

Credibility Assessment

2. Is this information reliable?

Credibility Considerations

- Assessing and determining credibility is an important DM role
- Credibility does not necessarily equate to honesty or truthfulness
 - Believability \neq truthfulness
 - Suspending character judgments
- Credibility impacts the reliability of evidence and its weight

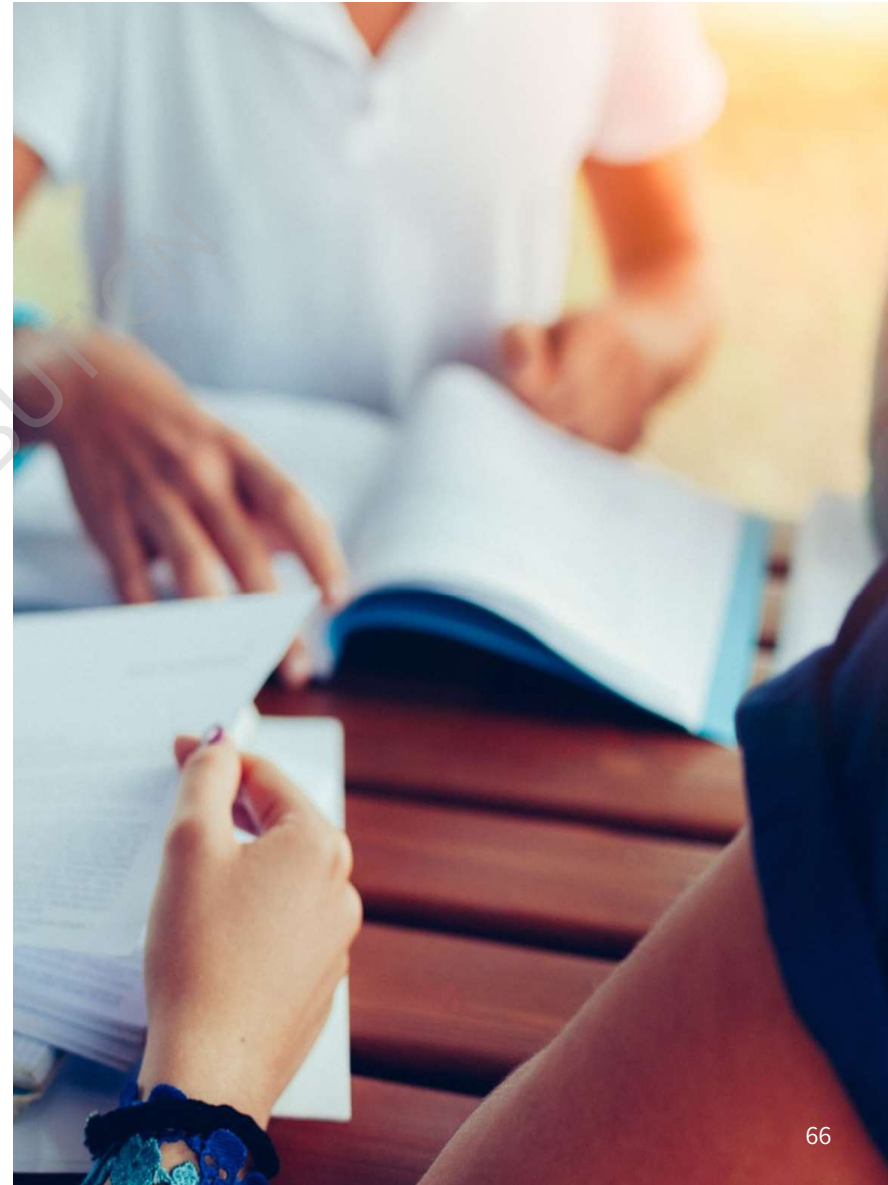
Evidence Authentication

Evidence authentication attempts to ensure that the evidence is genuine and credible

