

Association of
Title IX Administrators

Title IX Higher Education Decision-Maker

Training and Certification Course

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- Please log in to your ATIXA Event Lobby each day to access the course slides, supplemental materials, and to log your attendance.
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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.

Course Introduction



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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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.

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Title IX Compliance Overview

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Title IX and Equity

- Title IX is a gender equity law
- 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
  - Title IX seeks to remedy the inequities sexual harassment and sex discrimination create

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Essential Compliance Elements

The requirement to Stop, Prevent, and Remedy guides the institution's equity and compliance work

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

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Formal Grievance Process Overview

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Title IX 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 — HEARING

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

5 — APPEAL

- Appeal Grounds
- Determination & Rationale

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Title IX Grievance Process Overview

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

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Title IX Grievance Process Overview

Equitable Resolution

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



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Investigation Steps

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
9. Parties Review Draft Report & Evidence
10. Final Investigation Report

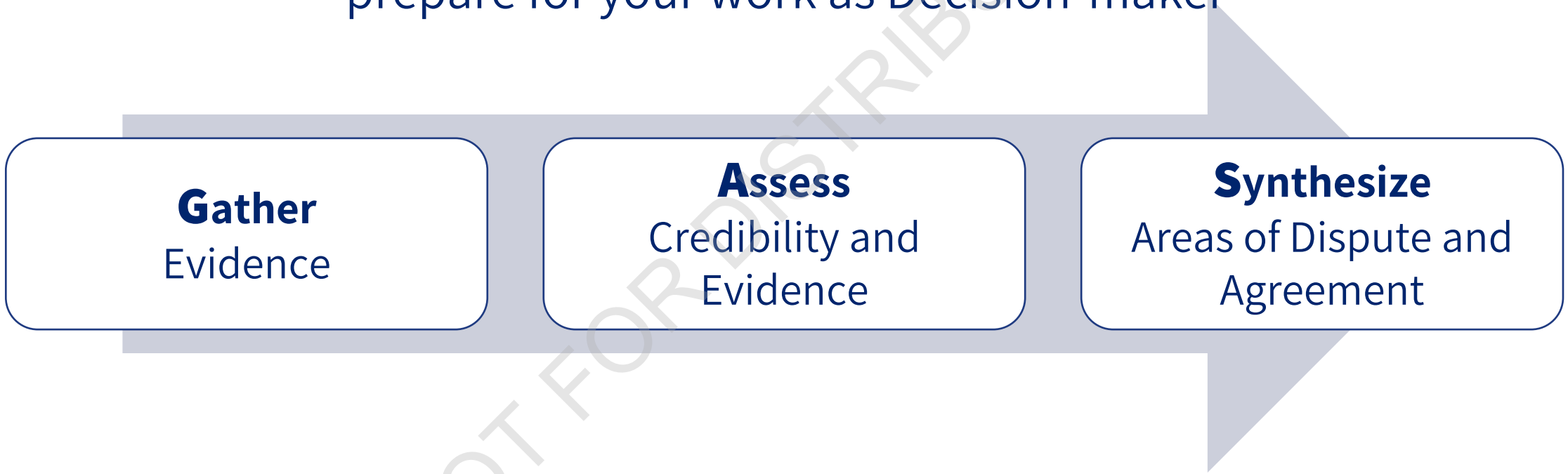


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Formal Investigation

The G.A.S. Framework describes the work of the Investigator to prepare for your work as Decision-maker



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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 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
- Investigator sends the final investigation report to the parties and Advisors for review at least 10 days prior to the decision-making phase/hearing

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Decision-Making Under Title IX

- Decision-maker (DM) could be a single person or a panel (typically three)
  - Institutional community member (typically faculty or staff) or external contractor
- Currently, 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 Decision-maker
- NPRM could affect decision-making structure in the future
  - Hearings may be optional, depending on jurisdiction
  - TIXC or Investigator may serve as DM

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Decision-Maker Mission and Role

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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



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Activity: Ranking Priorities

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Decision-Maker Role and Responsibilities

