



Association of
Title IX Administrators

Title IX Overview

**UNIVERSITY OF SOUTH CAROLINA
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TRAINING AGENDA

- 1 Law and Policy Overview
- 2 Intake Issues Early in the Process
- 3 Jurisdiction: When Does IX Apply?
- 4 Initial Assessment
- 5 Investigation: General
- 6 Investigation Logistics

TRAINING AGENDA (con't)

7 Investigation Report

8 Credibility

9 Discussion & Synthesis

10 Hearing & Cross Examination

11 Appeals

12 Documentation and Report Writing

13 New Day New Focus

TITLE IX

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

“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.”



TO WHOM DOES TITLE IX APPLY?

- Federal Law enacted in 1972
- Intended to end sex discrimination in all areas of education, including in employment
- Made non-discrimination based on sex/gender a condition of participation in all federally funded education programs for both public and private institutions
- It applies to educational program equity, such as in athletics, and also to sexual harassment and sexual misconduct and violence as well as employment
- Compliance with the law is overseen by the U.S. Dept. of Education, Office of Civil Rights

SEX BASED DISCRIMINATION

Sex Based Discrimination

- Program Equity
- Recruitment, Admissions and Access
- Pregnancy
- Athletics
- Employment, Recruitment and Hiring
- Extra-curricular activities
- Housing
- Access to Course Offerings
- Salaries and Benefits
- Financial Assistance
- Facilities
- Funding
- Sex, Gender, Gender Identity, Gender Expression

SEXUAL HARASSMENT

- Hostile Environment
- Stalking
- Domestic Violence
- Dating Violence
- Sexual Assault
- Sexual Violence
- Sexual Exploitation
- Sexual Intimidation
- Sexual Misconduct
- Retaliation

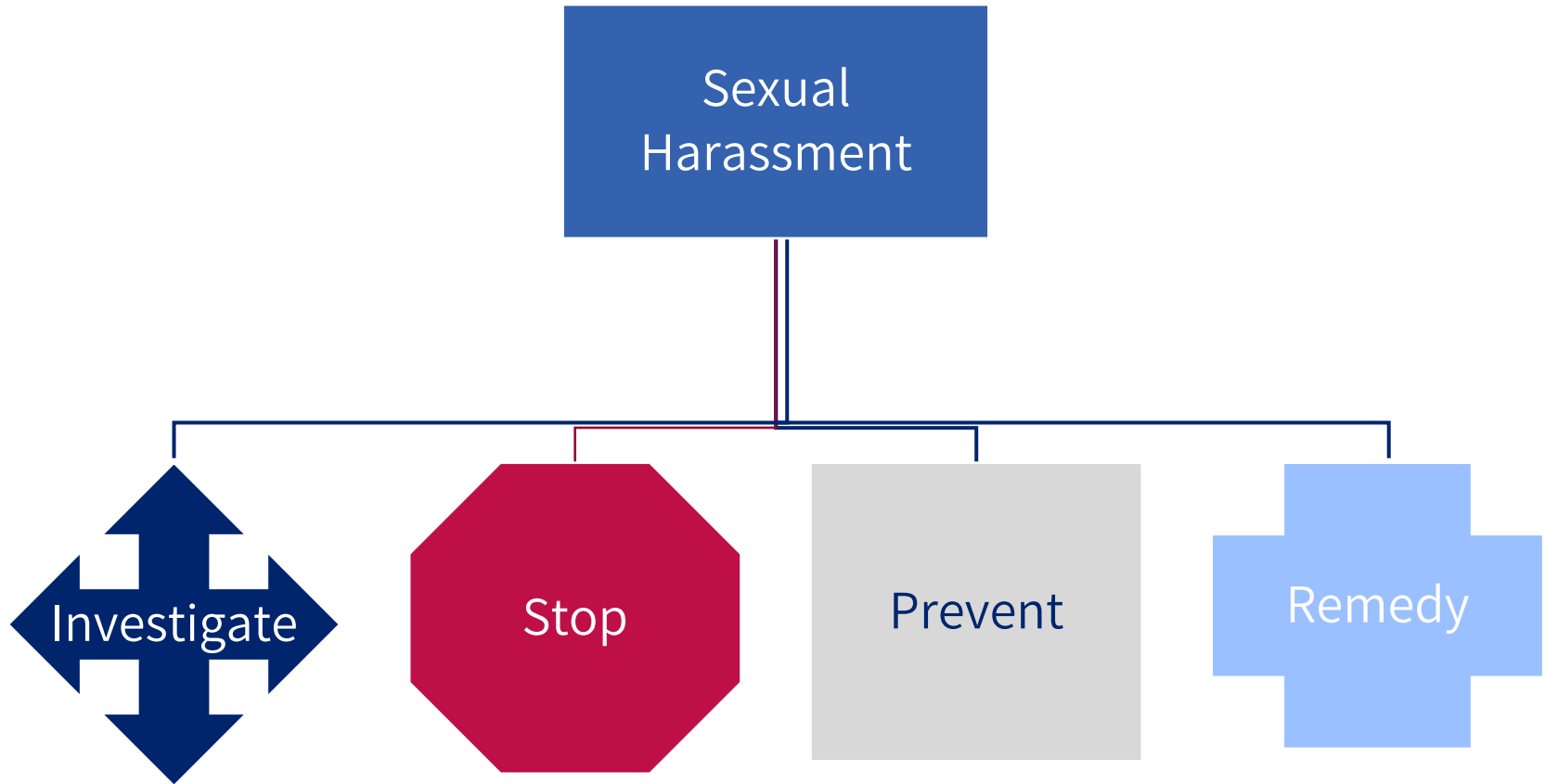
WHAT CONDUCT FALLS UNDER TITLE IX REGULATORY STANDARDS? (106.45)?

Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:

- An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient's education program or activity; or
- **“Sexual Assault”** as defined in 20 U.S.C. 1092(f)(6)(A)(v)
“Dating violence” as defined in 34 U.S.C. 12291(a)(10)
“Domestic Violence” as defined in 34 U.S.C. 12291(a)(8)
“Stalking” as defined in 34 U.S.C. 12291(a)(30)

What about the rest of the sex/gender-based conduct listed?

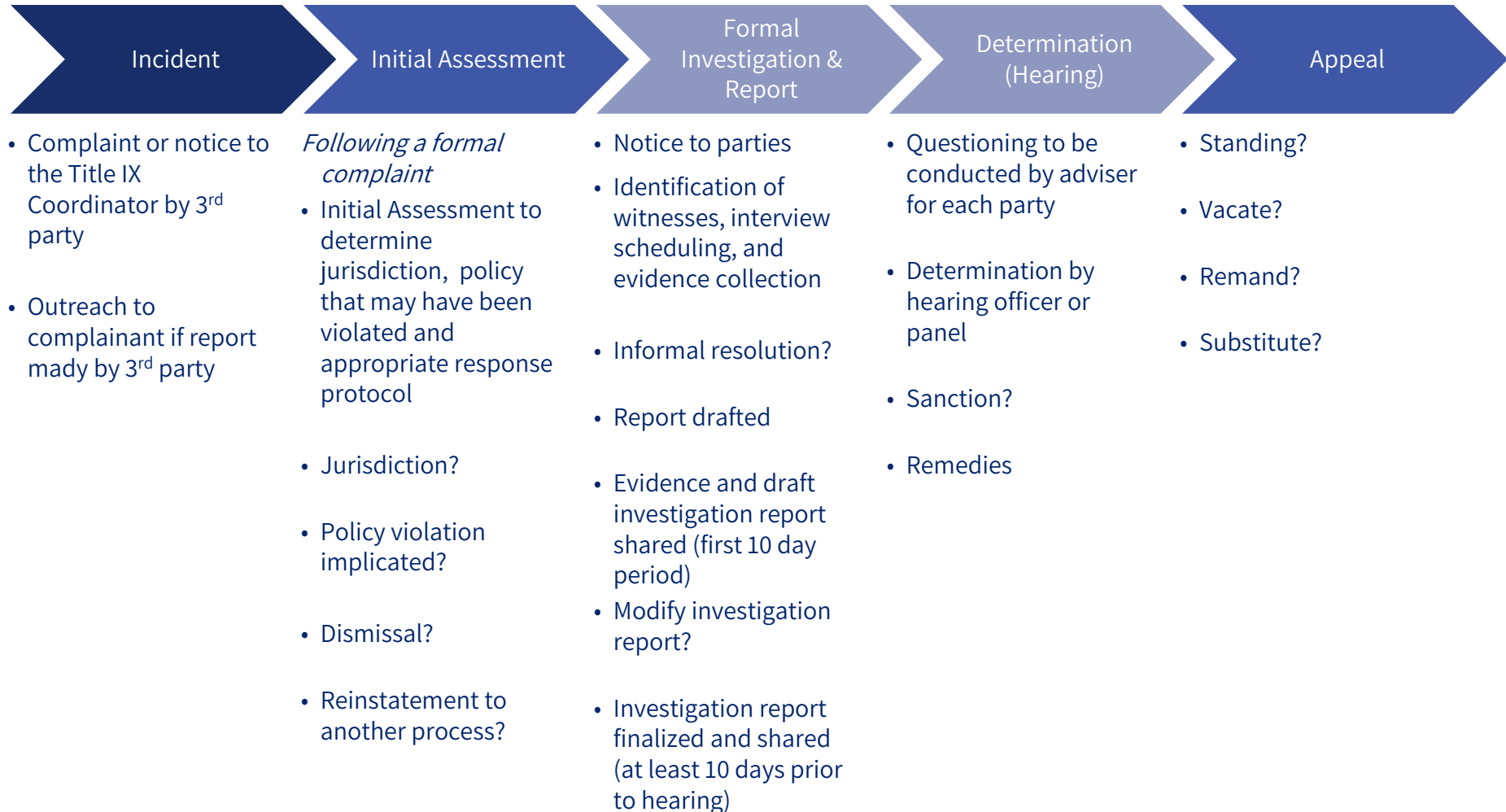
OBLIGATIONS UNDER TITLE IX



THE IX COMMANDMENTS

| | | | |
|------------------------|---------------------------------------|--------------------------------------|---------------------------------|
| INVESTIGATION → | Thorough | Reliable | Impartial |
| PROCESS → | Prompt | Effective | Equitable |
| REMEDIES → | Act reasonably to stop discrimination | Act reasonably to prevent recurrence | Act equitably to remedy effects |

