

Amarillo College

TITLE IX OVERVIEW:

Responding to Reports of Sexual Harassment, Sex Discrimination, and Retaliation





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.



Introduction



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



Practitioners will be provided 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.



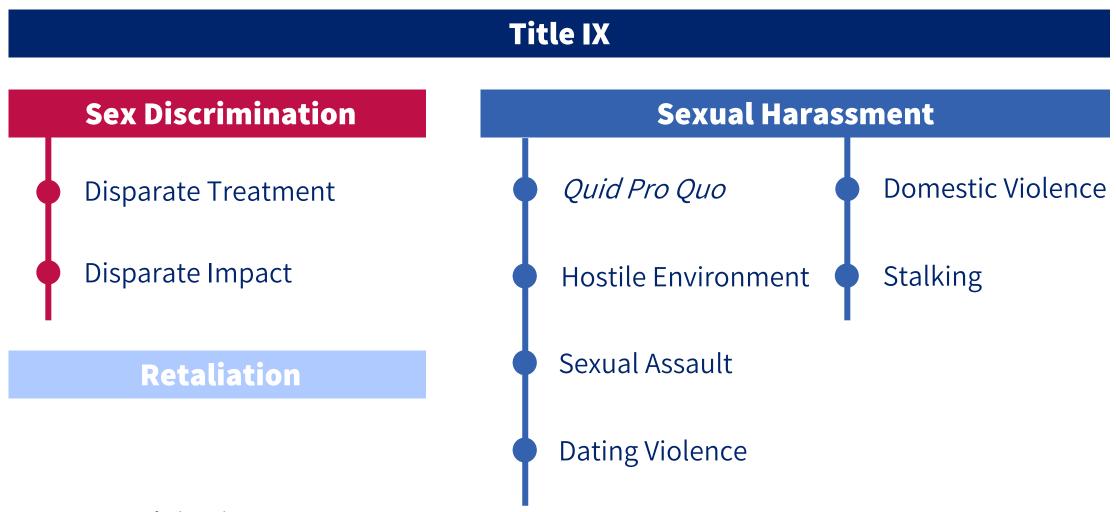
Applicability and Scope

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



Scope





Essential Compliance Elements

The requirements to **Stop, Prevent,** and **Remedy** guide institutions in their compliance work

1

STOP discriminatory conduct

2

PREVENT recurrence, on both individual and institutional levels

3

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

Roles in the Title IX Process

Parties and Advisors

- Complainant: a person who is alleged to have been subjected to conduct that could constitute sex discrimination, sexual harassment, or retaliation
- Respondent: a person who is alleged to have engaged in conduct that could constitute sex discrimination, sexual harassment, or retaliation
- Advisor: Any person chosen by a Party, or appointed by the school, who may accompany the Party to all meetings related to the Grievance Process and advise the Party on that process



Title IX Team Members

- Title IX Coordinator (TIXC): responsible for overall institutional Title IX compliance
 - Typically manages the Grievance Process, supportive measures, Informal Resolution, emergency removals, and dismissals
 - May serve as an Investigator
- Deputy Title IX Coordinator(s): assist and support the TIXC or function as the TIXC if they are conflicted out or otherwise unavailable
- Investigator(s): gather evidence, interview Parties and witnesses, organize evidence, and write an investigation report
- Decision-maker(s) (DM): individual or panel who renders a finding/determination, determines any sanctions, and recommends any remedies



Title IX Team Members

- Informal Resolution Facilitator: individual who facilitates Informal Resolution (IR) process
 - ATIXA recommends that the IR Facilitator not be the Investigator or DM
- Hearing Facilitator: individual who manages hearing logistics
 - Often the TIXC
- Appeal Decision-maker(s): individual or panel who decides an appeal of a final determination or a dismissal



Neutrality, Conflicts of Interest, and Bias

- Title IX regulations require that all individuals serve neutrally without bias or conflicts of interest
- Cannot be biased for or against the following:
 - Complainants, generally
 - Respondents, generally
 - The individual Parties involved with a complaint
 - Subject matter or details of the complaint itself
- Impartiality is critical to the integrity of the process
- Title IX team members have no "side"
- Advisor must be prepared to help their advisee raise and navigate issues of bias or conflicts of interest





What's the Difference?

Conflict of Interest

- Refers 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 Director deciding a complaint filed by a current Resident Assistant on their building staff

Bias

- Refers to unfair judgment in support of 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 DM who believes Respondents cannot be trusted to tell the truth



Definitions

Definitions: Sexual Harassment

Quid Pro Quo Sexual Harassment

- an employee of the College,
- conditions (implicitly or explicitly) the provision of aid, benefit, or service of the College,
- on an individual's participation in unwelcome sexual conduct.

