

Association of
Title IX Administrators

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Title IX Investigation Foundations Level One: Procedures and Critical Skills for Higher Education

Training and Certification Course

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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.

Content Advisory

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

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

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Introduction



The course focuses on the fundamental skills necessary to investigate sexual harassment, violence, and sex discrimination allegations.



Practitioners will learn how to conduct Title IX investigations, apply policy, and obtain a detailed overview of the resolution process for all types of harassment and discrimination complaints.



Our goal is to provide you with an in-depth exploration of each phase of an investigation and how to practically apply the concepts to your role within the Title IX Formal Grievance Process.

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2024 Title IX Regulations Vacated

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

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

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Department of Education (ED) Updates

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

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Dear Colleague Letter (02/04/25)

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

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

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Executive Order re: Sex and Gender

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

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

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Executive Order re: Gender and Athletics

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

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

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Rescinded Prior Guidance

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

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

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Review:
Applicability, Scope, and Definitions

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Title IX

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

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



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Applicability

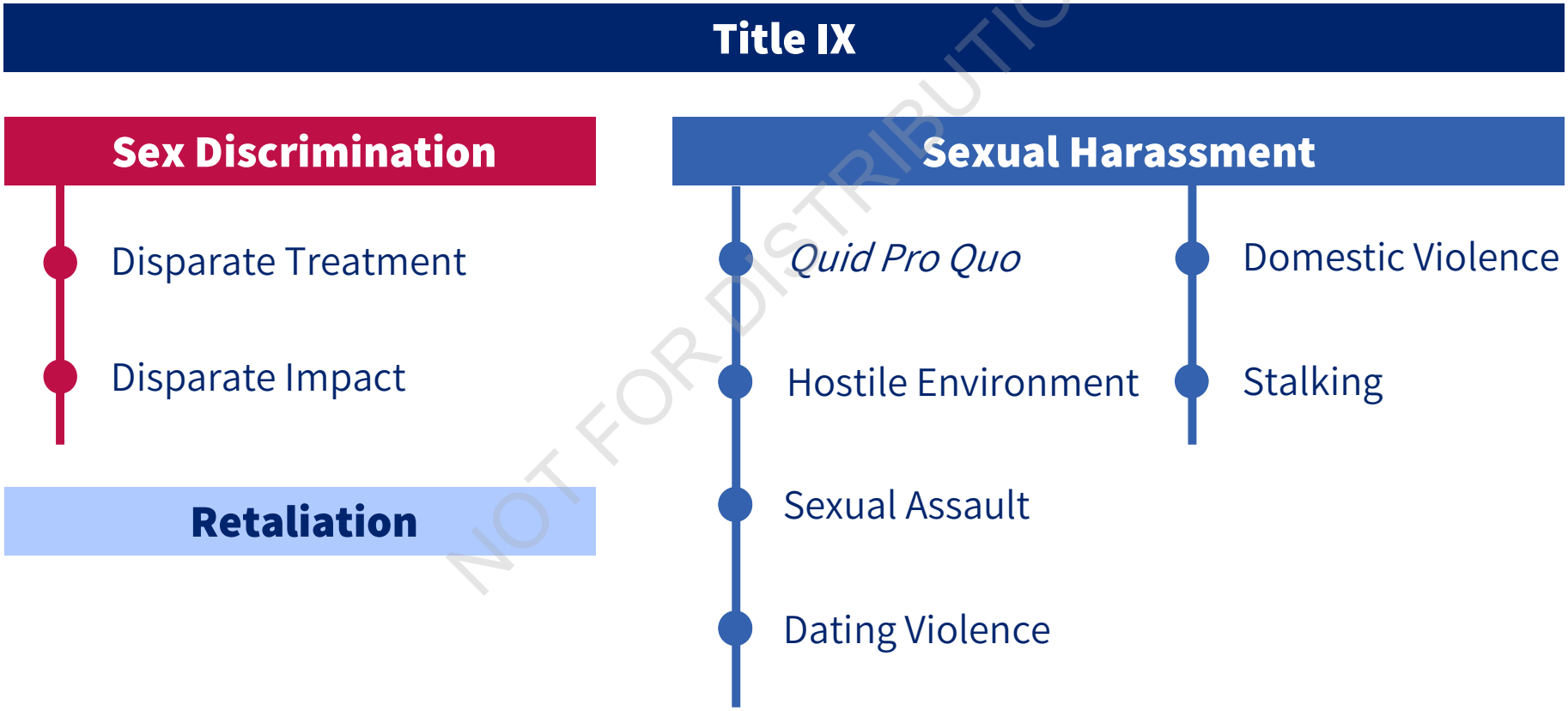
- Education program or activity in the United States
- Control over the Respondent
- Control over the context of the behavior
- Applies to both student and employee complaints



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Scope



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Review: Sex Discrimination Definitions

- **Disparate Treatment:** occurs when an institutional policy, practice, or procedure (or an agent thereof) **intentionally** discriminates
- **Disparate Impact:** occurs when an institutional policy, practice, or procedure (or an agent thereof) **unintentionally** discriminates
  - A policy may be intended to be neutral as written, but it may be applied in a discriminatory manner

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Review: Sexual Harassment Definitions

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



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ATIXA Model Policy Definitions