THE PROCESS





INTAKE/ISSUES EARLY IN THE PROCESS

- Intake: Report v. Complaint
- Formal complaints
- Jurisdictional issues
- Dismissal issues

REPORT v. COMPLAINT – TIX REGULATIONS

- Distinguish between a “report” or “notice” and a “complaint”
- Upon receiving a “report” (either from the would-be Complainant or a third party):
 - Promptly reach out
 - Offer and provide supportive measures to the person alleged to have experienced the harassment. May also offer to would-be Respondent.
 - Explain process to file a formal complaint.
- Conduct initial assessment to determine if jurisdiction is appropriate and if conduct would fall under TIX Regulations or other policy violations (this impacts the rest of the process)

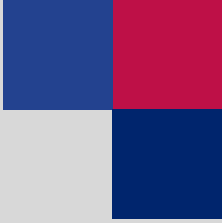
FORMAL COMPLAINT – TIX REGULATIONS

Formal Complaint

- Filed as a document or electronic submission
- Filed by Complainant (or parent/guardian) or signed by TIX Coordinator
 - TIXC does not become a party to the complaint
- Alleging Sexual Harassment or other harassment/discrimination conduct
- Requesting an investigation
- Must meet other jurisdictional requirements for Title IX
- If formal complaint meets TIX standards then eligible for informal resolution

JURISDICTIONAL ISSUES & QUESTIONS

- Jurisdiction
- Mandatory Dismissal
- Discretionary Dismissal
- When Title IX Does Not Apply
- Is It a IX?



WHEN DOES TITLE IX APPLY?

Jurisdictional Issues & Questions
Definitions of Sexual Harassment

WHEN DOES TITLE IX APPLY?

- ***Davis**** standard – Title IX applies when the University has:
 - Control over the Respondent
 - AND**
 - Control over context of the harassment
- When the definition of sexual harassment covers the in-program effects of out-of-program misconduct (though not the misconduct itself)

* *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999)

JURISDICTIONAL ASSESSMENT: IS IT A IX?

1 Who is the complainant?

2 Who is the respondent?

3 Is it behavior that meets one or more of the definitions of sexual harassment under Section 106.30?

4 Is it within the program or activity?

Is the conduct outside of the United States?

1. WHO IS THE COMPLAINANT?

- At the time of filing a formal complaint, a Complainant must be **participating in or attempting to participate** in the education program or activity of the University with which the formal complaint is filed
 - OCR adopts in the discussion a fairly broad definition of what could constitute “attempting to participate”

2. WHO IS THE RESPONDENT?

- If Respondent is **not** affiliated with the University in any way, the University **lacks authority** to take disciplinary action. Examples include:
 - Employee of an outside company (e.g., vendor, construction worker, etc.)
 - Guest or invitee
 - Prospective student
 - Former student
 - Former employee
 - Student from another institution
- May still remedy the harassment, but not provide a basis to run a formal grievance process as contemplated in the Title IX regulations.

3. DEFINITION OF SEXUAL HARASSMENT (§ 106.30)



Definitions are provided in regulations and/or refer to other federal laws (and generally track to FBI crime reporting definitions)

Conduct on the basis of sex that satisfies one or more of the following:

- Hostile environment sexual harassment
 - Severe, pervasive, **and** objectively offensive
- Quid pro quo harassment
- Sexual assault
- Domestic violence
- Dating violence
- Stalking

Retaliation is also prohibited.

4. PROGRAM OR ACTIVITY?

- There is NO expectation that you exercise jurisdiction over off-site incidents UNLESS
 - The property is owned or controlled by the school **OR**
 - The property is being used for a program or event sponsored by the school or an organization recognized by the school **OR**
 - The property is owned or controlled by an organization recognized by the school
- All programs run by a federal funding University
- All programs using facilities of the funding University
 - e.g., Camps using fields/stadium

LIMITATIONS ON WHEN TITLE IX APPLIES

- Limitations:
 - Actions/conduct/speech protected by **academic freedom**
 - Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research
 - Actions/conduct/speech protected by the **First Amendment**
 - Merely offensive conduct cannot be disciplined at a public school
 - Must be **severe, pervasive, and objectively offensive**