Rank your top three responsibilities as a Decision-maker

Finding the truth	Providing a just result	Providing an educational process	Making a safe community
Upholding the institution's policy	Ensuring a fair process	Protecting the institution from liability	Punishing wrongdoing

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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

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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

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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

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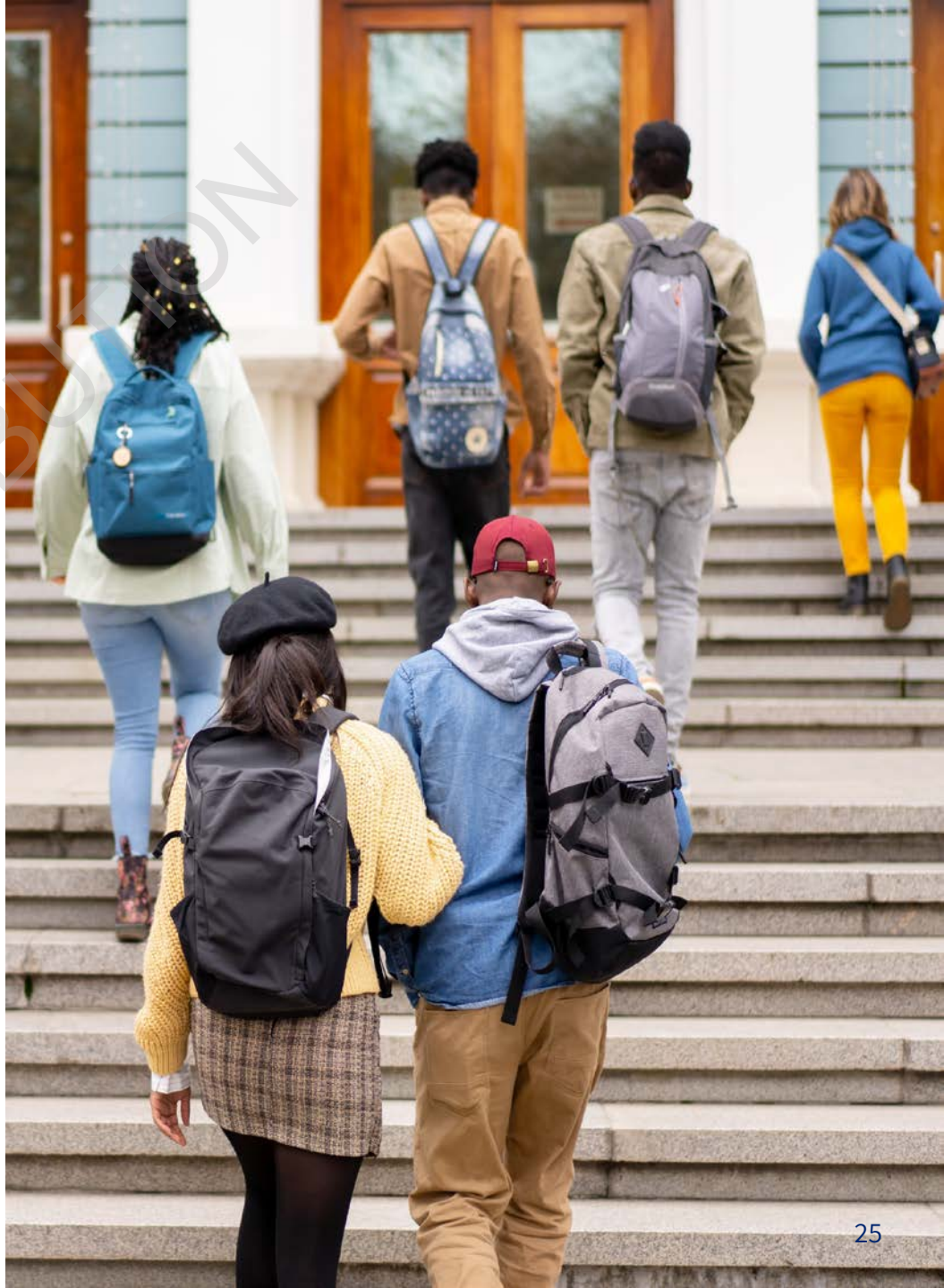
Title IX Scope and Definitions

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Review: Scope

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



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Review: Sexual Harassment Definitions

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



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Review: Definitions

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



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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

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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?