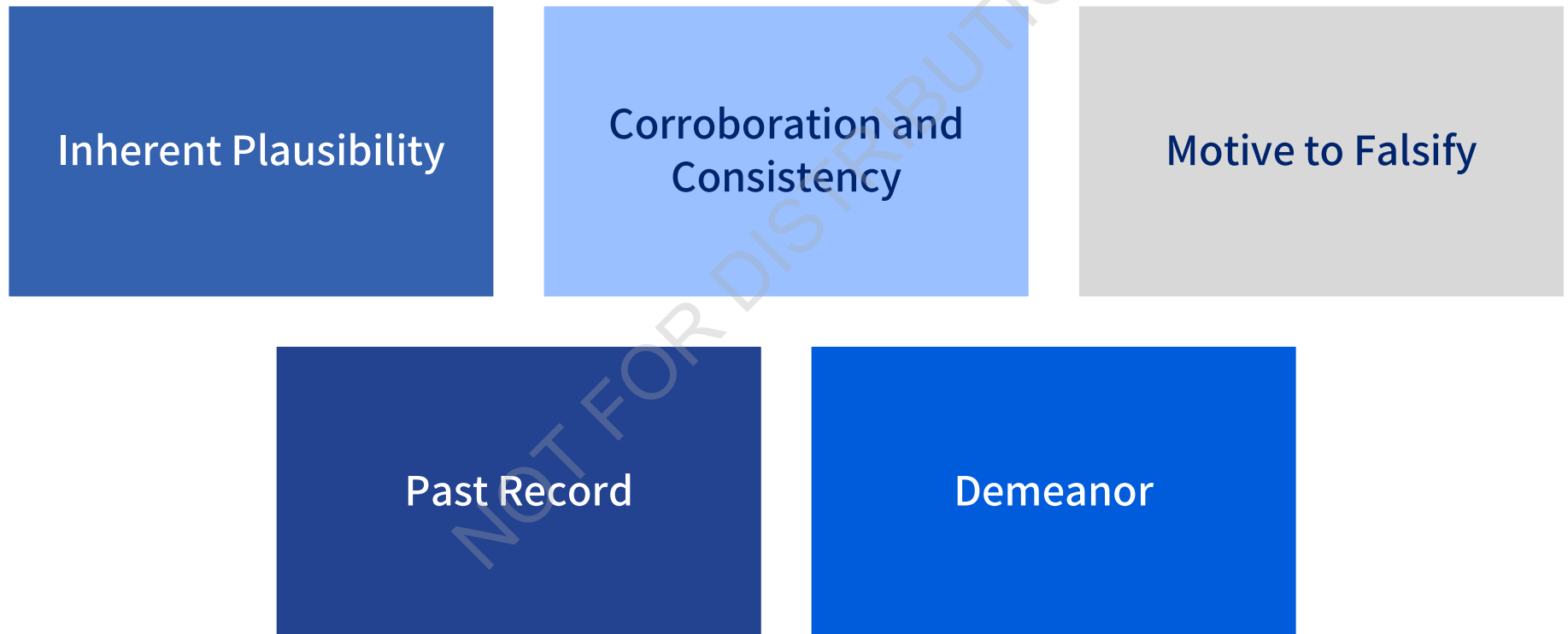
- Investigator should authenticate evidence, but sometimes the DM will
- Examples of authentication:
 - Verifying text messages by collecting texts from all involved parties
 - Collecting photographic evidence after it is referenced in an interview
 - Establishing chain of custody for a piece of physical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

Party and Witness Credibility

- **Credibility may speak to likeliness**
 - Would a reasonable person do the same?
 - Are there more likely alternatives?
- **Credibility Assessment** involves evaluating whether evidence is believable and reliable
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Note:** Memory errors alone do not necessarily diminish witness credibility, nor does some evasion