MANDATORY DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator **MUST** dismiss a formal complaint at any time if the alleged conduct:

- Would not constitute sexual harassment as defined (six offenses in § 106.30), even if proved
- Did not occur in the University's education program or activity
 - This includes having disciplinary control over the alleged Respondent
- Did not occur against a person in the United States
- The Complainant is not participating or attempting to participate in University's program at time of complaint

DISCRETIONARY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MAY dismiss a formal complaint if at any time prior to a determination:

- Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations
- Respondent is no longer enrolled or employed by University
- Specific circumstances prevent the University from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations

MANDATORY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

- Written notice of dismissal to parties required
 - Dismissal (or non-dismissal) of formal complaint may be appealed

Upon dismissal under the Title IX Regulatory framework (§106.45) the University may institute action under another provision of the Discrimination, Harassment and Sexual Misconduct Policy

IF TIX JURISDICTION IS NOT PRESENT

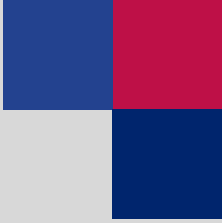
Behavior may still violate:

- University's Discrimination, Harassment, Sexual Misconduct Policy ("Part B")
- Student Handbook/Conduct policies
- Technology/Acceptable Use policies
- Employee Handbook/Policies
- Professionalism standards

IF TIX JURISDICTION IS NOT PRESENT (CONT.)

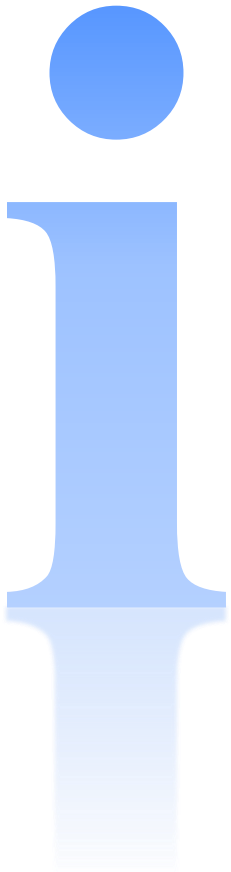
University should still take steps to:

- Provide support and resources to the Complainant and institutional community
 - Address any “downstream effects” that occur within the campus environment
- Determine if there are patterns or institutional variables that contributed to the alleged incident
- Take what action it can (e.g., trespass the person)
- Recognize that while Title IX action requires an “actual notice standard”, Title VII applies a “knew or should have known standard” that does not require a complaint
- Both laws require that we take action to Stop – Prevent and Remedy



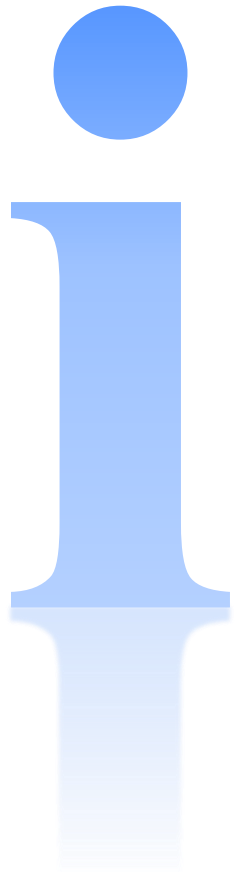
INITIAL ASSESSMENT

INITIAL ASSESSMENT IN SUMMARY



- The initial assessment is conducted by the Intake Officers who will determine the following:
 - Does the allegation meet the Title IX regulatory standard for response?
 - Does jurisdiction exist?
 - Does the TIXC need to sign/initiate a formal complaint?
 - Mandatory/Discretionary dismissal considerations.
 - If dismissed, should an alternate policy/ process begin?
 - Should this move forward under a VII rubric?
 - Can/should University remedy informally or without discipline?

INITIAL ASSESSMENT



- If proceeding under Title IX:
 - Establish basis of investigation:
 - Incident or pattern, and/or climate/culture
 - Establish a preliminary timeline for the investigation
 - If no formal action, document how University's response was not deliberately indifferent
 - Responding to anonymous reports:
 - Determine if a trend or pattern may be apparent
 - Can you identify parties?
 - Duty to attempt some form of remedial response, even to an anonymous report

SUPPORTIVE MEASURES

- Provided to all 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 sexual harassment
- If supportive measures not provided, document why not

COMMON SUPPORTIVE MEASURES

- Referral to counseling, medical and/or other health services
- Referral to the Employee Assistance Program
- Visa and immigration assistance
- Education to the community or community subgroup
- Altering housing situation (if applicable)
- Altering work arrangements for employees
- Safety planning

COMMON SUPPORTIVE MEASURES (con't.)