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



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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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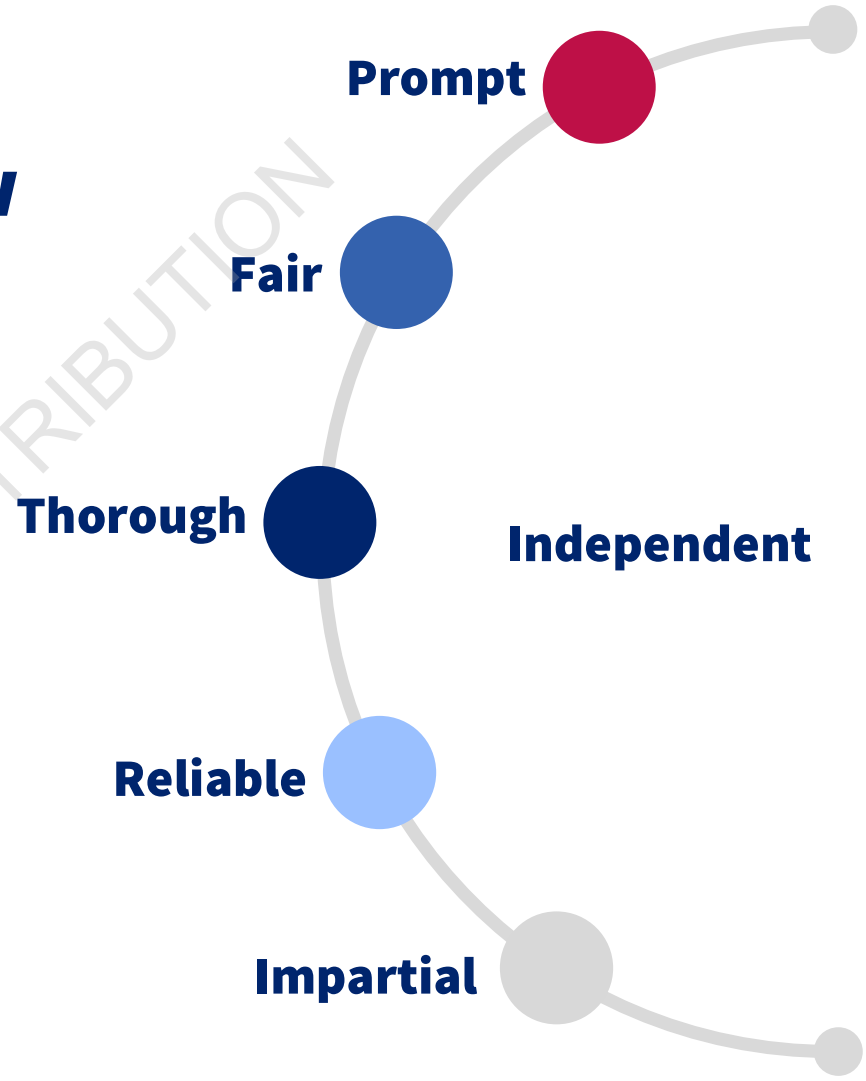
Civil Rights Investigations Overview

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Civil Rights Investigations Overview

- Investigations focus on gathering all available, relevant information
- The institution is responsible for gathering evidence—not the parties



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Bias and Conflicts of Interest

- Title IX Investigators have no “side” other than the **integrity of the process**
- Title IX Regulations **prohibit conflicts of interest or bias** against parties generally, an individual party, or the substance of the complaint
- Investigators identifying a potential conflict of interest or bias should **immediately notify** and disclose the information to the Title IX Coordinator (TIXC)



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Required Investigator Training

- Definition of **sexual harassment** in 34 C.F.R. Section 106.30
- **Scope** of the institution's education program or activity
- **Title IX grievance process**
- Conducting an **investigation**
- **Serving impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Issues of **relevance** to create an investigation report that fairly summarizes relevant evidence
- Investigator training must not rely on **sex stereotypes**

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Formal Grievance Process

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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
- Parties' Review/ Comment
- Final Report

4 DECISION-MAKING

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

5 APPEAL

- Appeal Grounds
- Determination and Rationale

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Formal Grievance Process Overview

Prompt Resolution

- Complete without undue delay
- Title IX Regulations do not define “prompt”
  - 60 business days is a good guide for a moderately complex investigation
- 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

Fair Resolution

- Treat all parties fairly
- Ensure that all parties have opportunity to fully participate in the grievance process
- Operate without bias and/or conflicts of interest



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Parties' Rights in the Grievance Process

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

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Parties' Rights in the Grievance Process, Cont.

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

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Investigation Process

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Investigation Overview

- Title IX investigations may examine sex discrimination, sexual harassment, or retaliation allegations
- 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



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Investigation Oversight and Supervision

Title IX Coordinator (TIXC) responsibilities:

- Appoint Investigators and ensure training
- Consult and strategize with Investigators
- Ensure timeline compliance
- Oversee recordkeeping
- Serve as parties' primary point of contact



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Investigation Steps

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



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Pre-Investigation

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Pre-Investigation Steps

1

Notice / Formal Complaint

2

Initial Assessment and Jurisdiction Determination

3

Determine Basis For Investigation

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Step 1: Notice/Complaint

- Institution receives a report, knowledge, or complaint of alleged discrimination, harassment, or retaliation
- 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 or the TIXC

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Step 2: Initial Assessment and Jurisdiction Determination

TIXC or designee will perform several steps including:

- Outreach and Intake to potential Complainant
- Jurisdictional Assessment
- Sign a Formal Complaint (if applicable)
  - Pattern, Predation, Threat, Violence, Weapons, Minors, Employee Respondent, Complainant not participating or attempting to participate (P/ATP)
- Offer and coordinate supportive measures
- Initiate Emergency Removal or Administrative Leave procedures (if applicable)
- Complete Mandatory or Discretionary Dismissal (if applicable)
- Arrange for Informal Resolution, if requested/appropriate (if applicable)

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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

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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 on the basis of sex
- **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

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Types of Discrimination



Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliation or perception of affiliation with protected characteristic



Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain people/ groups



Harassment

- *Quid Pro Quo*
- Hostile Environment

Retaliation

- Prohibited if engaged in protected activity
- Suffered adverse academic or employment action

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Investigation Scope

- TIXC determines the scope of the investigation
- **Scope** refers to the allegations, timeframes, and parties subject to the investigation
- Considerations:
  - Collateral misconduct allegations
  - Individual vs. group
  - Multiple Complainants or Respondents
  - Counter-complaints
  - Patterns
- If scope needs to be adjusted during the process, Investigator should consult with TIXC



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Who Should Investigate?