Hostile Environment Sexual Harassment

- unwelcome conduct,
- determined by a reasonable person,
- to be so severe, and
- pervasive, and,
- objectively offensive,
- that it effectively denies a Complainant equal access to the College's education program or activity



Definitions: Sexual Assault - Rape

- Any sexual act directed against a Complainant,
- without their consent, or
- instances in which the Complainant is incapable of giving consent.

Rape:

- Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person,
- without their consent,
- including instances where they are incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity."



Definitions: Sexual Assault - Fondling

- Any sexual act directed against a Complainant,
- without their consent, or
- instances in which the Complainant is incapable of giving consent.

Fondling:

- The touching of the private body parts of the Complainant (buttocks, genitalia groin, breasts),
- for the purpose of sexual gratification,
- forcibly, and/or
- against their will (non-consensually), or
- not forcibly or against their will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



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?



Definitions: Dating Violence

- violence,
- on the basis of sex,
- committed by a person,
- who is in or has been in a social relationship of a romantic or intimate nature with the Complainant.

The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the:

- length of the relationship
- type of relationship, and
- frequency of interaction between the Parties.



Definitions: Domestic Violence ("Family Violence" under Texas Law

- violence,
- on the basis of sex,
- committed by a current or former spouse or intimate partner of the Complainant,
 - with whom the Complainant
 - shares a child in common
 - is/has cohabitating with as a spouse or intimate partner (similarly situated to a spouse of under Texas law) or
 - by any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Texas.

OR

– by any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of Texas.



Definitions: Stalking

- a course of conduct,
- on the basis of sex,
- directed at the Complainant, that
- would cause a reasonable person to fear for the person's safety, or
- the safety of others; or
- suffer substantial emotional distress.
 - Course of conduct: two or more acts, including, but not limited to acts in which the
 Respondent directly, indirectly, or through third Parties, by any action, method, device, or
 means, follows, monitors, observes, surveils, threatens, or communicates to or about a
 person, or interferes with a person's property
 - Reasonable person: reasonable person under similar circumstances/identities to the Complainant
 - Substantial emotional distress: significant mental suffering or anguish



Mandatory Reporting

All Amarillo College employees must report actual or suspected discrimination, harassment, and/or retaliation unless specifically designated as confidential (e.g. Counseling Center staff)

Failure to report is a violation of Amarillo College policy and Texas law and can be subject to disciplinary action as well as criminal and civil penalties:

**Texas, Senate Bill 212 (SB 212) requires employees at post-secondary institutions to report incidents of sexual assault, sexual harassment, dating violence, or stalking.

**Texas Educ. Code Chapter 51, Subchapter E-2, Sec. 51.255 states that a person commits an offense if the person:

- (1) is required to make a report under Section 51.252 and knowingly fails to make the report; or
- (2) knowingly makes a false report with the intent to harm or deceive

An "offense" under Subsection (a) is a Class B misdemeanor, except that the offense is a Class A misdemeanor if it is shown on the trial of the offense that the actor intended to conceal the incident that the actor was required to report under Section 51.252.

A postsecondary educational College shall terminate the employment of an employee whom the College determines in accordance with the College's disciplinary procedure to have committed an offense under Subsection (a).



Formal Grievance Process

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
- CredibilityAssessment
- Determination and Rationale
- Sanctions
- Remedies

5

APPEAL

- Appeal Grounds
- Determination and Rationale



Formal Grievance Process Overview

Prompt Resolution

- Complete without undue delay
- Title IX Regulations do not define "prompt"
- Grievance process may take longer than expected
- Anticipate, mitigate, and document delays
- Communicate with Parties regarding delays

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



Intake Meeting

- TIXC or designee explains the process and reviews the Party's options for support and institutional response
- Title IX staff should explore facts, but not interview
 - Needed for initial assessment and Clery timely warning
- During the initial assessment, the Parties may wish to advocate for or against supportive measures, dismissal, or emergency removal/administrative leave

Supportive Measures

- Individualized measures designed to:
 - Restore or preserve access
 - Protect safety of Parties or educational environment
 - Provide support during Grievance Process
- May **not unreasonably** burden a Party
- May not be for punitive or disciplinary reasons
- Must be without fee or charge
- Institution may deem which supportive measures are reasonably available



Example Supportive Measures

Counseling/ Health Services Employee Assistance Program Visa and Immigration Assistance