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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)

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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

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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

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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 or 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 (reasonable person)** = policy violation
  - The Respondent's own intoxication cannot be used as a defense

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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

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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

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Conflicts of Interest and Bias

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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

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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

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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 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

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Conflicts of Interest Examples

Are these conflicts of interest?

- An academic advisor deciding a complaint in which the Respondent is a current advisee, but they have not met in two years
- A faculty member deciding a complaint for a colleague in a different department who has kids that play on the same soccer team as the faculty member's kids
- A finance division senior supervisor deciding a complaint involving a Respondent who is three levels below the supervisor in the finance division
- A faculty member serving on the same 30+ person committee as the Complainant
- The President recommends that the institution's general counsel serve as decision-maker based on their legal training and subject matter expertise

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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

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Bias Examples

Could the following qualify as bias if these people serve as DMs?

- A faculty member from Gender Studies wrote their dissertation on campus sexual violence at religiously affiliated institutions
- A student activities staff member who says, “When I think of the Respondent, I just think of my oldest child being in this situation and how I wouldn’t want their life ruined over something like this”
- A Provost liking a tweet that reads “Rape culture is a myth”
- A staff member belonging to a church that teaches LGTBQIA+ people are living contrary to God’s law and visibly protesting in the community

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Manifestations of Bias

Pre-determined outcome	Political bias	Intervention from senior-level admin	Group think
Improper application of policies	Confirmation bias	Implicit bias	Animus
Attribution Bias	Appearance Bias	Affinity Bias	Halo/Horn Effect

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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

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Due Process

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Due Process

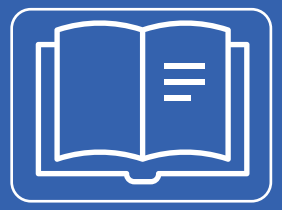


Title IX regulatory requirements



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 and evidence and be heard by the Decision-maker

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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

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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

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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

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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

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Decision-Making Phase: Skills and Practical Application

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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

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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



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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

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Activity: Parsing the Policy

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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

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Parsing the Policy: Answers

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

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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

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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**

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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

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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
- 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



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Skills: Understanding Evidence

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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



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Types of 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 **reliable**?

3

Will we rely upon it as evidence supporting a rationale?

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Relevance

1. Is this information relevant?

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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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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

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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

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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

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Activity: Relevant vs. Directly Related Evidence

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Activity: Relevant vs. DRE

- Turn to the Complainant transcript in the mock investigation file
  - You will notice that some portions of the transcript are highlighted in grey
  - Those grey selections have been marked by the Investigator as relevant
- Find three examples of:
  - Testimony marked as relevant that should be DRE, or
  - Testimony marked as DRE that should be relevant
- Prepare to explain your thinking

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Credibility Assessment

2. Is this information reliable?

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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 impacts the reliability of evidence and its weight