- Investigator(s) may not be Decision-maker(s) for the same complaint
- Tasks:
  - Conduct prompt, thorough, and impartial investigations
  - Collect the maximum amount of relevant information available
  - Write comprehensive investigation report summarizing all relevant evidence

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Full-Time Investigator(s)

Investigator Pool

External Investigator

Coordinator as Investigator

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Notice of Investigation and Allegations

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Investigation

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- Complaint/ Notice to TIXC

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Step 4: Notice of Investigation and Allegations

- The Notice of Investigation and Allegations (NOIA) letter is sent to all parties simultaneously in writing prior to the investigation
- **The NOIA includes:**
  - Notice of the allegations and known details, 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
  - The parties' rights in the Formal Grievance Process

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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 allegations change during the investigation

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Updating the NOIA

- NOIA may need to be updated for any of the following reasons:
  - Original NOIA was deficient
    - Did not include all potential policy violations
    - Did not identify specific policy provisions alleged to have been violated
    - Did not accurately charge overlapping policy provisions
  - TIXC receives additional allegations
  - Allegations are withdrawn
  - Policy provision no longer applies, based on details of incident
  - Counter-complaint is initiated
- Investigator should discuss any proposed NOIA changes with TIXC, including rationale

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Case Study

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Gia and Johnny

- Gia and Johnny were both first-year students at Poe College
- One night they attended an on-campus party in a residence hall
- While pre-gaming, Gia drank two to three cups of wine, two to three shots of tequila, and a mixed drink containing Sprite and three shots of vodka
- Gia and Johnny arrived at the party an hour after it began
- After leaving the party, Gia and Johnny decided to walk back to Gia's residence hall where they engaged in vaginal penetrative sex
- Midway through the sexual encounter, the condom broke, and Johnny ceased penetration

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Gia and Johnny

- Johnny informed Gia that the condom broke, told her that he would purchase the morning after pill for her the next morning, and then he left
- Gia was later found on the residence hall bathroom floor by a student and the Resident Assistant (RA)
- After helping Gia back to her room, the RA observed a used condom in Gia's trashcan in her residence hall room
- The RA noted her observation in her incident report, which the Hall Director forwarded to the TIXC

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Gia and Johnny

- Gia submitted a formal complaint for rape based on her recollection that Johnny refused to use a condom
- Gia told the TIXC that she had been drinking heavily and couldn't remember parts of the night
- The TIXC was also in receipt of the RA's incident report
- However, the TIXC wrote the NOIA by framing the rape allegation around condom use and did not include an incapacitation-based rape allegation

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Gia and Johnny: Discussion

Questions:

- What is your evaluation of the relevance of the evidence related to alcohol consumption?
- As the Investigator, how would you handle the possible deficiency in the scope of the NOIA?

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Recordkeeping

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Investigation File

- Investigator is responsible for developing and maintaining an **investigation file** through the duration of the investigation
  - Formal complaint
  - 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
    - Verified interview transcripts
    - Associated evidence (e.g., screenshots, written statements)
    - Correspondence with the Investigator(s)
  - Collected evidence and evidence log

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Investigation File

- Investigation file inclusions, Cont.
  - 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**

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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

Date	Time	Contact	Type	Notes	Follow-up/ Resolution
1/25/25	1:00 PM	Sam Smith	Phone	Discussed getting emails from IT	Received emails from IT on 1/26/25
1/27/25	2:00 PM	Sally Harris	Email	Interview Scheduling Request	Interview scheduled for 1/29/25
1/29/25	3:00 PM	Sally Harris	In Person	Investigation Interview	Send transcript for verification

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Evidence Log

- All evidence gathered with:
  - Description
  - Date of receipt
  - Source
  - Method of receipt
- Any evidence verification/authentication information



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Evidence Log Example

Date	Source	Method of Receipt	Type	Description	Authentication
1/25/25	Sam Smith	Email	Security video footage; USB drive	Elevator video footage from 9:10 – 10:10 PM on 12/10/24	Closed circuit from Public Safety
1/27/25	Sally Harris	Social Media Screenshot	Social Media Screenshot	Post made by Respondent at 9:22 PM on 12/10/24	
1/29/25	Sally Harris	In Person	Call Record	Phone call log from Complainant's cell phone carrier	Email with attachment from carrier to Complainant

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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
- Often included in the investigation report