Community Education

Alternate Housing

Alternate Work Arrangements

Safety Planning

Safety Escorts

Transportation Assistance

Contact Limitations

Academic Support

Trespass Orders

Emergency Notifications

Increased Security



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



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



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



Advisor Role

Working with Advisors

- Parties have the right to be accompanied by an Advisor of their choice
- "Of choice" truly means anyone
- Advisor availability may not unreasonably delay the process



Advisors

- Advisors are not required for all Title IX Grievance Processes, though it is a best practice
- When Advisors are permitted, the Title IX regulations contemplate two types of Advisors:

Party-Selected Advisor

- Title IX regulations (and VAWA) require that a Party be allowed to select an "Advisor of choice" for sexual harassment allegations
- May be present for every meeting, interview, and hearing
- Institution may not limit choice

Institution-Appointed Advisor

- Only required for conducting Advisor-led questioning at the hearing when a Party does not have an Advisor selected
- If appointed earlier than the hearing, may accompany the Party throughout Grievance Process and be present for every meeting, interview, and hearing

Institutions may regulate Advisor participation, if the restrictions apply equally to **all** Parties



Role of the Advisor

Advisor support may take various forms:

- Accompany advisee throughout the Grievance Process, including all meetings
- Analyze strategic issues, such as whether to:
 - File a complaint
 - Participate in Informal Resolution (IR)
 - File an appeal
- Access supportive measures, community resources, and advocacy services
- Participate in the investigation, including review and comment on the report
- Prepare for the hearing, if applicable
 - Conduct any questioning/cross-examination at the hearing, if applicable



Advisor Expectations

Advisors should:

- Understand their role in the context of their institution's policy and process
- Learn the applicable policies and procedures
- Adhere to rules of confidentiality and privacy
- Advise with integrity and follow any applicable professional ethics
- Be reasonably available to their advisee
- Be timely, professional, and organized



Advisor Expectations

Advisors should not:

- Make decisions for their advisee
- Act on behalf of their advisee without permission from the advisee
- Engage in disruptive or harassing behavior toward any Party, witness, or Title IX team member
- Attempt to negotiate a resolution with the Decision-maker(s)



Confidentiality and Privacy Concerns

- Although institutions must generally maintain privacy about the complaint and any individuals involved in Title IX processes, 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 the Title IX regulations, including investigations, hearings, or other proceedings
- Advisors may be asked to sign non-disclosure agreements regarding complaint information learned while serving as an Advisor
- Advisors should be familiar with mandated reporting policies and how to navigate reporting responsibilities when serving as an Advisor



Emergency Removals

Emergency Removals

- A student Respondent may be removed from the education program or activity after an individualized safety and risk analysis
 - Student must comply with assessment or risk removal for failure to comply
 - An immediate threat exists to the physical health or safety of any student or other individual must exist
 - Threat must arise from sexual harassment allegations
- Provide the Respondent an opportunity to challenge the decision immediately



Emergency Removal Challenge

Advising a Complainant

- Complainant may have an opportunity to provide a statement or attend the show cause meeting
 - May be in support of or against removal
 - Be cautious of potential Respondent influence on Complainant
 - Example: dating violence allegations where TIXC initiated the complaint
- Advisors should assist their Party as needed
 - Submit a timely statement and/or attend the meeting
 - Effective statements are fact-based and speak to the "immediate threat exists to the physical health or safety" standard
 - May benefit from supporting documentation



Emergency Removal Challenge

Advising a Respondent

- Respondent may submit a request to challenge the removal, meet with challenge decision-maker, or both
 - Ensure Respondent knows the deadline to challenge the removal
- Review the individualized risk and safety analysis documentation
- Determine whether institution offers partial removal vs. full removal and consider whether to advocate for partial removal rather than full removal or some other modification of removal terms
- Advisors should help their Party understand the emergency removal standard and articulate either 1) why the standard has not been met, or 2) how the circumstances have changed
 - Effective statements are fact-based and speak to the "immediate threat exists to the physical health or safety" standard
 - Standard must be met and arise from the alleged sexual harassment