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Evidence Authentication

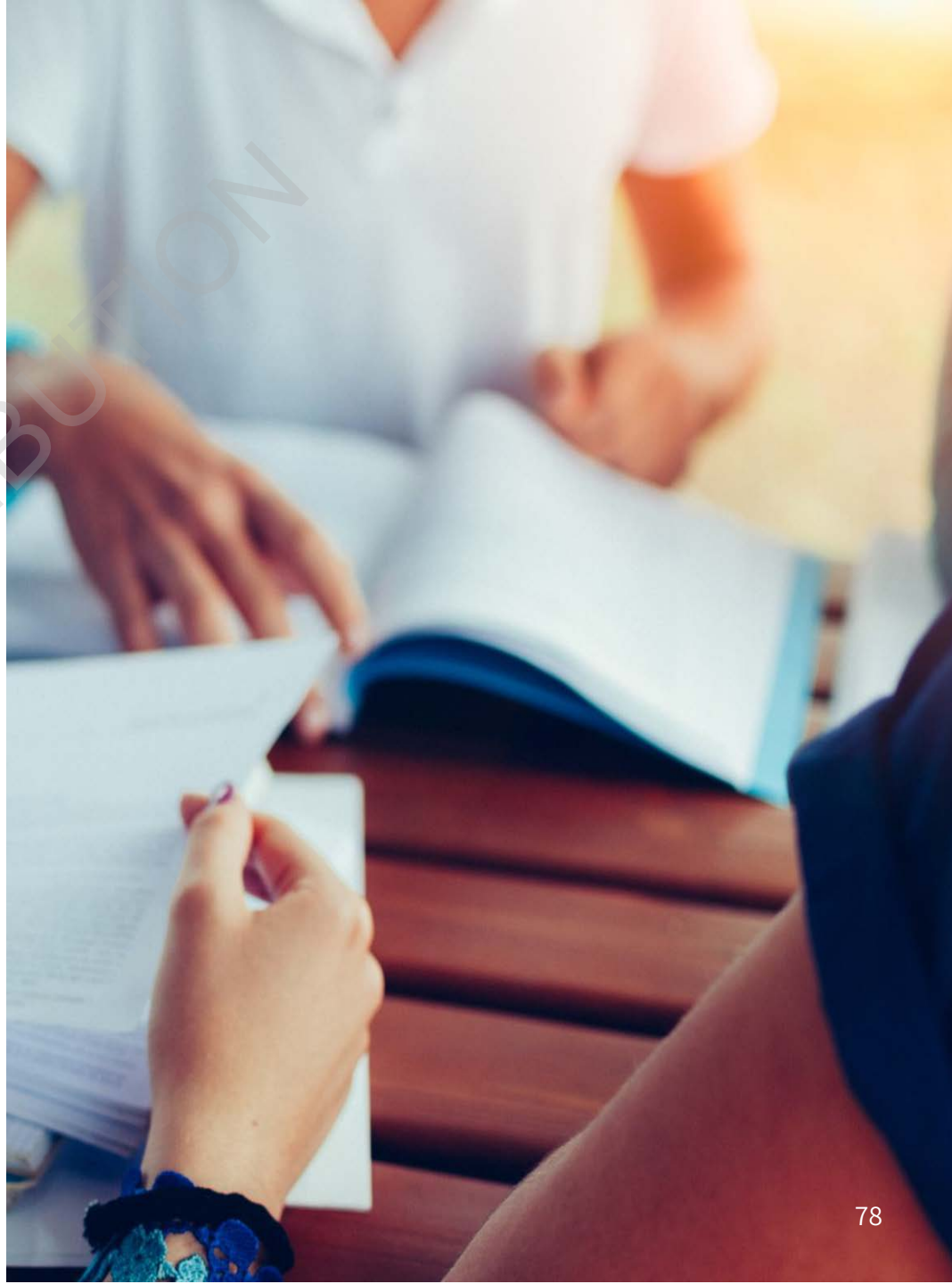
- Authenticating evidence seeks to prove that the evidence is genuine and credible
  - Investigator should authenticate evidence, but sometimes DM will
- Examples of authentication:
  - Verifying text messages by collecting texts from all involved parties
  - Collecting photographic evidence after it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

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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 Assessment

Inherent Plausibility

Corroboration and Consistency

Motive to Falsify

Past Record

Demeanor

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Activity: Credibility Analysis

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Activity: Credibility Analysis

- Use the mock investigation report to identify four to six examples of:
  - Evidence that raises authentication issues or questions and why
  - Evidence that raises credibility questions or concerns and why
  - Evidence that supports a party's or witness's credibility or corroborates another piece of evidence and why