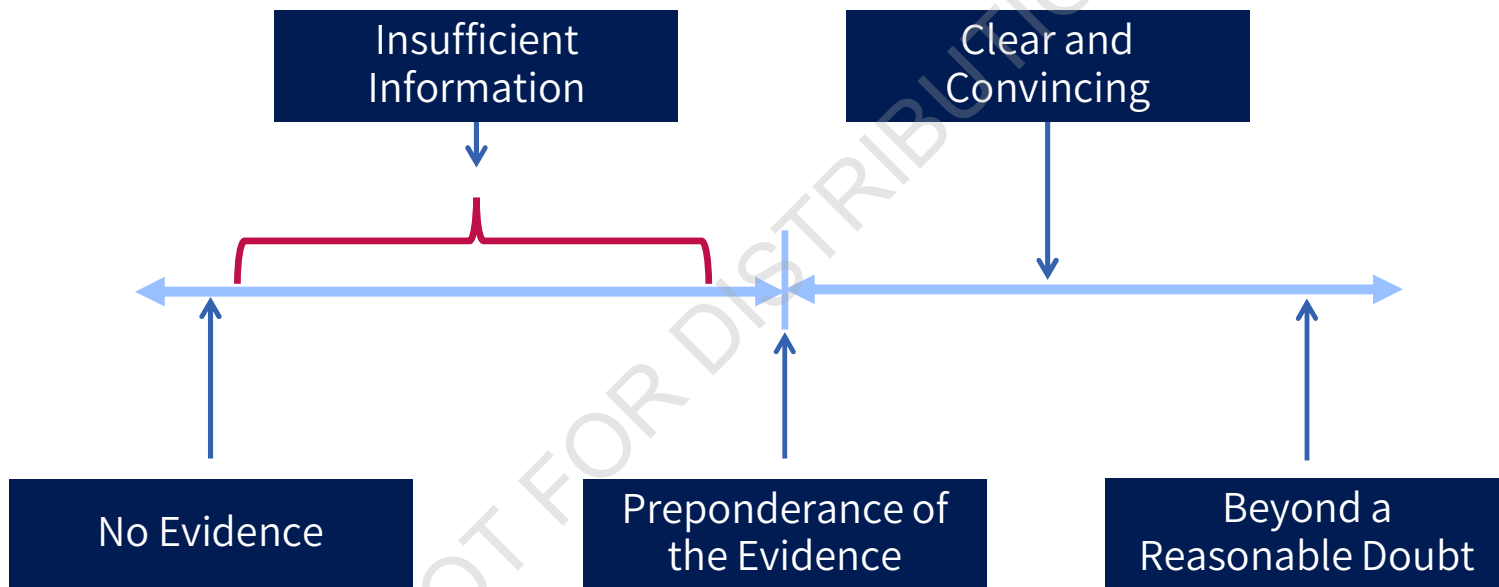
Credibility Assessment



Weighing and Analyzing Evidence

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

Standard of Evidence



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

Applying Facts to Policy

- DM must **presume the Respondent is not in violation** unless and until the standard of evidence is met
- The DM **analyzes facts against each policy element** to determine whether the Respondent violated policy
 - Written rationale will have to cite to specific evidence supporting conclusion
- Assess credibility of evidence and evidentiary weight
 - Assess statements as factual, opinion-based, or circumstantial
- Apply the standard of evidence to determine if policy has been violated

Making Findings, the Final Determination, and Sanctioning

Finding vs. Determination

Finding

Whether the conduct occurred, by the standard of evidence

Final Determination

Whether the conduct that is proven to have occurred violates policy

Written Determination Standards

- Cogent explanation of facts
- Evidence relied upon/not relied upon and why
- Evidence that was unavailable and why
- Whether presumption of innocence was overcome
- Credibility assessment and explanation
- Rationale explains how DM got from the allegation to the final determination, and also offers rationale for any sanctions implemented

Process Overview

- Anticipate having to concretely articulate the rationale for and evidence supporting all conclusions
- Parse the policy again; review the elements that comprise each allegation
- Determine credibility of evidence and assess statements as factual, opinion-based, or circumstantial
- Determine whether it is more likely than not that policy has been violated
 - Or use school/district standard of evidence
- Ensure an impartial decision that is free of substantive bias

Withhold judgment until all the evidence has been considered

Making a Finding and Final Determination

- Finding(s) must be based upon information gathered during the investigation and decision-making phases only; no outside information should influence decision-making
- **Separate the “Determination” from the “Sanction”**
 - Do not use impact-based rationales for policy violation findings and determinations
 - Use impact-based rationales for sanctions only; impact is not relevant to the policy question
 - Same with prior misconduct, unless a pattern is alleged/proven

Making a Finding and Final Determination

- Complainant and Respondent should share impact/mitigation statement(s) only if and after the Respondent is determined to have violated school/district policy
- A determination of whether the Respondent violated the policy should be distinct from factors that aggravate or mitigate the severity of the violation
- Do not “heighten” the evidentiary standard when anticipating a severe sanction

Determining Sanctions

- DM may consider:
 - Impact/mitigation statements from the parties
 - Precedent, prior misconduct, proven pattern (if alleged), attitude, collateral violations, or multiple violations
 - Aggravating or mitigating circumstances
- Primary purpose should not be developmental or educational, but focused on ensuring equity and providing remedies
- Each sanction must have a rationale

Common Student Sanctions

- Warning
- Detention
- Loss of privileges
- Counseling
- No contact order
- Limited access to school activities
- Service hours
- Online education
- Discretionary sanctions
- Alcohol and drug assessment, and counseling
- Alternative Placement
- In-School-Suspension
- Out-of-School Suspension
- Expulsion

Common Employee Sanctions

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

Common Sanctioning Pitfalls

- Failure to stop, prevent, and remedy
- Conflating the finding, the determination, and the sanction(s)
- Unwillingness to expel, suspend, or terminate
- Inconsistent or disparate sanctions for similar behaviors
- Failure to consider aggravating or mitigating circumstances
- Lockstep or prescribed sanctioning; failing to address incident-specific circumstances

