



Association of
Title IX Administrators

Title IX Hearing Advisors

Training and Certification Course

WELCOME!

- Please log in to your ATIXA Event Lobby each day to access the course slides, supplemental materials, and to log your attendance.
- The ATIXA Event Lobby can be accessed by the QR code or visiting www.atixa.org/atixa-event-lobby in your internet browser.
- Links for any applicable course evaluations and learning assessments are also provided in the ATIXA Event Lobby. You will be asked to enter your registration email to access the Event Lobby.
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Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice or an assurance of compliance. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law in your jurisdiction, any applicable state or local laws, and evolving federal guidance.

Content Advisory

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

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

Course Introduction



The primary focus of this course is to cultivate the skills needed to serve as an effective Advisor in the Title IX process.



Participants will learn about the scope and function of Advisors within Title IX proceedings.



Our goal is to provide Title IX Coordinators and Advisors with a deep understanding of the Advisor's role, responsibilities, and expectations during a Title IX process.

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 educational program or activity receiving federal financial assistance.”

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



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
- As one part of providing an equitable hearing process, institutions must provide parties with an Advisor if they do not have one

Essential Compliance Elements

The requirement to **Stop, Prevent,** and **Remedy** guides institutions in their equity and compliance work

1

STOP discriminatory conduct

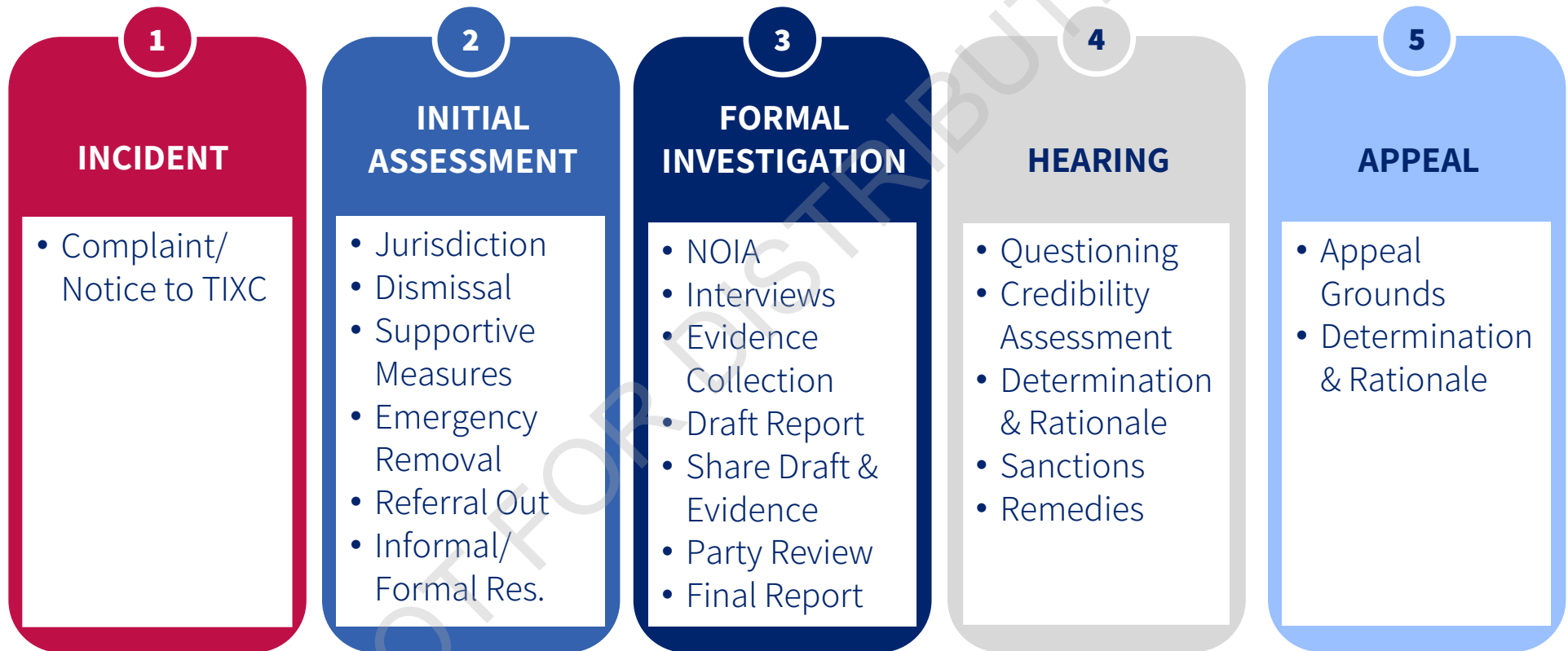
2

PREVENT recurrence, on both individual and institutional levels

3

REMEDY the effects of discrimination, for both the individual and the community

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



Advisor Role in Title IX

Role of the Advisor

Advisor support may take various forms:

- Accompany advisee to all phases of the resolution process
- Strategic issues, such as whether to:
 - File a formal complaint
 - Participate in Informal Resolution (IR)
- Accessing supportive measures, community resources, and advocacy services
- Participating in the investigation, including review and comment on the report
- Preparing for the hearing
- Conducting any questioning/cross-examination at the hearing
- Appeal procedures

Advisors

- Title IX regulations contemplate two types of Advisors
- Institution may regulate Advisor participation, so long as the restrictions apply equally to either party

Party-Selected Advisor

- Title IX regulations require that a party be allowed to select an “Advisor of choice”
- May accompany the party throughout resolution process
- May be present for every meeting, interview, and hearing
- Institution may not limit choice

Institution-Appointed Advisor

- Required to appoint only for the hearing
- If appointed earlier, may accompany the party throughout resolution process and be present for every meeting, interview, and hearing
- Appointed if the party has not chosen an Advisor by the hearing, if cross-exam desired

Advisor Expectations

- Understand Advisor role
- Learn the applicable policies and procedures
- Advise with integrity and follow any applicable professional ethics
- Meet the Title IX Team and establish a good rapport
- Be timely, professional, and organized



Know the Title IX Process

Advisee Rights

- The Title IX regulations confer many substantive rights on parties
- Advisors need to be:
 - Familiar with these rights to help ensure that their advisee receives them
 - Prepared to advocate for their advisee to receive them



Advisee Rights

Rights of the parties during the grievance process:

- Present witnesses, including expert witnesses
- Present inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Be accompanied by Advisor of their choice
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Inspect and review directly related evidence and investigation report

Who's Who in the Title IX Process?

- **Title IX Coordinator (TIXC):** responsible for the institution's Title IX compliance
 - Typically manages supportive measures, Informal Resolution, emergency removals, and dismissals (when applicable)
 - May serve as an Investigator; may not serve as Decision-maker (DM)
- **Deputy Title IX Coordinator(s):** assist and support the TIXC
- **Investigator(s):** employees/contractors who gather evidence and write an investigation report
- **Decision-maker(s):** single administrator/contractor or a panel (usually 3; including a Chair) who renders a finding/determination, determines any sanctions, and recommends any remedies