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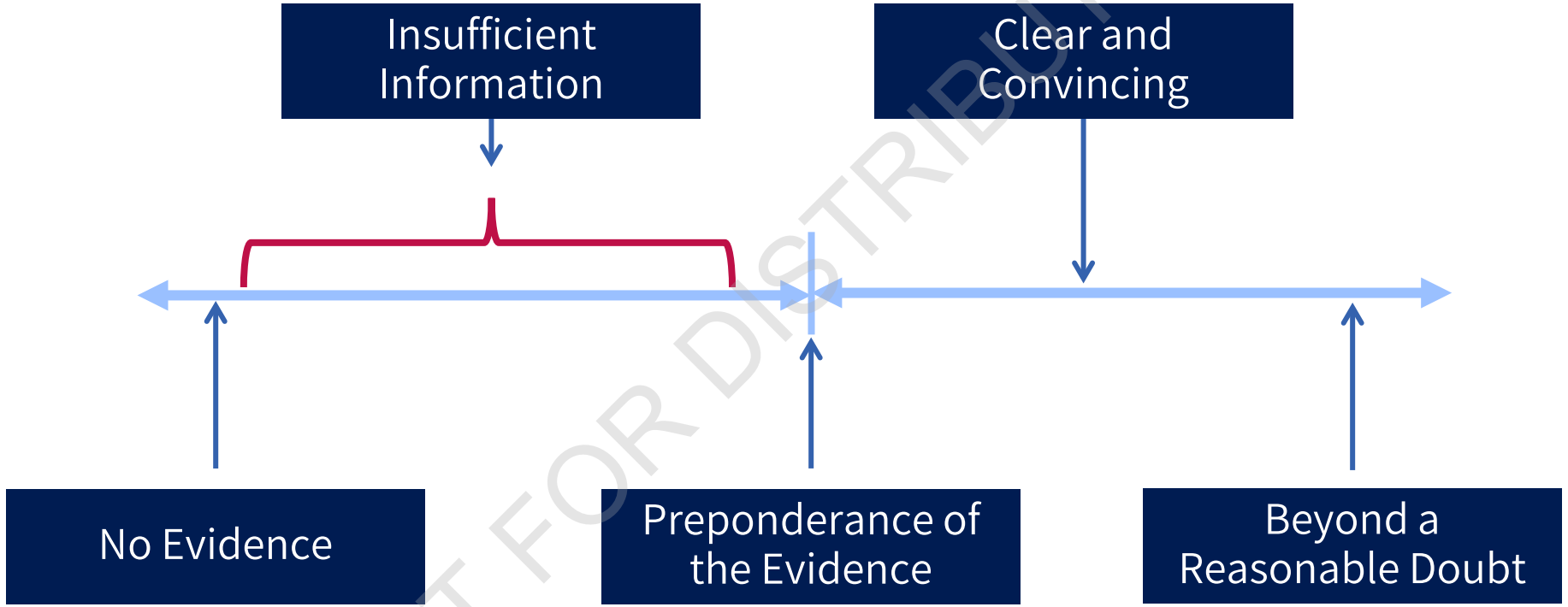
Weighing and Analyzing Evidence

3. What evidence is relied upon in making a determination?

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Standard of Evidence



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- **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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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

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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

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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

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Activity: Applying Facts to Policy

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Activity: Applying Facts to Policy

In groups of three to five:

- Parse the two policies on the next slide
- Use the investigation report to identify facts
  - Map facts to each policy element that you believe helps prove or disprove an element of the policy OR
  - Speaks to the credibility of evidence related to the elements of the policy

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Applicable Policies

Rape

- Penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant

Consent

- Knowing, voluntary, and clear permission by word or action to engage in sexual activity
- A person cannot consent if they are unable to understand what is happening or are disoriented, helpless, asleep, or unconscious for any reason, including by alcohol or other drug consumption

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Activity Discussion

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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



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Determining Sanctions

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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

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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

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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

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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