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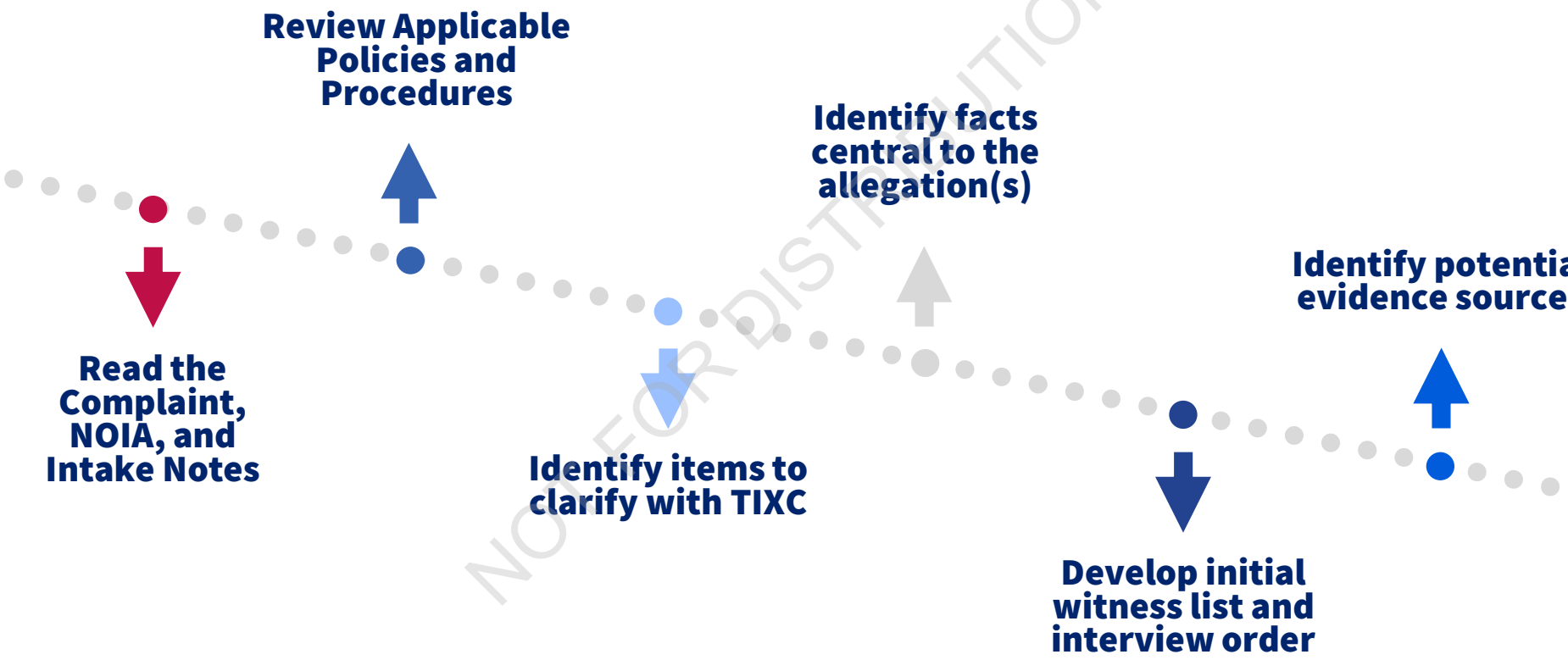
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Investigation Strategy

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Investigation Strategy



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Step 5: Investigation Strategy

- Investigation begins with a strategy meeting
  - Investigator(s) and TIXC (or investigation supervisor)
- Review complaint, NOIA, and intake documentation
- TIXC reviews scope with Investigator
  - Identify potential biases or conflicts of interest
  - Clarify roles and responsibilities
    - Interview scheduling
    - Primary contact for Advisors
  - Discuss information sharing



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Strategy Considerations

Sexual Harassment

- Common understanding vs. Title IX definition
- First Amendment
- Consent Construct
- Credibility
- Limited eyewitnesses
- Bandwagon effect
- Evidentiary limitations

Sex Discrimination

- Pattern and practice
- Climate and culture
- Respondent vs. no Respondent
- Similarly situated comparator
- Non-discriminatory justification
- Statistical and numerical data

Retaliation

- Common understanding vs. Title IX definition
- Back-and-forth interview process
- Protected activity
- Adverse action
- Non-retaliatory purpose
- Evidence of pretext

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Strategy Meeting

- Review elements of the specific policy provision(s) alleged to have been violated
  - Investigators are looking for evidence that speaks to each element
- Develop initial witnesses and tentative interview order
- Discuss challenges with the type of complaint and the parties involved
  - Anticipate allegiances
  - Disrupt possible collusion
  - Predict obstacles and obstructions
- Assess relevant pattern considerations
- Identify preliminary undisputed and disputed facts and their significance
- Other types of possible evidence and the plan to acquire such evidence

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Strategy Meeting

- Establish preliminary investigation timeline
- Consider whether Informal Resolution is available
- Discuss supportive measures, accommodations, and language assistance needs as applicable
- Determine whether Emergency Removal or Administrative Leave is applicable
- Other considerations:
  - Coordination with law enforcement
  - Counter-complaints



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Counter-Complaints

- Respondents may file a **counter-complaint** of sex discrimination, sexual harassment, or retaliation against the Complainant if there is Complainant misconduct that they wish to report
- Reporting other alleged misconduct (e.g., drug dealing, academic misconduct) is not considered a counter-complaint
- Counter-complaints may arise prior to, during, or after the investigation of the original complaint
- If a party mentions (even casually) discrimination or harassment that could serve as a basis for a counter-complaint, but it is unclear if they wish to make a complaint, clarify or have the TIXC contact them to clarify
  - Be wary of the use of counter-complaints for retaliatory purposes

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Activity: Investigation Strategy

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Activity: Investigation Strategy

Read the Strategy Exercise document in the course lobby

- Are there additional policies that may apply?
- Who are the initial witnesses?
- Who do you want to interview and in what order?
- What other sources of evidence may exist?