- Transportation accommodations
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course-related adjustments
- Trespass or Be on the Lookout (BOLO) orders
- Emergency notifications
- Increased security and monitoring of certain areas of school
- Other tailored measures appropriate to the circumstances

ATIXA RUBRIC FOR EVALUATING WHETHER TO HAVE TIXC SIGN FORMAL COMPLAINT: PPTVWM

Title IX Coordinator may need to file a formal complaint if any of the following are present:

- **Pattern**
- **Predation**
- **Threat**
- **Violence/Weapon**
- **Minors**

PPTVWM (CONT.)

Pattern, Predation, Threat, Violence, Weapon, or Minors

- Additional complaints of sexual violence involving the same Respondent
- Whether the sexual violence was committed by multiple individuals
- Whether the Respondent has a prior history of violence
- Whether the report reveals a pattern of behavior at a given location or by a particular group
- Whether the Respondent threatened further sexual violence or violence against the Complainant or others

PPTVWM (CONT.)

Pattern, Predation, Threat, Violence, Weapon, or Minors

- Whether a weapon facilitated the sexual violence
- Age of the Complainant
- Whether the school possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence)

If school proceeds, it should notify the Complainant and utilize appropriate supportive measures to protect them.

NOTICE TO THE PARTIES

- Upon receipt of a formal complaint, a University must provide **written notice** to the parties who are known that includes:
 - Notice of the grievance process, including any informal resolution process
 - Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
 - Identities of the parties involved in the incident, if known
 - Description of conduct
 - Date and location, if known

NOTICE TO THE PARTIES (CONT.)

Written notice

- Must state that Respondent is presumed not responsible and a determination regarding responsibility is made at the conclusion of the grievance process
- Parties may have an Advisor of their choice, who may be an attorney
- Parties may inspect and review evidence prior to the completion of the investigation report
- Any provision from code of conduct that prohibits knowingly making false statements or knowingly submitting false information (if any)
- Update notice if additional allegations will be added/investigated

EMERGENCY REMOVAL

The University may remove a student Respondent from the education program or activity on an emergency basis, only after:

1. Undertaking an individualized safety and risk analysis
2. Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal
3. Providing the Respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.

EMPLOYEE ADMINISTRATIVE LEAVE

- A University may place a non-student employee Respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act
- What is the appropriate action for student employees?

INFORMAL RESOLUTION

- The Title IX regulations include a provision that encourages informal resolution, and it is a worthy practice, when voluntary.
 - Following formal complaint
 - Allowed at any time prior to a final determination at discretion of TIXC
 - Voluntary, written consent of the parties and their parent/guardian
 - OCR regs preclude informal resolution of allegations that an employee harassed a student
 - Must still stop, prevent, remedy, and document response

INFORMAL RESOLUTION

- The Title IX Coordinator or designee may look to the following factors to assess whether Informal Resolution is appropriate, or which form of Informal Resolution may be most successful for the parties:
 - Amenability of the parties to Informal Resolution
 - Likelihood of potential resolution, taking into account any power dynamics between the parties
 - Motivation of the parties to participate
 - Civility of the parties
 - Cleared violence risk assessment/ongoing risk analysis
 - Whether an emergency removal is needed

INFORMAL RESOLUTION POSSIBILITIES

- Shuttle Resolution
- Age-appropriate education, facilitated dialogue, and discussion
- Conflict coaching
- Restorative practice methods:
 - Circles
 - Conferences
 - Hearings
- Mediation
- Remember that the university is a participant in the informal process



INVESTIGATION LOGISTICS

- Recording and Recordkeeping
- Who is in attendance?
- Preparation considerations
- Timing considerations

STEPS OF A TITLE IX INVESTIGATION

- Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
- Determine policy(ies) alleged to have been violated, if meets Title IX Regulatory Standards proceed using this process, if it does not, then follow your alternative process (“Process B”)
- Send Notice of Investigation/Notice of Formal Allegation(s) to Parties (NOIA)
- Establish investigation strategy
- Conduct formal comprehensive investigation
 - Witness interviews
 - Evidence gathering
- Create draft investigation report
 - All evidence that is relevant to the determination
 - Assess credibility and evidence
 - Synthesize areas of dispute/agreement

STEPS OF A TITLE IX INVESTIGATION

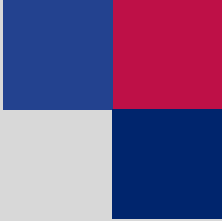
- Investigator meet with Title IX Coordinator (and/or legal counsel) to review draft report and evidence
- Provide all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
- Revise (as needed) and finalize the investigation report
 - Gather, assess, and synthesize relevant evidence
- Meet with Title IX Coordinator (and/or legal counsel) to review final investigation report
- Send final report to Decision-maker and parties/Advisors at least 10 days prior to hearing

STEPS OF ALTERNATIVE PROCESS (PROCESS “B”)

- Receive Notice/Complaint
 - Title IX allegations requires “actual notice” to trigger complaint before initiating investigation
 - Title VII allegations only require “knew or should have known” to trigger investigation (no formal complaint required)
 - Both Title IX and Title VII allegations require remedial response (supportive measures)
- Conduct Initial Assessment and Jurisdiction Determination
- If does not meet Title IX standards but is based on a protected class, including sex/gender and involves a student respondent the process will follow the Title IX Investigation standard. If an employee respondent, the case will be addressed through Civil Rights process for employees