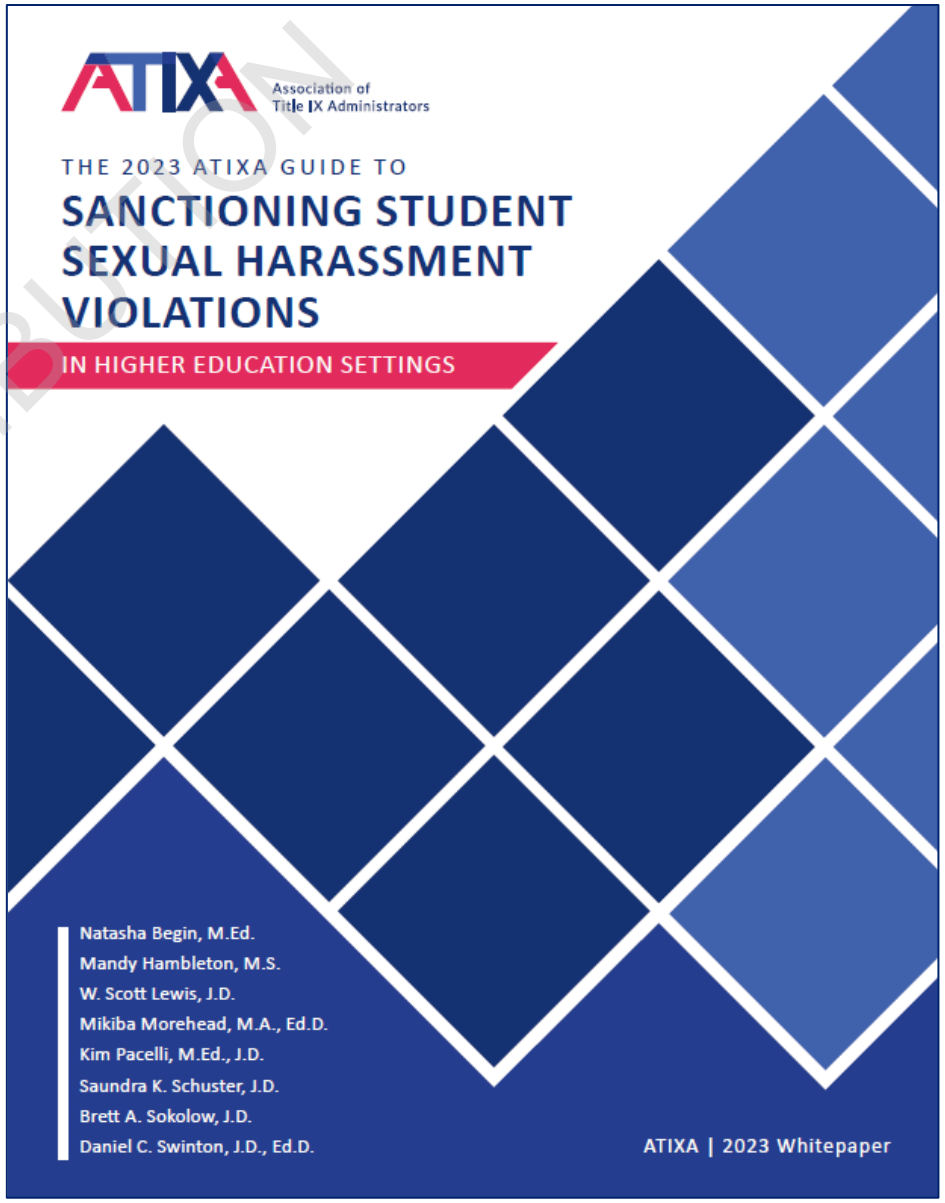
- Warning (preferably written)
- Probation
- Performance improvement/ management process
- Training
- Counseling
- Loss of privileges
- Reduction in pay
- Loss of annual raise
- Discretionary sanctions
- Loss of supervisory or oversight responsibilities
- Paid or unpaid leave
- Suspension
- Termination

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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 Determination

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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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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

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Appeals

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Appeals

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

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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

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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)

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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