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Formal Investigation

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Step 6: Formal Comprehensive Investigation



THOROUGH



RELIABLE



IMPARTIAL



PROMPT



FAIR

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Pre-Interview Planning

- Before scheduling interviews, consider:
  - Location
    - Virtual vs. in-person
    - Accessibility
  - Scheduling constraints
  - Participants
  - Preparation
- Must provide written notification to parties with sufficient time to prepare
  - Date, time, location, participants, and purpose
- Cannot mandate interview participation for any student or employee

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Interview Scheduling and Sequencing

- Conduct interviews as promptly as possible to capture fresh recollections (but not before NOIA)
- Schedule ample time to complete the interview, review notes, and document necessary next steps
  - Consider Investigator mental capacity attention span (e.g., “Zoom fatigue”)
  - Allow time for breaks and meals or snacks
- 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

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Interview Preparation

- Review all available documentation and evidence
- Use policy elements to determine types of evidence that would help a Decision-maker (DM) determine whether each policy was violated
  - Example: “without consent”
    - Evidence that Complainant gave consent or could not give consent
- Identify clear goals and a set of initial questions
  - Investigator should not passively accept what an interviewee wants to share, but actively gather evidence that will prove or disprove the allegations of the complaint

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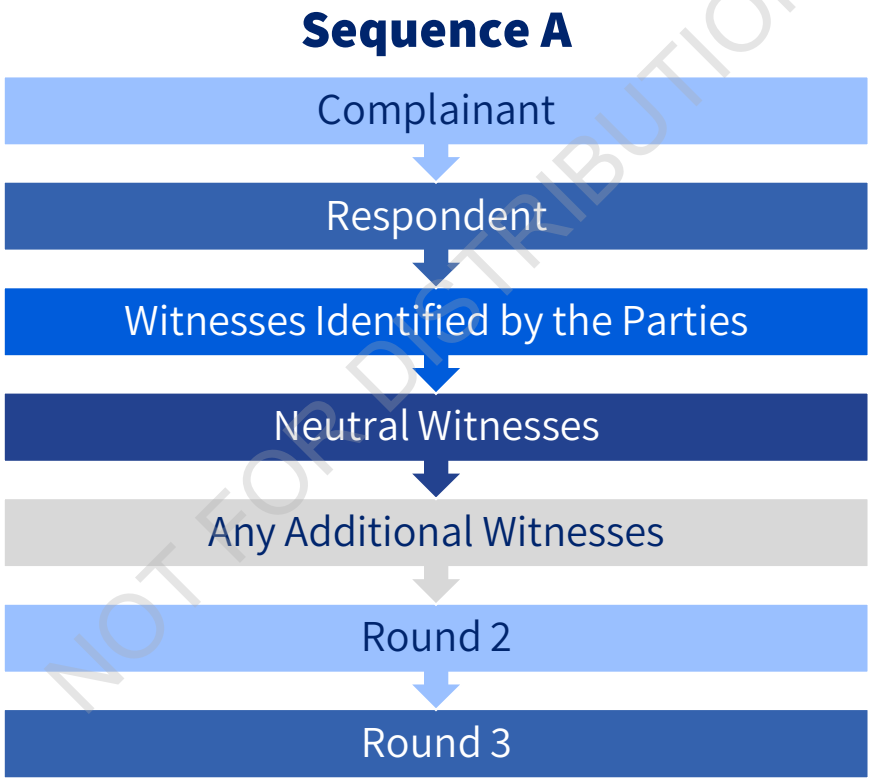
Interview Preparation

- Identify initial questions for each party and witness based on their role and evidence to which they may have access
  - Relationships prior to and after the reported incident(s)
  - Direct observation vs. receiving information after the fact
  - Communication with whom, when, and content

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Sample Interview Sequences



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Sample Interview Sequences

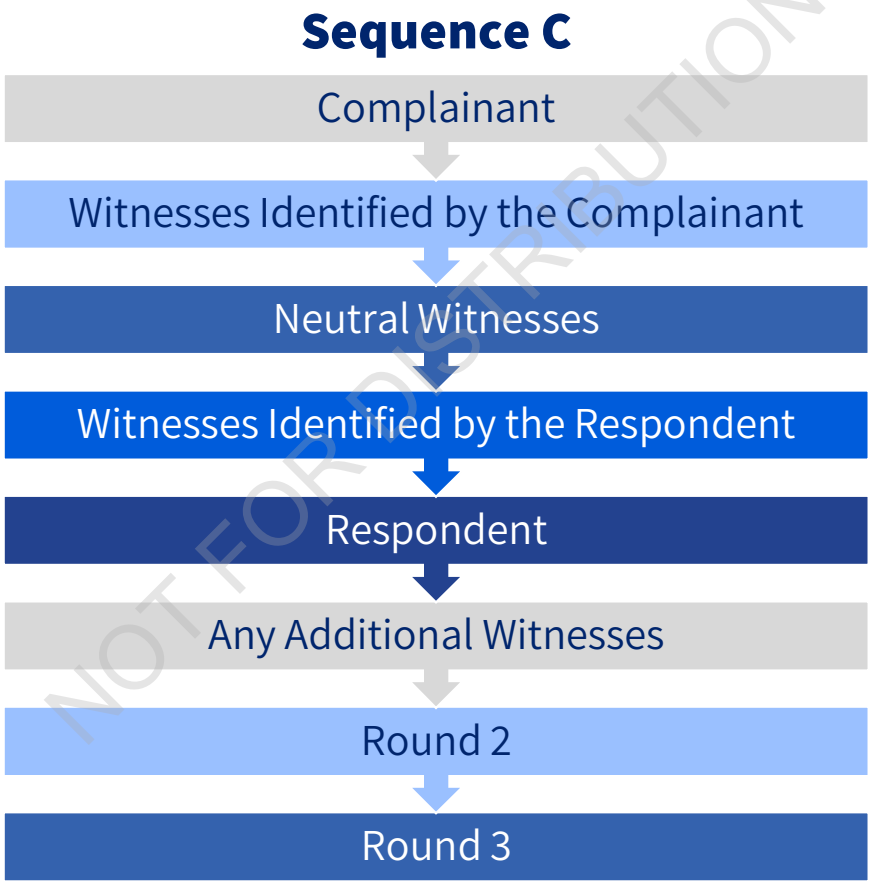
Sequence B



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Sample Interview Sequences



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Evidence Collection

- Active process to gather evidence
- Identify potential sources of information
- Seek to verify/authenticate evidence obtained
- Document efforts to gather, even when not successful

What are the most common types of evidence in your investigations?