Pre-Investigation

Pre-Investigation Steps

1

Notice / Formal Complaint

2

Initial Assessment and Jurisdiction Determination

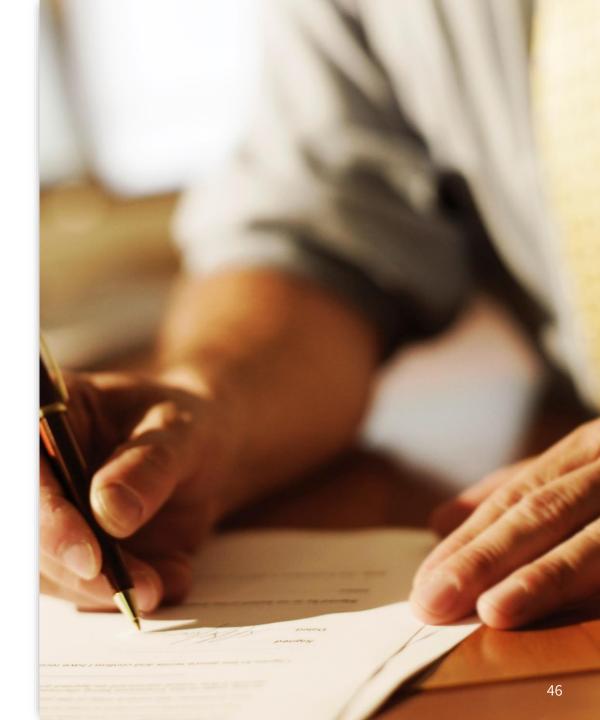
3

Determine Basis For Investigation



Investigation Scope

- TIXC determines the scope of the investigation
 - allegations, timeframes, and Parties
- If scope needs to be adjusted during the process, Investigator should consult with TIXC



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

Full-Time Investigator(s)

Investigator Pool

External Investigator

Coordinator as Investigator



Investigation Steps

- 1. Receive Notice/Complaint
- 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





Informal Resolution

- Title IX permits voluntary Informal Resolution (IR)
- Not available for employee-on-student sexual harassment
- Available at TIXC's discretion, at any time prior to a final determination
- 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



Notice of Investigation and Allegations

Investigation

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
- CredibilityAssessment
- Determination and Rationale
- Sanctions
- Remedies

5

APPEAL

- Appeal Grounds
- Determination and Rationale



Notice of Investigation and Allegations

 A letter sent to all Parties, simultaneously, in writing, prior to the investigation

The NOIA includes:

- Allegations and known details, such as Party identities
- Description/date/location of the alleged conduct
- Relevant policy/procedures/Party rights
- Presumption Respondent is not responsible
- Retaliation is not permitted
- Informal Resolution options



Updating the NOIA

NOIA may need to be updated for any of the following reasons:

- Original NOIA was deficient
- TIXC receives additional allegations
- Allegations are withdrawn
- Policy provision no longer applies, based on details of incident
- Counter-complaint is initiated



Investigation Strategy

Investigation begins with a **strategy meeting** (Investigator and TIXC)

- Complaint
- Intake documentation
- Allegations/ NOIA / Scope / Policy
- Potential biases / conflicts of interest
- Evidence
- Safety concerns
- Informal Resolution
- Supportive measures
- Preliminary undisputed and disputed facts and their significance
- Investigation Timeline



Counter-Complaints

- Respondents may file a counter-complaint against the Complainant if there is Complainant misconduct but NOT for retaliatory purposes
- 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 Parties 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, Investigator should clarify or have the TIXC contact them to clarify



Formal Investigation

Formal Comprehensive Investigation













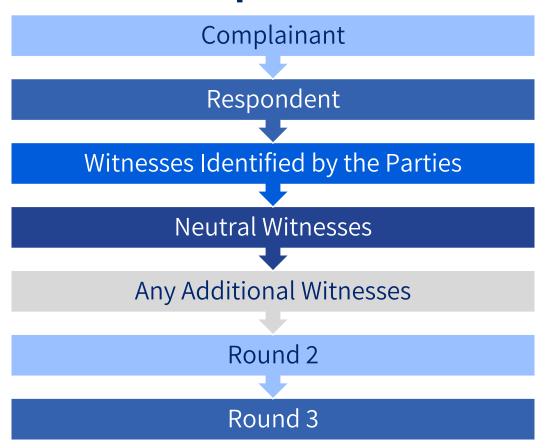
Interview Preparation

- Review available documentation and evidence (e.g. surveillance footage)
- 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 actively gather evidence that will prove or disprove the allegations
 - Identify initial questions for each Parties and witness
 - Consider relationships between Parties and witnesses
 - Consider direct observations vs. receiving information after the fact



Sample Interview Sequences

Sequence A





Sample Interview Sequences

Sequence B





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



Information Sharing

- Balance transparency, privacy, strategy, and Parties' rights
- Sharing more information during the investigation often garners more information
- 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 don't make assumptions that witnesses already know certain facts



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



Building Rapport

GOAL: Interviewee trusts that Investigator is neutral and impartial

- Investigators can help set the tone for a productive interview
- 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