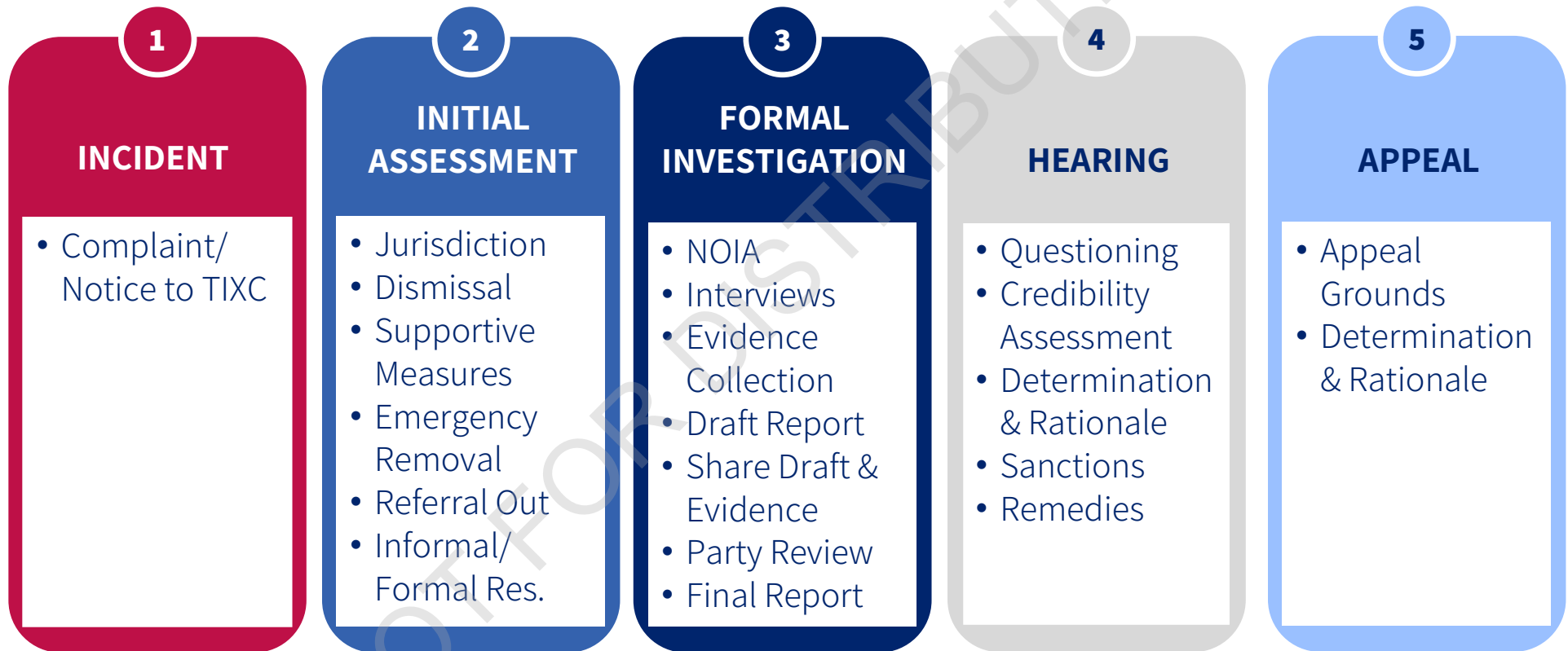
Who's Who in the Title IX Process?

- **Hearing Facilitator:** administrator who runs the logistics of the hearing
- **Appeal Decision-maker:** single administrator/contractor or a panel who decides an appeal of a final determination or a dismissal



The Advisor's Role Prior to the Hearing

Pre-Hearing Steps



When is the Institution “On Notice?”

The institution is “**on notice**” of sexual harassment when a report is made to:

- **TIXC**, or
- An **Official with Authority (OWA)**: any official who has authority to institute corrective measures on behalf of the institution

Intake to Investigation

- Advisors may accompany advisees to any intake meetings
 - Institution can conduct intake without an Advisor present if the party agrees
- During the initial complaint assessment, the parties may wish to advocate for or against dismissal
 - Advisors can help parties frame their arguments, and appeals of any dismissal (if any)
- Advisors can and should help advisees understand the details of the Notice of Investigation and Allegations (NOIA)

Outreach and Intake

- After receiving a report, TIXC (or designee), should always reach out to the Complainant
 - Best practice and regulatory requirement
- **Outreach** includes:
 - Introduction to Title IX and staff
 - Reason for the outreach
 - Offer to meet/speak over the phone; include right to Advisor
 - Available resources and resolution options, including how to file formal complaint
 - Supportive measures and resources
 - Option to report to law enforcement
- Follow up in writing with resources and information

Supportive Measures

Provided to parties throughout the process:

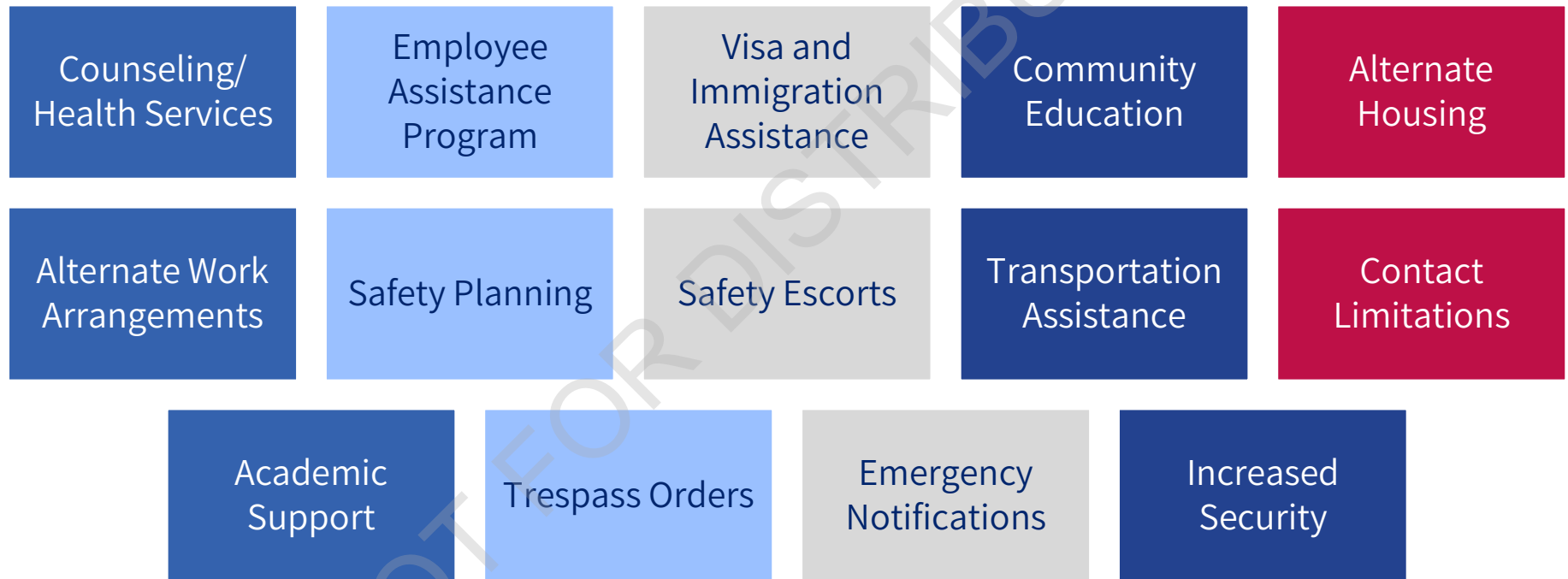
- Non-disciplinary, non-punitive
- Individualized
- Restore or preserve equal access
- Without unreasonably burdening other party
- Protect safety of parties or environment, or deter sex discrimination
- At no cost to the party



Supportive Measures

- Publish the range of available supportive measures
- Avoid unnecessary disclosures about supportive measures
- Consult with disability services administrators when appropriate
- Ensure state requirements are also met (where applicable)
- If not provided, document the rationale for refusal
 - Be able to demonstrate that response is not deliberately indifferent

Supportive Measures



Emergency Removal

Emergency Removal:

- Imposed upon student Respondents on an emergency basis only
- Individualized safety and risk analysis
 - Immediate threat exists to the physical health or safety of any student or other individual
 - The threat arises from the allegations of sexual harassment
- Respondent entitled to immediate notice and opportunity to challenge



Administrative Leave

- May remove a non-student employee Respondent using existing administrative leave procedures
- A lower bar than emergency removal of a student Respondent



Mandatory Dismissal

TIXC must dismiss the complaint at any time prior to a determination, if:

1. The conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX regulations even if proved, and/or
2. The conduct did not occur in the Recipient's education program or activity, or
 - No control over the context or Respondent
3. The conduct did not occur against a person in the United States, or
4. At the time of filing a formal complaint, a Complainant is not P/ATP
 - AND the TIXC determines they do not need to sign a formal complaint

Discretionary Dismissal

The TIXC may dismiss the complaint (or a portion of it) at any time prior to a determination, if:

- Complainant notifies the TIXC in writing that they would like to withdraw the formal complaint or any portion thereof
- Recipient no longer employs or enrolls Respondent
- Specific circumstances prevent the Recipient from gathering sufficient evidence for a determination

Dismissals

- TIXC must promptly notify parties of the dismissal
- Notification includes information about how to appeal the dismissal
 - Appeal Decision-maker(s) must be trained; must not have prior involvement in the complaint
- Institution may, and often will, address reported behavior under other applicable policy

Informal Resolution

- Title IX permits **voluntary** IR
- Not available under Title IX for employee-on-student harassment
- IR is not defined by regulations
- At discretion of TIXC, at any time prior to a final determination
 - Likelihood of resolution
 - Power dynamics
 - Goals and motivation of the parties to participate
 - Complexity and timing of the complaint
- IR facilitators must receive training and be free of bias or conflicts of interest
 - ATIXA recommends IR facilitators not serve in any other role for the same complaint

Informal Resolution

- Procedural requirements:
 - Formal complaint
 - Parties must receive written notice of the allegations, IR procedures, records created, and potential consequences
 - Parties' voluntary, written consent
 - Must still stop, prevent, remedy
- May withdraw from IR to start or resume Formal Grievance Process at any time