STEPS OF ALTERNATIVE PROCESS (PROCESS “B”)

- Notice of Investigation to Parties/Notice of Formal Allegation(NOIA) (“Charge”).
- Establish investigation strategy
- Formal comprehensive investigation.
 - Witness interviews
 - Evidence gathering.
- Draft report
- Provide report including all evidence directly related to the allegations to parties and their advisors for inspection and review
- Complete final report.
 - Synthesize and analyze relevant evidence, provide a recommendation for the finding to appropriate source



THE INVESTIGATION REPORT

G.A.S. Framework

Sharing the Evidence & Report

IMPORTANCE OF INVESTIGATION REPORT

- Importance of investigation report:
 - Highlight the relationships between different pieces of evidence
 - Contradictory, corroborating, (in)consistencies, etc.
 - The Investigator's opinion is not controlling, but they want to point the Decision-makers toward decisive or corroborating evidence without telling them how to interpret it

THE INVESTIGATION REPORT

- Under the 2020 Title IX regulations, investigators may or may not assess credibility with or without rendering conclusions or making findings related to credibility, but will help to roadmap where Decision-makers should look for information critical to a determination
 - ATIXA advises that Investigators make credibility analysis instead of credibility determinations
- The regulations also allow Investigators to include a recommended finding of responsibility in the investigation report
 - ATIXA advises against Investigators including a recommended finding in the investigation report

THE INVESTIGATION REPORT

- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Results of interviews with parties and witnesses
 - Results of interviews with experts (if any)
 - Summary of other information collected (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of text, email and social networking messages, etc.)

G.A.S. FRAMEWORK

To draw a clear line between investigation and decision-making functions, Investigators should follow the G.A.S. Framework for investigations and reports:

- **Gather** evidence
- **Assess** credibility and evidence
- **Synthesize** areas of dispute/agreement and all questions asked

FRAMING THE EVIDENCE IN THE REPORT

- Collect the evidence from all sources
- Organize it according to the investigation strategy and allegations
 - Chronology
 - Geography
 - Policy prohibitions
 - Alleged violations
- Summarize evidence in a written report
- This is the fact-gathering function. It's a function all investigators have performed since at least 2011, and it's not new or different as a result of regulations.



INVESTIGATION REPORT SECTIONS

- Complaint Information
- Executive Summary
- Relevant Background
- Jurisdiction & Scope of the Investigation
- Applicable Policies & Relevant Definitions
- Investigation Timeline
- Reported Incident(s) Timeline(s)
- Summary of Relevant Statements & Evidence

SCOPE OF THE INVESTIGATION

- **Scope:** the purpose of and parameters around the investigation
 - Allegations it will explore
 - Timeframe being considered
 - Who will be involved
 - Outcome
- The Title IX Coordinator or designee will determine the scope of the investigation
- Most investigations will originate from a formal complaint, but the content of the complaint is not the sole determiner of the scope of the investigation

SCOPE OF THE INVESTIGATION (con't.)

- List the parties and relevant witnesses, while providing basic context for who the witness is in relation to the school/district and the parties.
- Include when each individual was interviewed and by whom
 - If there were witnesses or parties who were contacted and were either nonresponsive or declined to participate, include that information as well

APPLICABLE POLICIES AND RELEVANT DEFINITIONS

- Include the full text of ALL applicable policy sections
 - Alleged violation(s)
 - Relevant definitions (e.g., consent)
 - Standard of Evidence
- This section should be consistent with the Notice of Investigation and Allegations (NOIA), including any amendments

COMPLAINT INFORMATION

- Complaint date
- Complainant's name and ID
- Initial notice date
- Initial notice received from
- Respondent name and ID
- NOIA date
- Date assigned to Investigator(s)
- Assigned Investigator(s)
- Final investigation report date

RELEVANT BACKGROUND

- Summarize when and how the report/formal complaint was made and received
- Summarize the allegations, including applicable policies
- Include additional background information as necessary to understand relationship history, context, etc.
 - Separate by topic

JURISDICTION

- Provide a statement of jurisdiction including:
 - Incident date, time, and location
 - Individuals involved
 - Relevant policies and procedures related to jurisdiction
 - Information and analysis for subject matter jurisdiction
 - Indicate whether Title IX requires the university to investigate, or whether jurisdiction is discretionary and Title IX does not apply