Written Determinations

Written Determination

- Authored by DM
- TIXC/Legal counsel typically reviews
- TIXC communicates to the parties simultaneously in writing

Finality

- On the date the school/district provides a written appeal determination
 - OR the date when an appeal would no longer be timely

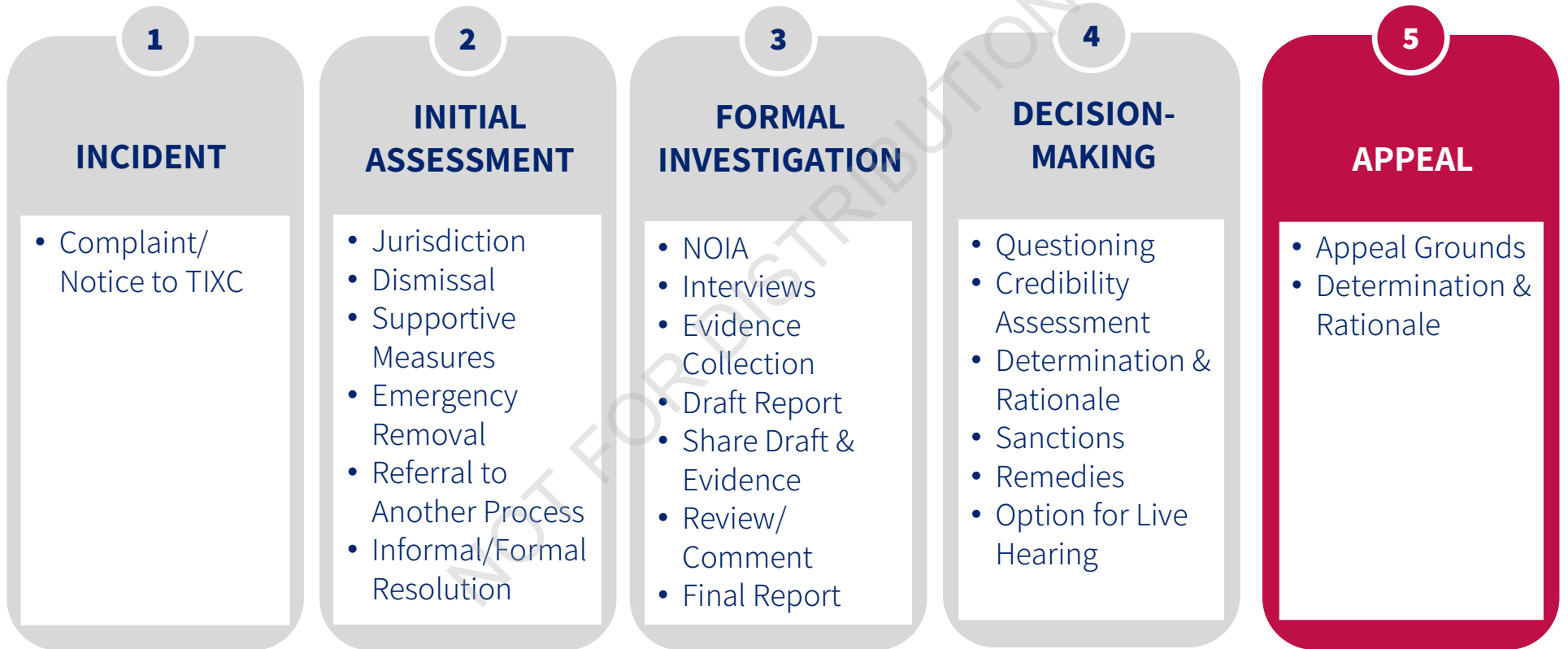
Written Determination Elements

- 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

Appeals

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Appeals



Appeals

School/District must offer an equitable appeal process

- School/District policy must include grounds and process for appeal
- School/District must provide information about the appeal process in writing to parties and Advisors
- One level of appeal is best practice
- Typically, document-based review for error only; not a new consideration
- Deference is given to the original DM

Appeals

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

Schools/Districts have the discretion to add additional appeal grounds

Role of the Appeal Decision-maker

- Cannot be TIXC or serve another role in the same complaint resolution
- Makes determination on a party's request for an appeal
- Reviews written submissions from parties
- May review investigation report or evidence gathered during investigation/decision-making phase
- May speak with Investigator, DM, parties, and/or witnesses
 - More likely when this will serve as the *Goss* hearing; when suspension/expulsion may be recommended
- **Review of complaint should be limited to the grounds noted in the appeal request**
 - Not a *de novo* review; exception may be when this will serve as the *Goss* hearing
- Draft a written determination that outlines the rationale for the outcome

