a harassment definition where there was no allegation that the conduct was based on a protected characteristic).

Do

- Understand the scope of the investigation.
- Break the prohibited conduct definition into specific key elements.
- Gather relevant evidence that addresses each key policy definition element.
- Ensure that the scope and prohibited conduct definitions are accurate as the investigation unfolds.

FAILURE TO ADDRESS NEW EVIDENCE

Don't

- Tell a party that they cannot submit new evidence after the fact-finding portion of the investigation concludes.
- Fail to provide the other party(ies) with the opportunity to review/comment on new evidence.
- Fail to update the draft report/evidence file.
- Fail to review new evidence for relevancy.

Do

- Document the new evidence in the draft investigation report and allow the parties a second ten-day review period.
- Consider additional written responses a party may provide.
- Document the rationale for the additional review in the final investigation report.
- Explain the additional review to the parties/advisors.

MISUNDERSTAND RELEVANT EVIDENCE

Don't

- Include evidence that discusses the Complainant's sexual predisposition or sexual history.
- Include evidence that does not answer the question(s) the investigation seeks to answer.
- Forget to redact irrelevant evidence from the evidence files shared with the parties.

Do

- Review each piece of evidence and consider whether it proves or disproves an issue in the complaint.
- Include evidence when it is regarding a party or witness's credibility.
- Include a separate and organized directly related evidence file.

THOROUGH AND RELIABLE INVESTIGATIONS

Don't

- Fail to gather all relevant evidence available.
- Fail to interview witnesses who may have relevant evidence.
- Fail to test the veracity of evidence.
- Only gather inculpatory evidence.
- Fail to interview outcry witnesses.

Do

- Document the inability to gather evidence and the reason why.
- Document witnesses who did not participate in the investigation.
- Verify documentary evidence with others (such as screenshots of messages).
- Gather relevant evidence from all sources, internal and external to the institution.

INADEQUATE NOIAS

Don't

- Fail to read the NOIA and understand what is being alleged and investigated.
- Observe gaps in the NOIA and fail to address them with the TIXC.
- Receive additional allegations from the Complainant and fail to update the NOIA.
- Mischarge, unclear charges, or broad charges (i.e., sexual assault only).

Do

- Read the NOIA and understand the allegations.
- Assess the Complainant's interview statement to ensure the appropriate charges are included in the NOIA.
- Ensure the TIXC includes overlapping charges like FHA sexual harassment and dating violence for a sexual assault allegations between individuals who are dating.
- Ensure the investigation report reflects the information included in the NOIA.

BIAS IN INVESTIGATIONS

Don't

- Only consider certain types of evidence or evidence that supports a certain belief.
- Refuse to explore contradictory information presented by an interviewee.
- Avoid jumping to conclusions or forming a belief as to whether you believe a policy was violated.
- Have a stake in the outcome.

Do

- Remain a neutral fact-finder.
- Understand your biases and how to ensure the don't seep into investigation.
- “Flip it to test it.”
- Have your work reviewed by TIXC or General Counsel.
- Be mindful of the language used to communicate and write reports.
- Engage in professional development around recognizing and preventing bias.

INADEQUATE INVESTIGATION REPORT

Don't

- Include irrelevant evidence.
- Use biased language.
- Create a summary of the evidence.
- Switch tenses.
- Write in passive voice.
- Fail to assess the credibility of the parties, witnesses, and evidence.

Do

- Create a comprehensive report that includes all relevant evidence.
- Consider your audience (parties, legal counsel, court, etc.).
- Use formal language and write from the third-person objective point of view.
- Have the report reviewed prior to submitting to parties.



APPEALS

- Appeal Bases
- Appeal Process

APPEALS

The 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

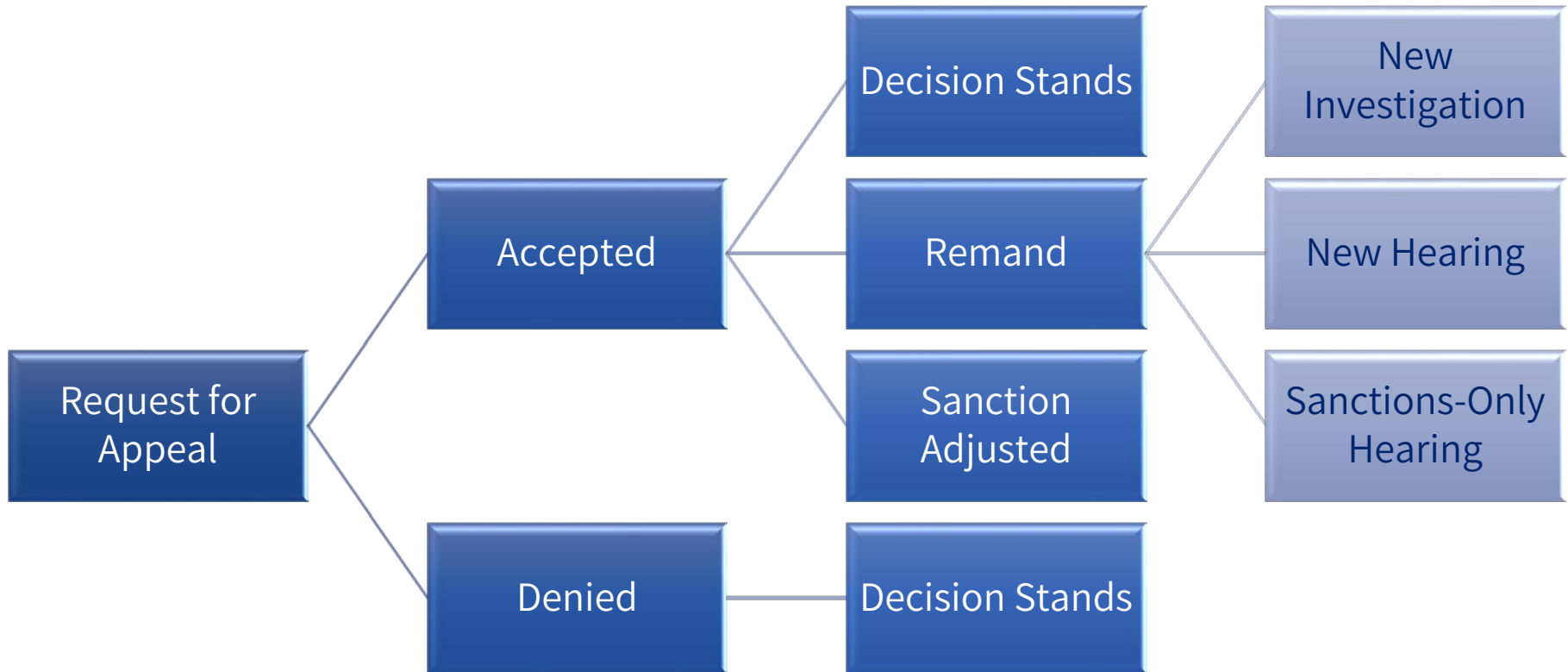
APPEALS (CONT.)