INVESTIGATION TIMELINE EXCERPT EXAMPLE

| Date | Action |
|----------|--|
| 10/26/19 | <ul style="list-style-type: none">Complainant notified [NAME] of allegations. |
| 10/27/19 | <ul style="list-style-type: none">No contact order put in place between parties. |
| 11/01/19 | <ul style="list-style-type: none">Meeting between Complainant and Title IX CoordinatorFormal complaint submitted by ComplainantAssigned to Investigators |
| 11/03/19 | <ul style="list-style-type: none">Law enforcement requests delay to allow for criminal evidence gathering |
| 11/15/19 | <ul style="list-style-type: none">Parties sent Notice of Investigation and AllegationEmailed interview requests to parties and witnesses |
| 11/21/19 | <ul style="list-style-type: none">Investigators interview Complainant |
| 12/2/19 | <ul style="list-style-type: none">Investigators interview Respondent |
| 12/3/19 | <ul style="list-style-type: none">Investigators interview W1, W2, and W3 |

REPORTED INCIDENT(S) TIMELINE(S)

- Timelines are a visual representation or list that shows events in chronological order
- Investigators should develop one timeline for the reported incident(s) based on all information collected during interviews and submitted as evidence
- Reference evidence which substantiates with the timeline (e.g., timestamped text messages, receipts, call logs)
- Timelines are especially helpful in cases where incapacitation may be involved

REPORTED INCIDENT(S) TIMELINE EXAMPLE

| Date/Time | Event |
|---------------------------|---|
| 9/18/19 ~ 9:50 pm | Complainant goes to [name] house (Address) before [event]. |
| 9/18/19 ~ 10:45 pm | Complainant and [names] walk to [location]. |
| 9/18/19 ~ 11:00 pm | Complainant and [names] others arrive at [location, plus brief description of activity.] |
| 9/18/19 ~ 11:30 pm | Complainant vomited [where.] |
| 9/18/19 ~ 12:15 am | Complainant starts [specific activity] with Respondent. They [engage in activity] for approximately [time frame]. [Add brief details re: drug/alcohol consumption, potential witnesses, etc.] |
| 9/18/19 ~ 1:30 am | Parties agree to leave and go back to [location.] |

EXECUTIVE SUMMARY

- Date, time, and manner of formal complaint
- Complainant's identity
- Description of alleged misconduct
- Request for a formal investigation or TIX Coordinator's decision to sign a formal complaint
- Who investigated the complaint and in accordance with which law(s) and/or policies was the investigation conducted
- Detailed account of undisputed facts
- Detailed account of disputed facts
- Status of the complaint (e.g., dismissal or referral to Decision-maker(s))

EXECUTIVE SUMMARY EXAMPLE

INTRODUCTION

On Tuesday, October 6, 2020 the Deputy Title IX Coordinator met with the Complainant and her father. The Complainant reported that on Friday, October 2, 2020 the Respondent forced the Complainant to perform oral sex on him in the boys' locker room. The Complainant requested to file a Formal Complaint and completed the complaint form during the meeting.

As a result of this allegation and additional evidence presented at the time of intake, the Deputy Title IX Coordinator asked the Title IX Investigator to conduct a thorough and impartial investigation using the provisions outlined in the District's Nondiscrimination and Sexual Misconduct Policy and in accordance with Title IX, following guidelines from the U.S. Department of Education's Office for Civil Rights.

SUMMARY OF RELEVANT STATEMENTS & EVIDENCE

- The content of the investigation may dictate the most logical organization structure for this section
 - Chronological by interview
 - Chronological by incident timeline
 - Parties first, then witnesses

SYNTHESIZE AREAS OF DISPUTE

- Examine only actions that have a direct relation to the situation under review or a pattern of incidents
- Narrow the scope to areas in dispute or disagreement between the parties
 - Two lists: contested and uncontested facts
- Use evidentiary and report review periods to clarify disputed facts
- Present evidence in report organized around facts relating to alleged policy violations
- Contested facts will form the bulk of the Resolution Officer's work in making a determination



OVERVIEW OF EVIDENCE

- Relevant
- Directly Related, but Not Relevant
- Not Directly Related or Relevant
- Weighting Evidence

BUCKET 1: RELEVANT EVIDENCE



- Evidence is relevant when it tends to prove or disprove an issue in the complaint
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 2 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers within the investigation report via secure technology

BUCKET 2: DIRECTLY RELATED, BUT NOT RELEVANT EVIDENCE



- Evidence is directly related when it is connected to the complaint but is neither inculpatory nor exculpatory and will not be relied upon in the investigation report
- Parties may make case to Investigators/ Resolutions Officer that this evidence should be shifted to Bucket 1 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/ Resolutions Officer in a separate file via secure technology

BUCKET 3: NEITHER RELEVANT NOR DIRECTLY RELATED EVIDENCE



- Evidence should be maintained by the Investigator(s) but disregarded for purposes of the process
- Parties/Advisors/ Resolutions Officer don't receive this information

WEIGHTING EVIDENCE

- Investigator or Resolutions Officer may consider and assign weight to different types of evidence, when relevant and credible (see next slide)