Investigation Basics

Notice of Investigation and Allegations

- NOIA letter is sent to all parties, simultaneously
- The NOIA includes:
 - Notice of the allegations and known details, such as identities of the parties
 - A description of the alleged conduct and relevant policy provisions
 - The date and location of the alleged conduct
 - Information about Formal Grievance Process
 - Any IR options

Notice of Investigation and Allegations

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

- To present witnesses, including expert witnesses
- To present inculpatory and exculpatory evidence
- To freely discuss the allegations
- To be accompanied by an Advisor of their choice
- To receive sufficient details known at the time and with sufficient time to prepare a response before any initial interview
- To review all relevant and directly related evidence before the investigation report is finalized

Notice of Investigation and Allegations

The NOIA must also include:

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

Retaliation Definition

- Retaliation means intimidation, threats, coercion, or discrimination against any person by a(n):
 - Student, employee, institution, or person authorized by the institution to provide some sort of aid, benefit, or service, AND
 - For the purpose of interfering with any Title IX right or privilege OR
 - Because the person has:
 - Made a report or complaint, OR
 - Testified, assisted, or participated or refused to participate in any Title IX process

Confidentiality and Privacy Concerns

- Although institutions must generally maintain confidentiality about the complaint and the identity of any individuals involved in Title IX processes, the procedural requirements necessitate that each party know:
 - The identity of all other parties
 - The identity of all witnesses
- Information may be shared as permitted by FERPA, required by state law, or to execute Title IX regulations, including investigations, hearings, or other proceedings
- Institution may ask Advisors to sign non-disclosure agreements regarding information learned during the course of advising and reviewing any materials shared with Advisors

Confidentiality, Privilege, and Privacy

1

CONFIDENTIALITY

Those who receive reports from students (and sometimes employees) and have no mandate to report to the TIXC

2

PRIVILEGE

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

3

PRIVACY

Only disclosing the allegations to those who need to know, but cannot guarantee confidentiality

Best Practices in Investigations

- Advisor may support advisee during interviews, but should avoid answering questions on advisee's behalf or coaching (unless permitted by law or policy)
 - Breaks for consultation or rest are permissible
- Working with Investigators
 - If there is a pre-interview opportunity, build a rapport with the Investigator(s) to support an advisee prior to the interview
 - Confirm whether institutional rules require Advisors to take breaks or sidebars with an advisee, or if Advisors may speak directly to them in an interview
 - Clarify under what circumstances an Advisor can address Investigator(s)

Investigation Report

- Investigator writes an investigation report that summarizes the investigation and all relevant evidence gathered
- Two-step process for review of the evidence and the report that allows parties and Advisors to:
 - Comment on the report prior to its finalization
 - Prepare for the hearing

Investigation Report Elements

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

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 10 days prior to the hearing

Reviewing the Investigation Report and Evidence File

During the first 10-day review period, the advisee and Advisor may:

- Suggest new witnesses
- Suggest additional questions to be asked of parties or witnesses
- Comment on the evidence
- Offer new evidence
- Challenge Investigator determinations of what is relevant versus what is directly related
- Ask to correct any mis-transcription or errors to ensure accuracy
- Address any bias concerns

Pre-Hearing DM Interactions

- Chair or Decision-maker may conduct pre-hearing meetings for each party (in writing, or in person)
- Pre-hearing meetings provide the opportunity to:
 - Answer questions about the hearing and its procedures
 - Clarify expectations regarding logistics, decorum, the role of Advisors, and technology