- When an appeal is filed, the Recipient must notify the other party and implement appeal procedures equally for all parties
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome
- The Chair may be called upon by the Appeal Decision-maker to inform the appeal process
 - Likely a paper exchange; not in-person

BASES FOR APPEAL

- Title IX Regulations specify three bases for appeal:
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available when the determination of responsibility was made that could affect the outcome
 - Title IX Coordinator, investigator, or decision-maker had a general or specific conflict of interest or bias against the complainant or respondent that affected the outcome. Recipients may offer appeals equally to both parties on additional bases.
- Recipients may offer additional bases for appeal so long as they are offered equally to both parties

APPEALS: THE PROCESS





INFORMAL RESOLUTION OVERVIEW

- ATIXA's Informal Resolution Framework
- Terminology
- Informal Resolution Goals
- Informal Resolution Foundations
- Relational vs. Structural Complaints
- Flexibility
- Contextual Limitations

ATIXA'S INFORMAL RESOLUTION FRAMEWORK

Supportive
Measures Only

Accepted
Responsibility

Alternative
Resolution

TERMINOLOGY

For the purposes of this training, the following definitions apply:

- **Informal Resolution** – a complaint resolution approved by the Parties and the Recipient that occurs prior to a formal Final Determination being reached.
 - Under ATIXA’s Informal Resolution Model, this includes:
 - Supportive Measures Only
 - Accepted Responsibility
 - Alternative Resolution
- **Supportive Measures Only** – a type of Informal Resolution in which the Title IX Coordinator resolves the matter by providing supportive measures (only) to remedy the situation

TERMINOLOGY (CONT.)

- **Accepted Responsibility** – a type of Informal Resolution in which the Respondent accepts responsibility for violating policy and accepts the recommended sanction(s), ending the Resolution Process
- **Alternative Resolution (AR)** – a type of Informal Resolution in which the parties agree to resolve the complaint through an alternative resolution mechanism such as facilitated dialogue, mediation, or restorative practices.
 - Alternative Resolution may allow for, but does not require, the parties to communicate directly about the complaint with the assistance of a third-party facilitator.

INFORMAL RESOLUTION GOALS

- Restoring educational access
- Empowering choice and agency over the resolution
- Identifying, and to the extent possible, addressing participants' needs and community needs
- Addressing past harm
- Preventing future harm
- Creating a space for communication and understanding when desired

INFORMAL RESOLUTION FOUNDATIONS

- Safety (physical and emotional)
- Focus on needs
- Mutually serving
- Intentionality
 - Informal ≠ casual
- Presence
- Meeting parties where they are
- One IR process will not fix or prevent harm; strong pre- and post-process support and resources are needed

FLEXIBILITY

- There is no one-size-fits-all approach to Informal Resolution
- Structured modes of AR exist and can be drawn upon (e.g., mediation), but their structures may not fit the unique needs of Title IX complaints
 - Center participants rather than the institution or the process
 - AR needs to meet the needs of the parties AND the institution
- Institutions—and by extension their policies—should allow for flexibility in both structure and strategy
- Systems need to reasonably adjust to the participants not vice versa

CONTEXTUAL LIMITATIONS

- Informal Resolution offerings within an institutional resolution process are limited by that context
 - Available resources
 - Compliance requirements
 - Liability
 - Fitting into a policy/process
 - Cultural expectations and assumptions
 - Change management
- Institutions should be aware of external resources for resolution (formal and informal) and consider how those entities can interact with the institution

MAKING INFORMAL RESOLUTION AVAILABLE

Can the institution uphold the key values of IR?

- **Safety** – Are there conditions that could create an unsafe environment?
- **Mutually serving** – Can the institution provide a facilitator who can serve all parties and the institution in the resolution process?
- **Quality** – Do the facilitators have sufficient training, expertise, and sensitivity to facilitate a process?
- **Privacy** – Can the institution ensure the privacy of the process?
- **Self-Determination** – Does the institution allow parties to make fully informed decisions for themselves?

CONSIDERATIONS FOR APPROPRIATENESS

Informal Resolution may not be appropriate if one or more of the following are present:

- History of emotional, physical, or sexual violence between the parties
- Power imbalances between the parties that cannot be offset by appropriate support measures
- Any situations where the parties' engagement in IR could jeopardize the safety or well-being of a party
- Situations involving minors who have been harmed by adults
- Party or parties not sincere or acting in good faith



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Questions?



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