"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



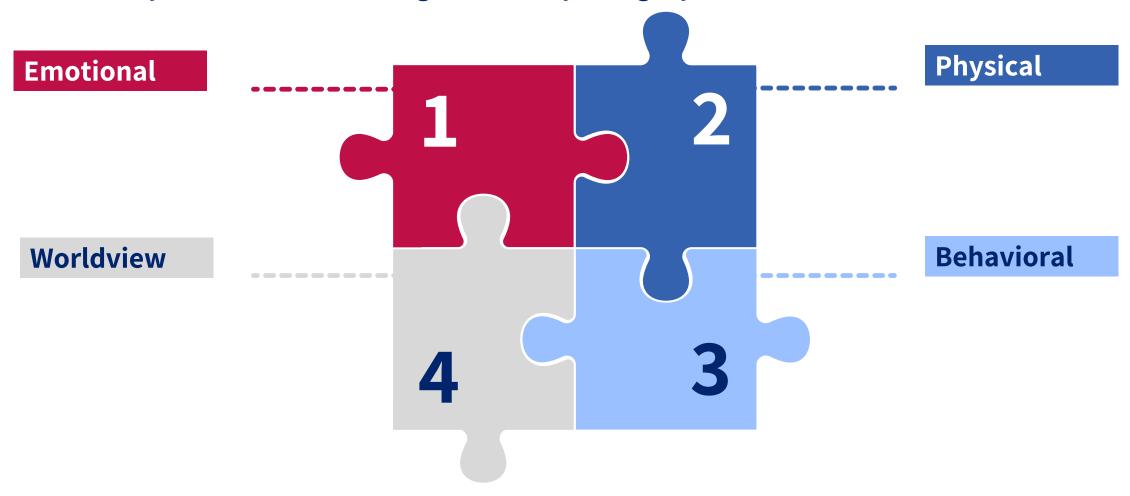
Understanding Trauma

- 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



Impacts of 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





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 Recommendation: incorporate trauma-informed investigation and interviewing methods without compromising gathering credible, relevant evidence

Trauma-informed practices should not significantly influence evidence evaluation



Interviewing Skills

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
- Avoid tangents or distractions
- Insert logical additional questions flowing from interviewee's answers



Questioning Considerations

- Start with broad questions
- Clarify timelines and details
- Explore all gaps in information
- 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

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
- Sanitizing language (use the terms used by the interviewee)



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 Parties?"
- Document questions and answers provided



Evidence

Understanding 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:
 - Inculpatory: supports a finding of responsible for a policy violation
 - Exculpatory: supports a finding of not responsible for a policy violation



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



Privileged and Medical Information

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

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



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

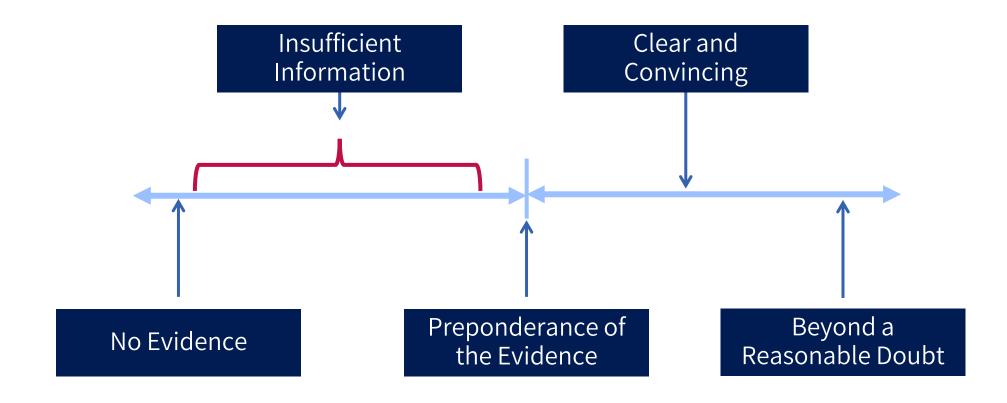


Evidence Authentication

- 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



Standard of Evidence



Preponderance of the Evidence is the current industry standard



Standard of Evidence

Preponderance of the evidence:

"More likely than not"