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Information Sharing

- Information-sharing practices must balance transparency, privacy, and strategy, as well as the parties' rights
  - Often sharing more information during the investigation garners more information
    - Investigators may have to give to get, but be judicious in what is shared
- The parties will have access to all relevant and directly related evidence at the conclusion of the investigation
- Witnesses:
  - May have limited or no knowledge about the complaint itself
  - May or may not know the parties or other witnesses
  - Some information sharing will be necessary, but be circumspect and don't make assumptions that witnesses already know certain facts

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Party and Witness Investigation Concerns

Privacy vs. **Confidentiality** vs. **Privilege**

1

PRIVACY

Statutory protection (FERPA) only allows disclosing records to those who need to know, but cannot guarantee confidentiality

2

CONFIDENTIALITY

Information protection by those who need not report to the TIXC because they are designated confidential or have ethical/statutory confidentiality duties (subject to exceptions)

3

PRIVILEGE

The highest legal protection (attorney giving advice to a client or clergy providing pastoral advice); client/patient/parishioner controls the privilege

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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 equally to the Parties' Advisor
- Advisor availability may not unreasonably delay the process



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Building Rapport

GOAL: Interviewee trusts that Investigator is 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 human 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

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Understanding Trauma

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 Title IX services and processes accessible, including those who may have experienced trauma

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Trauma-Informed Practices

- **Key principles of trauma-informed practice:**
  - Safety
  - Trustworthiness and transparency
  - Collaboration and mutuality
  - Empowerment, voice, and choice
  - Cultural, historical, and identity issues
- **ATIXA Position Statement:** application of trauma-informed practices in our field has gotten 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

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“The Spiel”
The Process and Investigator Role

- 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
- Recording/notetaking practices
- Commitment to privacy
- Witness-specific information
- Post-interview steps
- Interview expectations
- Relevant policies
- Acknowledge difficulty
- Retaliation reminder

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Activity: Practicing Your Spiel

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Interviewing Skills

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Interviewing Skills

Investigators build and improve skills over time and with practice:

- Appropriate questioning
- Active listening
- Seeking clarification
- Identifying gaps
- Body language and non-verbal communication (use caution)



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Interviewing Considerations

- Prepare questions in advance
  - Open-ended questions designed to elicit narrative responses
  - Listen to answers before asking additional questions
  - Note discrepancies or areas for follow-up
- Use active listening skills
  - Eye contact
  - Head nodding
  - Summarization/restating
- Avoid tangents or distractions
- Insert logical additional questions flowing from interviewee's answers

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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

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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/tone
  - Confusing questions
  - Blaming questions
  - "Double-barreled" questions
  - Evaluative responses
  - Sanitizing language (use the terms used by the interviewee)



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Questioning Techniques



Following
vs.
Leading



Explaining
vs.
Defending



Clarifying
vs.
Challenging



Curiosity
vs.
Suspicion

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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
- Avoid statements reflecting moral judgment

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Final Interview Questions

- "Is there anyone else that you think we should talk to?"
- "Are there any questions you expected, but that we didn't ask?"
- "Is there anything else you think we need to know?"
- "What questions should I pose to other witnesses/parties?"
- **FOR THE PARTIES:** "Are there any questions that you would like us to ask any witness or other party?"
- 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

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Interview Documentation and Review

- Maintain interview transcripts or written summaries
  - **Transcript:** word-for-word documentation of a recorded interview
  - **Summary:** Investigator's summation of 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

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Activity: Developing Questions

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Activity: Developing Questions

- Refer back to the **Strategy Exercise** in the course lobby
- Begin developing interview questions based on the complaint, intake notes, and policy language provided

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Evidence

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Understanding Evidence

- Duty to collect and objectively evaluate all relevant evidence
- **Evidence** is any kind of information presented to help determine what occurred
- **Relevant** means related to the allegations of sex discrimination under investigation:
  - Questions are relevant when they seek evidence that may aid in showing whether the alleged sexual harassment occurred
  - Evidence is relevant when it may aid a DM in determining whether the alleged sexual harassment occurred or in assessing credibility
- All relevant evidence must be objectively evaluated and considered, including both inculpatory and exculpatory
  - **Inculpatory:** supports a finding of responsible for a policy violation
  - **Exculpatory:** supports a finding of not responsible for a policy violation

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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	Factual inferences
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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Privileged and Medical Information

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

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



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Relevant Evidence Exclusions

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
  - If offered to prove that someone other than the Respondent committed the alleged conduct; or
  - If offered to prove consent with respect to prior consent with the Respondent
  - Any prior consensual sexual conduct between the parties does not by itself demonstrate or imply the Complainant's consent
- Both exclusions apply even if admitted/introduced by the Complainant
- Exclusions do **not** apply to Respondent's prior sexual behavior or predisposition

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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
- Investigator should try to **authenticate all evidence** provided
  - Check for possible evidence fabrication or alteration
  - Corroborate information between witnesses
  - Try to obtain complete, rather than partial, records when possible
  - Test assertions to verify accuracy when possible
    - Example: “I don’t remember if I wore a condom, but the condom in my wallet is no longer there”