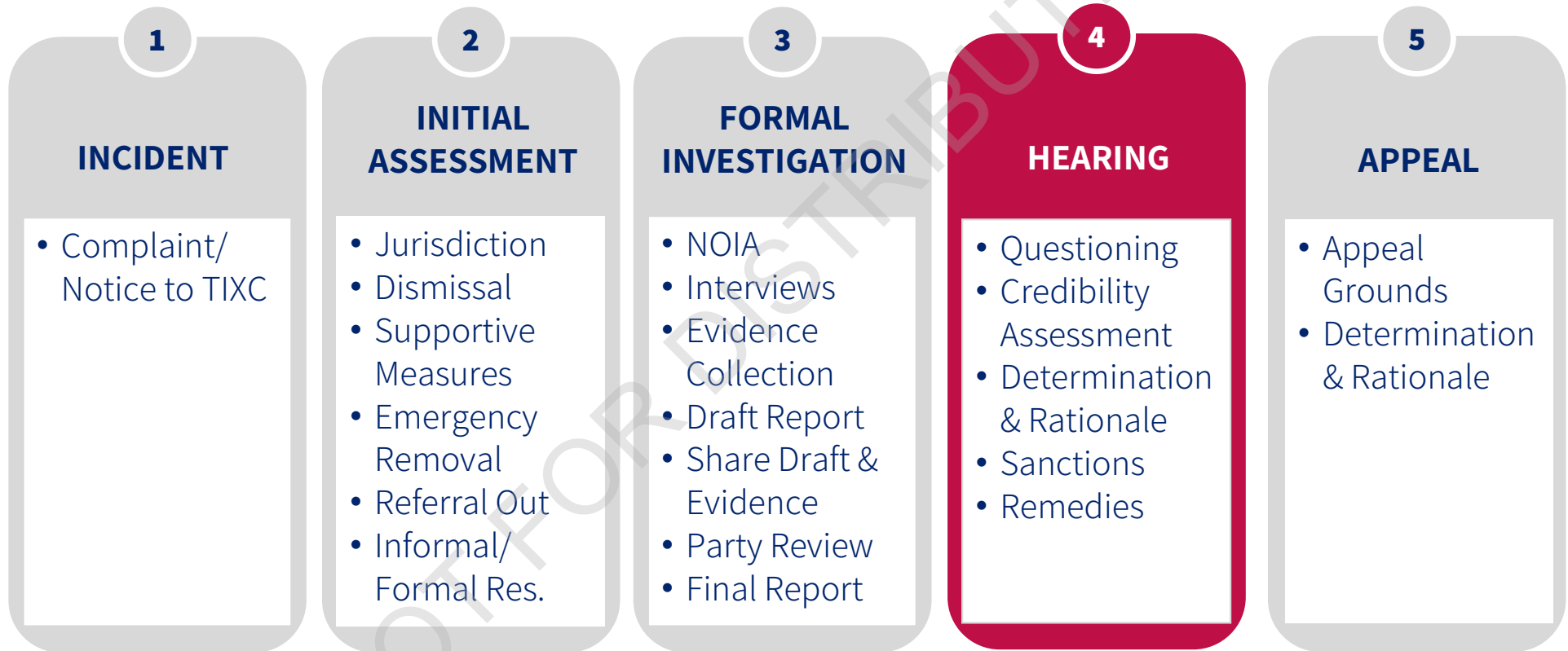
Pre-Hearing DM Interactions

Pre-hearing meetings can provide an opportunity to:

- Discern whether parties intend to ask questions of any or all witnesses, or whether a party intends not to testify at the hearing
- Invite parties to submit questions in advance, but this is not required
- Discern any conflicts of interest/vet recusal requests
- Consider any questions regarding relevance of evidence or proposed questions and make pre-hearing rulings

The Advisor's Role at the Hearing

Decision-Making



Live Hearing Requirement

- Live hearings required for higher education institutions
 - May have reasonable decorum rules
- Can occur via technology with the parties located in separate rooms or located remotely
 - Request of either party
 - DM, parties, and Advisors must be able to see and hear the party or the witness answering questions
- Create an audio or audiovisual recording, or transcript, make it available to the parties for inspection and review



Questioning & Cross-Examination

- Cross-examination of the other party and all witnesses must be permitted:
 - Directly and verbally by a party's Advisor
 - In real time by a party's Advisor and never by a party personally
- The DM must:
 - Permit relevant questions and follow-up questions, including those challenging credibility
 - Determine whether questions are relevant and direct the party or witness to answer
 - Explain any decision to exclude a question as not relevant
- The DM's relevance determination is final
- Institutional procedures may state whether Advisors may ask questions of their own advisee

Individuals Who Do Not Submit to Questioning

- A party and/or witness may choose not to “submit” to cross-examination. Examples:
 - A party who did not participate in the investigation
 - A party or witness who participated in the investigation but does not attend the hearing
 - A party or witness who attends the hearing and answers some questions but not all
- DM will rely on available earlier statements and assess credibility and weigh. Examples:
 - Statements made at the time of the incident and reported to the investigator
 - Statements made in writing
 - Evidence provided to the Investigator