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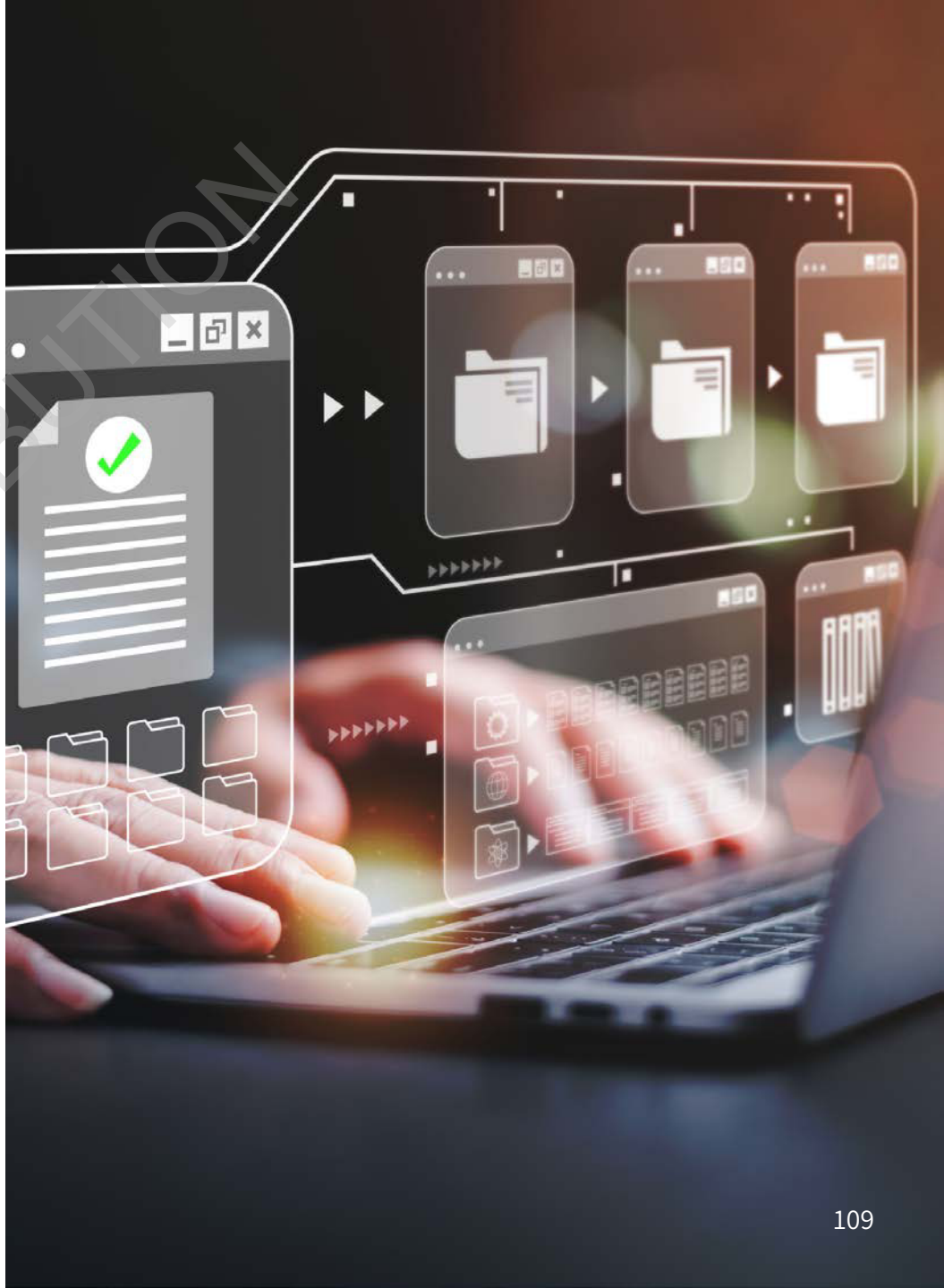
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Recordkeeping and Documentation

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Recordkeeping

- The 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

- Ask the TIXC for guidance and clear expectations about saving your work product, including your personal notes
- Anticipate that the parties could see your work product
  - Student FERPA inspect and review rights
  - Employee rights to personnel records
  - Litigation
- Be judicious with notetaking, annotating, draft writing, and communication

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Questions?

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