Appeal Determinations

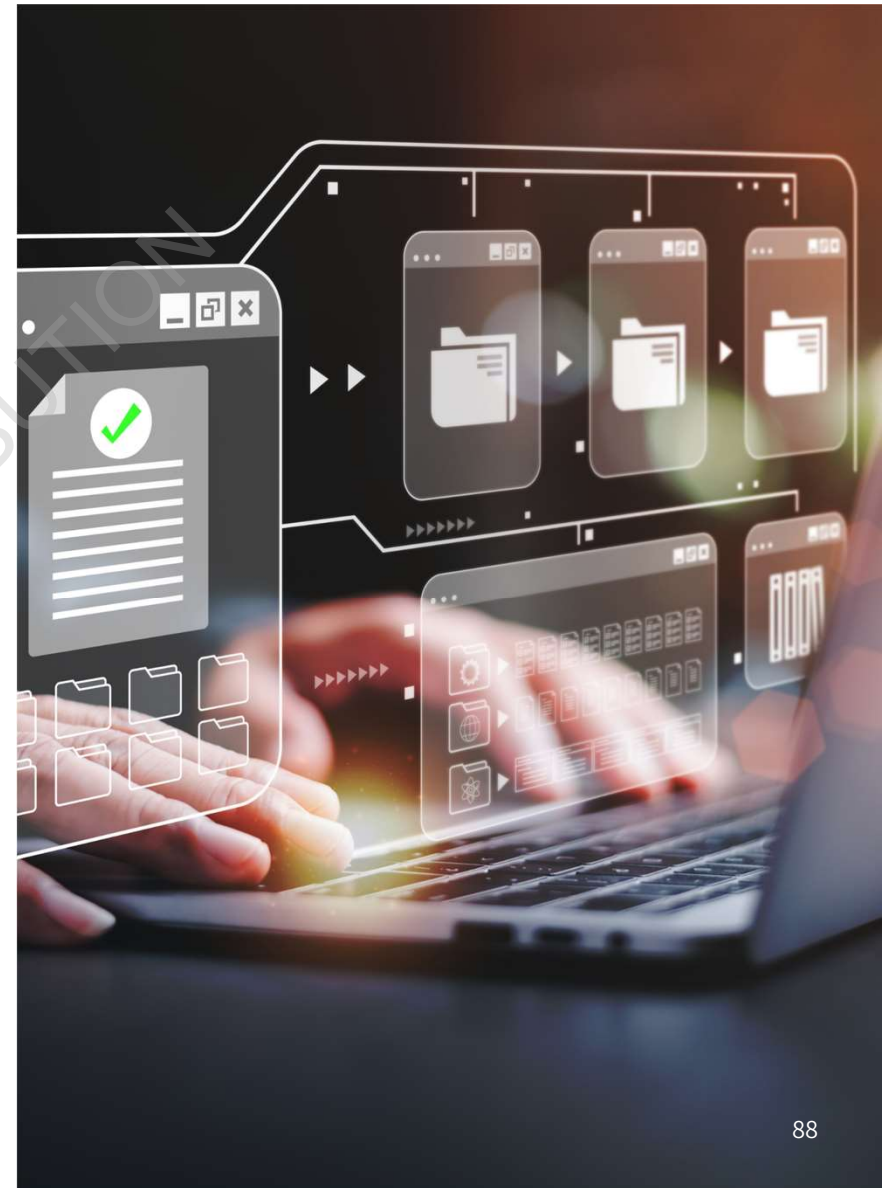
Appeal Decision-maker must complete a written determination with rationale

- Determinations may include:
 - **Upholding** the original determination and sanctions (if any)
 - **Remanding** the complaint back to the DM for reconsideration or to the Investigator for further investigation
 - **Modifying** the original determination and/or sanctions (if any)
 - **Overturing** the determination (not recommended)

Recordkeeping and Documentation

Recordkeeping

- DM compiles all documentation related to the decision-making process, including:
 - **Timeline** of decision-making process
 - **Interactions** and 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**



Decision-Maker Notes and Drafts

- TIXC should provide guidance and clear expectations about saving work product, including personal notes
- Anticipate that the parties could see the work product
 - Students have FERPA review rights
 - Employees may have rights to personnel records
 - Litigation
- Be judicious with notetaking, annotating, draft writing, and communication



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Questions?

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