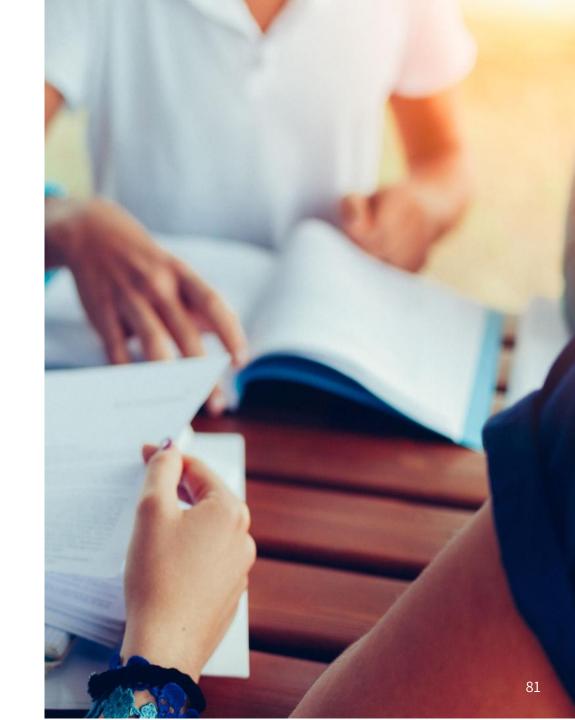
- 1. Is it more likely than not that the Respondent engaged in the alleged conduct?
- 2. If proven to have occurred by a preponderance of the evidence, does the conduct violate the Policy?

Same standard for complaints against students and employees, including faculty



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



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

*Less probative



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



Case Study

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



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



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



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?



Investigation Report

Draft Investigation Report Sections

Title IX requires a written investigation report that fairly summarizes all relevant evidence and the investigation

- 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



Parties and Advisors Review Draft Investigation Report

Parties/Advisors will have **10 business days to review** the Draft Investigation Report and directly related evidence:

Parties may:

- Provide a written response
- Offer additional information
- Clarify statements
- Submit additional evidence
- Request a follow-up interview and/or additional investigation, including Party/witness interviews



Final Investigation Report

After the 10-day review, the Investigator must:

- Consider Parties' feedback
- Incorporate where appropriate
- Document rationale for not making recommended changes as appropriate

Once finalized, the investigation report and directly related evidence is distributed simultaneously to the Parties and their Advisors at least 10 days prior to the hearing.

The Title IX office provides the report and directly related evidence file to the Decision-maker(s).



Post-Investigation: Decision-Making and Hearings

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



Decision-Making Oversight

Title IX Coordinator

- Oversees process and serves as resource
- Facilitates scheduling and communication
- Ensures sanction compliance
- Implements remedies
- Provides institutional memory and precedent information
- Trains and appoints Decision-makers
- Maintains institutional records

Decision-Maker(s)

- Facilitates Decision-making process, including questioning
- Determines relevance
- Assesses credibility
- Makes a finding of fact
- Determines whether policy was violated
- Assigns sanctions (if applicable)
- Writes determination rationale



Decision-Maker Role and Responsibilities

- Decision-makers have no side, other than the integrity of the process
- DM must have a thorough understanding of:
 - Institutional policy and procedures, including the investigation process
 - Whether the determination is for an alleged incident(s), a pattern, or a culture/climate complaint, and what findings are necessary based on that footing
 - Best practices for asking relevant questions
 - Decision-making procedures and management
 - Evidence: how to weigh it and apply it to institutional policy by the standard of evidence
 - How to analyze credibility
 - How to make determinations, decide sanctions/remedies, and write a rationale



Decision-Making

- Decision-maker(s) cannot be the Title IX Coordinator or Investigator
- Decision-maker(s) rely heavily on the work of the Investigator to determine:
 - Relevance of all evidence
 - Credibility of all evidence
- Decision-maker determines whether the Respondent violated policy, and if so, what sanctions or remedies are appropriate and necessary



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
- 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



Due Process

Due Process



Title IX regulatory requirements



Fundamental fairness concepts (private institutions)

Constitutional Due Process concepts (public institutions)



Institutional policies and procedures

Due Process in Procedure

- Consistent, thorough, and procedurally sound review of all allegations
- Substantial compliance with written policies and procedures
- Policies and procedures afford sufficient rights and protections to satisfy mandates of all applicable laws
 - Clear, written notice of the allegations
 - Opportunity to present witnesses and evidence and be heard by the Decision-maker



Due Process in Decision-Making

A decision must:

- Be appropriately impartial and fair (both finding and sanction)
- Be neither arbitrary nor capricious
- Be based on a fundamentally fair rule or policy
- Be made in good faith (i.e., without malice, ill-will, conflict, or bias)
- Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence



Due Process in the Grievance Process

Rights of the Parties during the Title IX grievance process:

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



Due Process in the Grievance Process

Rights of the Parties during the Title IX grievance process, continued:

- Inspect and review directly related evidence and investigation report
- Conduct cross-examination, if desired, through the Advisor
- Right to explanation of any ruling that a question is not relevant
- See/hear all evidence the DM may rely upon in their decision
 - Right to review and comment on that evidence to the DM
- Access to recording of any hearing
- Receive a written rationale explaining the basis for the DM's decision
- Appeal



Notice of Investigation and Allegations

- The Notice of Investigation and Allegations (NOIA) is critical to fundamental fairness and due process
- The NOIA lists the rights of the Parties in the grievance process, in addition to:
 - Known details of allegations, such as identities of the Parties
 - A description of the alleged conduct and relevant policy provisions
 - The date and location of the alleged conduct
 - Information about grievance procedures
 - Any Informal Resolution options
 - Presumption of non-responsibility
 - Prohibition on retaliation and false statements
- May need to update NOIA during process



Working with Advisors

- Parties have the right to be accompanied by an Advisor of their choice
 - Could be an attorney, but need not be
- Parties may request that the institution provide an Advisor for hearing
 - Institution may choose to appoint earlier in process
- DM may establish equitable ground rules for participation if they do not interfere with any Party rights
- Set and communicate reasonable expectations for Advisor participation



Initial Materials Review

- DMs should take time to review all available documentation and evidence prior to making a determination
- Review should consist of:
 - Complaint
 - NOIA
 - Applicable policies
 - Relevant and not otherwise impermissible evidence
 - Investigation report



Materials Review

- ATIXA recommends reviewing materials multiple times, focusing on areas of consistency and inconsistency
- Consistency review: note all areas of information consistency/alignment
 - No additional verification or questioning is likely needed on these issues
 - Begin to identify pieces of evidence that address the various policy elements
- Inconsistency review: identify information inconsistencies/disparities
 - DM compiles any remaining questions
 - DM identifies the pieces of evidence that address the various policy elements
 - DM's primary focus is resolving contested facts where possible



Policy Elements and Procedures

Policy

- What policies are alleged to have been violated?
- What are the elements of those policies?
 - DMs will weigh and apply relevant evidence to determine whether a policy violation occurred

Procedures

- Review decision-making procedures to refresh previous training
- Note any procedural questions to ask the TIXC/legal counsel



Primary Questions for Decision-Makers

1
Is this information relevant?

Is this information reliable?

Will we rely upon it as evidence supporting a rationale?

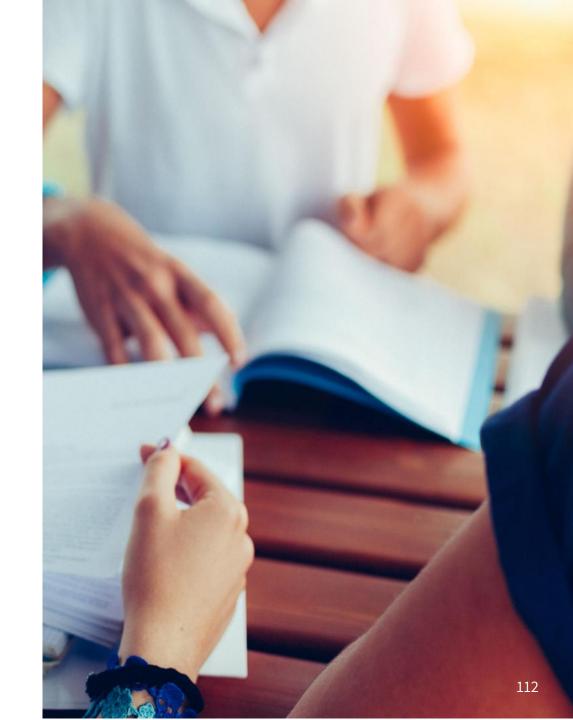
Credibility Considerations

- Credibility is often a function of corroboration and consistency
- Credibility does **not** necessarily equate to honesty or truthfulness:
- Believability does not equal truthfulness
- Credibility impacts the reliability of evidence and its weight
- Specific credibility issues that a DM may consider:
 - Relationships between the Parties and witnesses
 - Whether a witness was exposed to information (e.g., in the case of a parent or Advisor) that may have influenced their testimony



Party and Witness Credibility

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



Credibility Factors

Corroboration

Aligned testimony and/or physical evidence

Inherent Plausibility

- "Does this make sense?"
- Be careful of bias influencing your sense of "logical"

Motive to Falsify

Do they have a reason to lie?

Past Record

Is there a history of similar behavior?

Demeanor

Do they seem to be lying or telling the truth?