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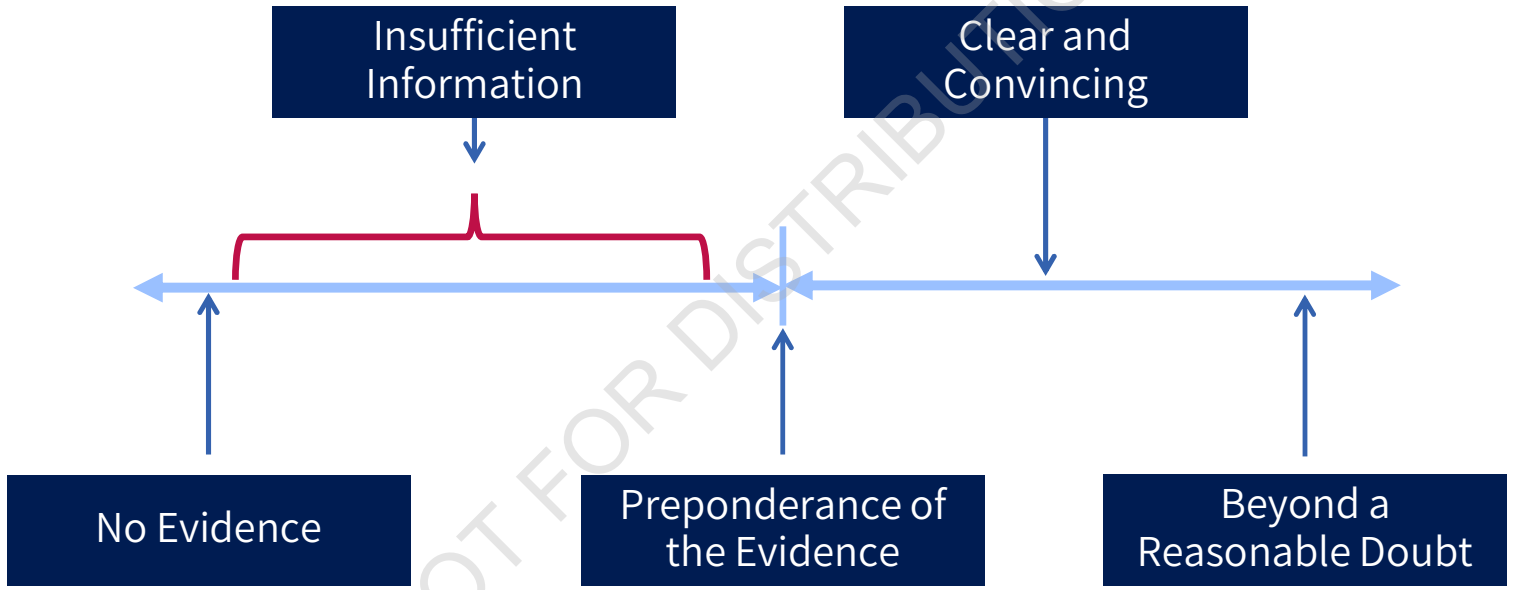
Standard of Evidence

- **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

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Standard of Evidence



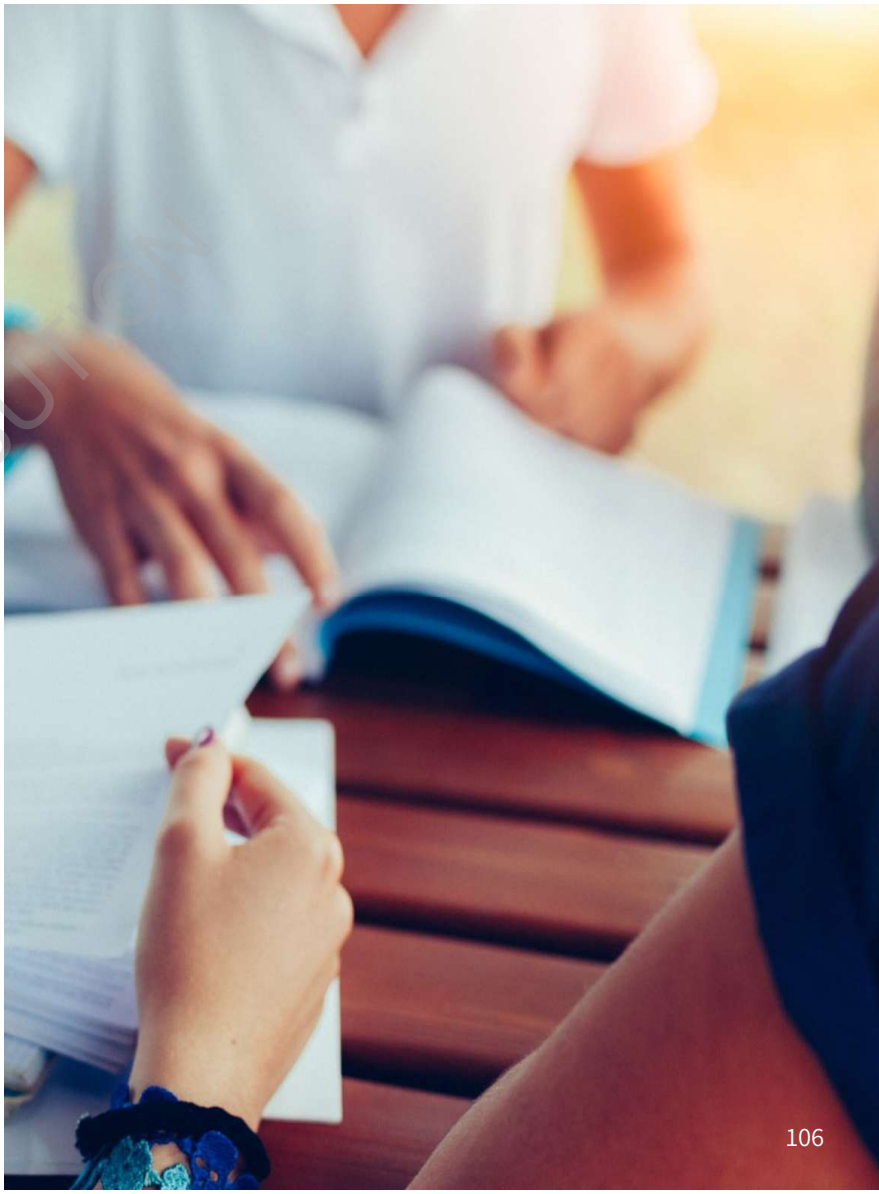
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Preponderance of the Evidence is the current industry standard