Additional Considerations

- DM cannot draw an inference about responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions
- An advisee/party has the choice to appear or not to appear and can determine whether they wish to answer questions or not
- Advisors may wish to support efforts to ensure that witnesses attend the hearing to aid the DM in fully assessing their credibility and the credibility of the evidence provided
 - Particularly important if an advisee will rely upon a witness's testimony or evidence
 - Advisors may need to assist advisees to ensure that key witnesses are willing to attend/testify
- Institution's procedures may limit the introduction of new evidence at the hearing that was available during the investigation, but intentionally withheld

Questioning & Cross-Examination Tips

Golden Rule

Ask direct questions,
but don't intimidate

Don't try to trick or
confuse

Remain seated while
questioning

Respect the process
rules and boundaries

Pause after asking each
question to allow the
Chair/Decision-maker
to determine its
relevance

Avoid multi-part or
confusing questions

Additional Tips

- DM questions:
 - Questions may be asked before the Advisor gets the opportunity
 - Advisor's question may be disallowed if already asked or if abusive/uncivil
- Keep track of what has been asked
 - Be prepared to explain why a question is relevant, but engage in discussion only if invited to do so by the DM or Chair
 - Explain why the question may produce a different answer than was already provided

Supporting an Advisee During Questioning

An Advisor can support their advisee in the following ways:

- Be supportive during questioning
- Ask for a break if an advisee is uncomfortable or emotional
- Ask the DM to rule on questions from the other Advisor if they seem to be asked in an abusive way
- Ask for questions to be repeated or clarified for an advisee
- Repeat questions for the advisee if necessary
- Allow space for advisees to pause, frame their response, and compose themselves before answering questions

Answering Questions During the Hearing

- Advisee may pause to discuss a question or answer with their Advisor
 - Advisor can also request to pause or confer before the advisee answers
- No obligation to conduct cross-examination if the advisee determines that it is not necessary or could be counter-productive
 - If an advisee does not direct their Advisor to conduct cross-examination, the Advisor is not to conduct it
 - An Advisor is there on the advisee's behalf and has no independent agency as an Advisor

Specific Evidence Issues: Rape Shield Provision

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct; or
 - If offered to prove consent with respect to prior consent with the Respondent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition

Specific Evidence Issues: Privileged and Medical Information

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

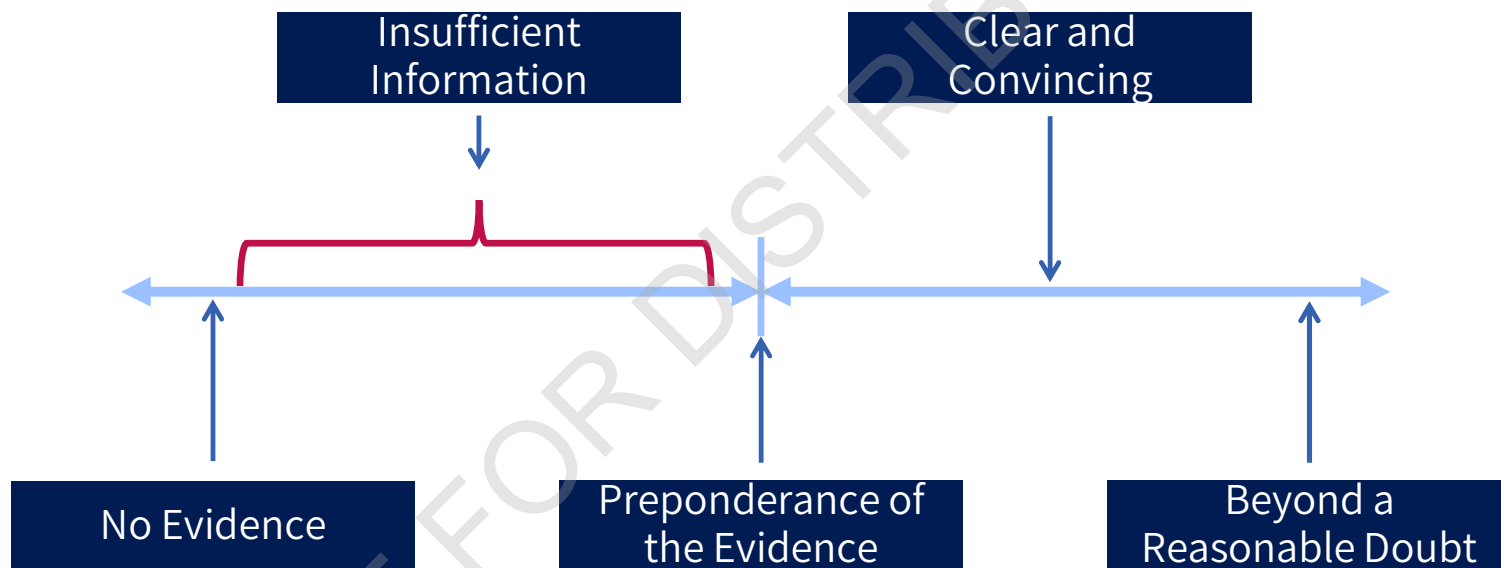
- Evidence protected under a legally recognized privilege
- Records made or maintained by:
 - Physician
 - Psychiatrist
 - Psychologist