Investigation Strategy Exercise

Investigation Strategy Exercise

Review the Investigation Strategy Exercise in your course lobby.

- 1. Read the Complaint
- 2. Review the Applicable Policy Provisions
- 3. Identify items to clarify with the Title IX Coordinator
- 4. Identify facts central to the allegation(s)
- 5. Develop an initial witness list and order
- 6. Identify potential evidence sources



Writing Determinations

Written Determinations

Finding

Whether the conduct occurred, by the standard of evidence

Final Determination

Whether the conduct proven to have occurred violates policy



Written Determinations

Written Determination

- Authored by Decision-maker(s)
- TIXC communicates findings to the Parties, simultaneously, in writing

Finality

- the date an Appeal Decision-maker 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



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 violation question
 - Same with prior misconduct, unless a pattern is alleged/proven
- Institutions can identify a separate individual to determine sanctions OR permit the DM to determine sanctions, if any



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

Remedies

- May be implemented before or after a determination
- TIXC determines remedies that are equitable and not clearly unreasonable given the circumstances
- Goal: preserve or restore access to education program and activity
- TIXC ensures remedies are implemented for both Complainant and community



Determining Sanctions

- Each sanction should have a rationale
- Decision-makers should consider:
 - Nature and severity of the conduct
 - Aggravating or mitigating circumstances
 - Precedent, prior misconduct/discipline, proven pattern (if alleged), acceptance of responsibility, collateral violations, or multiple violations
 - Need for sanctions and other responsive actions to stop, prevent, and remedy
 - Impact on the Parties



Common Student Sanctions

- Warning (preferably written)
- Probation
- Loss of privileges
- Counseling
- No contact order
- Residence hall relocation, suspension, or expulsion
- Limited access to campus
- Service hours

- Online education
- Alcohol and drug assessment and counseling
- Discretionary sanctions
- Parental notification
- College suspension
- College expulsion



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



Appeals

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
- CredibilityAssessment
- Determination and Rationale
- Sanctions
- Remedies

5

APPEAL

- Appeal Grounds
- Determination and Rationale



Appeal Grounds

Must offer appeals on one or more of the following grounds:

- Procedural irregularity that affected the outcome of the matter
- New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter
- 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

Appeal Decision-Maker and Outcomes

- Appeal Decision-maker cannot have previously been involved in 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)



Recordkeeping

Case File

Title IX Coordinator is responsible for maintaining the entire case file for seven years (minimum)

Investigation Case File

- Formal complaint
- Incident report(s)
- Policies/procedures in place at the time of the incident(s) and the investigation
- Original NOIA and any subsequent NOIA updates
- Verified interview transcripts/statement summary
- Collected evidence
- Background information (education, employment, etc.)
- Investigator notes / contact log / evidence log
- Investigation Report

Title IX Coordinator, Decision-maker & Appeal Decision-maker files

- TIXC intake notes
- Supportive measures
- Party, witness, investigator, Decision-maker,
 Advisor names/contact info
- Hearing transcript
- Decision-letters
- Related correspondence
- Notes
- Recordings





Questions?

ALL ATIXA PROPRIETARY TRAINING MATERIALS ARE COVERED BY THE FOLLOWING LIMITED LICENSE AND COPYRIGHT.

By purchasing, receiving, and/or using ATIXA materials, you agree to accept this limited license and become a licensee of proprietary and copyrighted ATIXA-owned materials. The licensee accepts all terms and conditions of this license and agrees to abide by all provisions. No other rights are provided, and all other rights are reserved. These materials are proprietary and are licensee to the licensee only, for their use. This license permits the licensee to use the materials personally and/or internally to the licensee's organization for training purposes only.

If these materials are used to train Title IX personnel, they are subject to 34 C.F.R. Part 106. If you have lawfully obtained ATIXA materials by registering for ATIXA training, you are licensed to use the materials provided for that training.

34 C.F.R. 106.45(b)(10) (2020 Regulations) requires all training materials to be publicly posted on a Recipient's website. Licensees subject to the 2020 Title IX Regulations may download and post a PDF version of training materials for their completed training to their organizational website to comply with federal regulations. ATIXA will provide licensees with a link to their materials. That link, or links to the materials on that page only, may be posted to the licensee's website for purposes of permitting public access to the materials for review/inspection only.

You are not authorized to copy or adapt these materials without ATIXA's explicit written permission. No one may remove this license language from any version of ATIXA materials. Should any non-licensee post these materials to a public website, ATIXA will send a letter instructing the licensee to immediately remove the content from the public website upon penalty of copyright violation. These materials may not be used for any commercial purpose except by ATIXA.