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Credibility

- **Credibility** is largely a function of corroboration and consistency
  - Credibility and honesty are not the same
- **Credibility Assessment** involves evaluating the extent to which evidence is believable and reliable (accurate reflection of what occurred)
  - 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

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/by context
- **Consistency of evidence/testimony**
- **Motive to Falsify**
- **Past Record***
- **Demeanor***

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*Less probative

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Additional Considerations

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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, but offer supportive measures in the meantime
- Criminal investigation cannot substitute for the Title IX investigation



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Complaint Analysis Tools

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Sexual Harassment Charging Rubric

- "Sexual harassment" is an umbrella term, though it is often thought of as a specific charge for hostile environment harassment
- A Hostile Environment/SPOO analysis (severe, pervasive, and objectively offensive) **is never needed for a sexual assault allegation**
  - Sexual Assault = SPOO by definition
  - If sexual assault is found to have occurred, sexual harassment (umbrella term) is automatically proven
- There may be a separate sexual harassment (hostile environment) charge alongside a sexual assault charge when the allegations arise from separate facts

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Evaluating Sexual Harassment Rubric

- Unwelcomeness is considered from a subjective lens
- Generally considered a “self-proving” element when a Complainant says the conduct was unwelcome
  - Includes a quid pro quo situation
- Investigators should primarily be focused on the “severe, pervasive, and objectively offensive” elements of sexual harassment

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Consent Construct: Three Questions

1. Did the Respondent use **force** used 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?

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Investigation Report

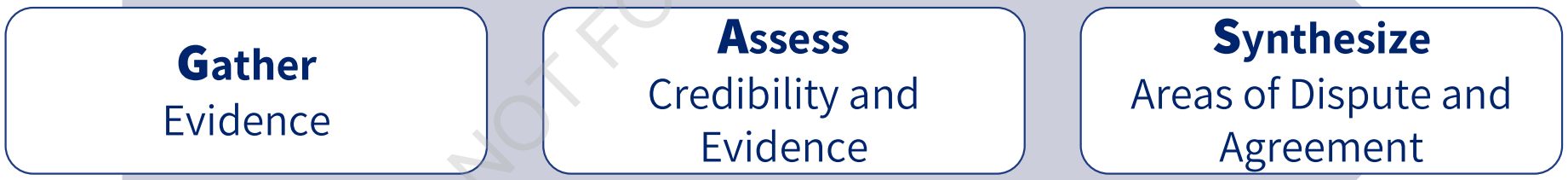
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Step 7: Draft Investigation Report

- Title IX requires a written investigation report that fairly summarizes all relevant evidence and the investigation
- ATIXA recommends sharing draft report in Step 9 when the parties are entitled to review the evidence

G.A.S. Framework



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Example Investigation Report Sections

- Introduction/Complaint Information
- Allegations Overview
- Jurisdiction
- Investigation Scope
- Applicable Policies and Relevant Definitions
  - Standard of Evidence
- Evidence List
- Investigation Timeline
- Relevant Background
- Incident Timeline
- Relevant Evidence Summary
- Credibility Assessment
- Discussion and Synthesis
- Recommended Findings and Final Determination
- Conclusion
- Appendices
- Directly Related Evidence File

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Investigation Report Steps



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Step 8: Internal 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



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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

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Review and Response

Review and response may include:

- Suggested additional witnesses
- Suggested additional questions for parties or witnesses
- Additional evidence for review
- Clarification of earlier statements
- Correction of misinformation
- Argument that evidence is relevant or not



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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 and directly related evidence file to the DM(s)
- Parties and Advisors will be sent the final investigation report for review at least 10 days prior to the hearing

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Post-Investigation: Decision-Making and Hearings

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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
- Parties' Review/ Comment
- Final Report

4 DECISION-MAKING

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

5 APPEAL

- Appeal Grounds
- Determination and Rationale

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Decision-Making

- Separate Decision-maker(s) who is not the TIXC or Investigator for sexual harassment allegations; may use a different structure for other types of complaints
- **Decision-making models situate the Investigator role in three ways:**
  - Investigator as evidence gatherer
  - Investigator as evidence synthesizer
  - Investigator as determination recommender
- **DM relies heavily on the work of the Investigator to determine:**
  - Relevance of all evidence
  - Credibility of all evidence
- DM determines whether the Respondent violated policy, and if so, what sanctions or remedies are appropriate and necessary

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Live Hearings

- All sexual harassment complaints must be resolved through a live hearing unless an Informal Resolution is reached
- Investigator may be asked to participate as a witness in the live hearing and be questioned by the DM(s) and/or parties through their Advisors
  - Example: Why did you decide some evidence relevant; other evidence was not?
- DM manages the hearing and questioning to limit to relevant evidence
- Hearing can be held in a physical location or virtually
- Must record hearing or create transcript

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Written Determinations

- **Written Determination**
  - Authored by DM(s)
  - TIXC/Legal counsel reviews
  - TIXC communicates to the parties simultaneously in writing
- **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
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal

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Appeals

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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
- Parties' Review/ Comment
- Final Report

4

DECISION-MAKING

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

5

APPEAL

- Appeal Grounds
- Determination and Rationale

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Appeal Grounds

Must offer appeals on one or more of 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 for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

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Appeal Decision-Maker and Outcomes

- Must not have been previously involved in the complaint or Formal Grievance Process
- Must complete a written determination with rationale
- Determinations may include:
  - **Upholding** the original determination and sanctions (if any)
  - **Remanding** the complaint back to the DM for reconsideration or to the Investigator for further investigation
  - **Modifying** the original determination and/or sanctions (if any)
  - **Overturning** the determination (not recommended)

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Questions?

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