Decision-Making

- After the hearing, the DM (or panel) will deliberate
- Findings
 - DM determines what occurred based on the standard of evidence
- Final Determination
 - DM determines whether what occurred is a policy violation applying the standard of evidence
 - Each allegation is considered individually for each Respondent
- Standard of Evidence
 - DM applies either the preponderance of the evidence standard or the clear and convincing evidence standard
 - Standard of evidence must be consistent for all formal sexual harassment complaints

Evidentiary Standards



Preponderance of the Evidence is the current industry standard

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

Sanctions

- Nature of Title IX sanctions
- May consider prior misconduct, precedent, acceptance of responsibility, contrition, and collateral or multiple violations
- Sanctioning Pitfalls
 - Conflating the finding, the determination, and the sanctioning
 - Failure to stop, prevent, and remedy
 - Unwillingness to expel, suspend, or terminate
 - Prescribed sanctioning
 - Inconsistent or disparate sanctions for similar behavior
 - Impact or mitigation statements influencing findings
 - Failure to consider aggravating or mitigating circumstances

Written Determinations

- Written Determination
 - Authored by Decision-maker(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

The Advisor's Role Post-Hearing

Appeals



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

Institutions have the discretion to add additional appeal grounds

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)
- Cannot be TIXC or someone who has served in another role in the same complaint resolution

Neutrality, Conflict of Interest, and Bias

Neutrality, Conflicts of Interest, and Bias

- Title IX regulations require that all individuals serve neutrally without any bias or conflicts of interest
- Expectation includes:
 - Objective evaluation of evidence
 - Credibility determinations regardless of party status as Complainant or Respondent



Training Materials

- Materials used to train Title IX team members must:
 - Promote impartiality
 - Not rely on sex stereotypes
- Accessing training materials
 - Most recent training materials posted on institution's website
 - Seven years of materials maintained in TIXC files



Conflicts of Interest and Bias

- Title IX team members must **not have a conflict of interest or bias** for or against the following:
 - Complainants, generally
 - Respondents, generally
 - Parties involved with a complaint
 - Subject matter or details of the complaint itself
- Advisors should report potential conflicts of interest or bias to the TIXC

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
 - Prevents neutrality or objectivity
 - Ex: A residence life professional staff member deciding a complaint filed by a current Resident Assistant on their building staff

Bias

- Bias refers to prejudice for or against a **person or group**, or an unwillingness/inability to be influenced by factual evidence
- A preference or tendency to like or dislike
- Implicit or explicit
- Can be intentional, but generally unintentional or at least unconscious
- Ex: A faculty member DM who believes Respondents cannot be trusted to tell the truth

Conflicts of Interest

- Evaluated on a case-by-case basis
- Simply knowing a student or employee is **not** enough to generate a conflict of interest, as long as objectivity is not compromised
 - Previously disciplining a student or employee is likewise **not** enough
- Bring any potential conflicts to the TIXC's attention
 - TIXC will make a recusal determination
 - Policy may have a recusal provision

Bias

- Bias can be a significant problem for TIXCs, Investigators, and/or DMs
 - Explicit or implicit
 - The often implicit and unconscious nature can lead to unexpected outcomes
 - The regulations mandate training to identify and avoid bias
- Formed from stereotypes, societal norms, cultural experiences, expectations of the people around an individual
- Can affect 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
- Advisors can help advisees to recognize it and raise concerns to TIXC and in hearing (if needed)



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Questions?



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