Documentary Evidence

e.g., supportive writings or documents

Electronic Evidence

e.g., photos, text messages, and videos

Real Evidence

i.e., physical objects

Direct or Testimonial Evidence

e.g., personal observation or experience

Circumstantial Evidence

i.e., not eyewitness, but compelling

Hearsay Evidence

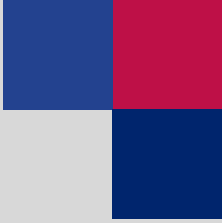
e.g., statement made outside the hearing but presented as important information

Character Evidence

subject to relevance determination; often not probative of the underlying allegation

DETAILS OF ANALYSIS OF EVIDENCE

1. Assess evidence carefully. For each piece of information you have as a result of your analysis and matching process you need to assess its evidentiary value:
 - What are the facts? They carry the most evidentiary weight.
 - What is the circumstantial evidence?
 - What are the opinions or hearsay information? They're less valuable than facts, but are probably the bulk of what you're being told. Potentially are valuable when witnesses share similar opinions. Not worthless, but only suggestive rather than probative (proving).
2. How does the evidence add up?



CREDIBILITY

ASSESS CREDIBILITY

- Accuracy and reliability of information
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading may impact
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility

COMMON ERRORS IN ASSESSING CREDIBILITY

- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
 - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about memory
 - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes

COMMON ERRORS IN ASSESSING CREDIBILITY (CONT.)

- Misplaced focus on the status of the parties
 - No scientific studies support the notion of neurobiological response differences between perpetrators and victims
- Bias in interviews
 - Presumptions of guilt can influence credibility assessments

CREDIBILITY OVERVIEW

Corroboration

- Aligned testimony and/or physical evidence.

Inherent Plausibility

- “Does this make sense?”
- Be careful of bias influencing 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?

*Enforcement Guidance
on Vicarious Employer
Liability for Unlawful
Harassment by
Supervisors*

EEOC (1999)

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they were in class, teacher confirms
 - Party describes text conversation, provides screenshots
- Not simply alignment with friendly witnesses

FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

- Can include contemporaneous witness accounts
 - More “separate” the witness, greater the credibility boost
- Outcry witnesses
 - Does what party said then line up with what they say now?
- Pay attention to allegiances
 - Friends, teammates, group membership
 - This can work both directions (ex. honest teammate)

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility

- Does what the party described make sense?
 - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- “Plausibility” is a function of “likelihood”
 - Would a reasonable person in the same scenario do the same things? Why or why not?
 - Are there more likely alternatives based on the evidence?

FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
 - Could they have heard what they said they heard?
 - Were there other impediments? (darkness, obstructions)
- How good is their memory?
 - Temporal proximity based on age of allegations
 - “I think,” “I’m pretty sure,” “It would make sense”

FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications
 - Personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the Complainant– failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

FACTORS TO CONSIDER FOR CREDIBILITY

Past Record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
 - Even if found “not responsible,” may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship

FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

- Is the interviewee uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- BE VERY CAREFUL
 - Humans are excellent at picking up non-verbal cues
 - Human are terrible at spotting liars (roughly equivalent to polygraph)
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source

CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

- Indicate where to focus for the Decision-maker without rendering conclusions or making findings related to credibility
- NOT GOOD
~~“The Decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons...”~~
- GOOD
“Mark’s testimony about X contrasts with Mariana’s testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana’s testimony, not Mark’s, during the investigation.”

CASE STUDY: IVAN AND JUANITA



CASE STUDY: IVAN & JUANITA

- Juanita, a first-year member of the women's soccer team, made a Title IX complaint directly to the Title IX Coordinator.
- On the morning of October 11, her teammate, who was checking her email in the computer lab, yelled for Juanita to come and look at something on the computer.
- Juanita saw an email sent from the men's soccer team email address, menssoccer@school.edu, which said, "Greetings new freshman, meet the girl next door."
- The email included a photo of Juanita's face photoshopped onto a naked body with huge breasts.

CASE STUDY: IVAN & JUANITA

- Everyone in the lab knew it wasn't Juanita, but they all laughed anyway.
- Juanita ran from the room crying, embarrassed that others would think it was her.
- She immediately called Ivan, a member of the men's soccer team, who she believed sent the email.
- Earlier in the year, Ivan asked Juanita out several times, but she didn't like him.
- Juanita found Ivan really annoying, and while she knows it wasn't nice, she called him a total loser in front of his friends.
- She knows that he sent the email to hurt and embarrass her.

CASE STUDY: IVAN & JUANITA

- Ivan told the investigator that he believes Juanita is blowing the whole matter out of proportion.
- He admits to creating the photo for a class project. He reports:
 - “It was only meant to be a joke. I never put her name on it, so what’s the big deal? This is a work of art that I created for my class, not a porn picture or anything. I only showed my artwork, which by the way is protected by the First Amendment, to a few of my teammates. I know my rights very well since my dad is a lawyer.

CASE STUDY: IVAN & JUANITA

- Ivan stated that he showed the photo to a couple of teammates but did not send the email.
- The email account is for official team business. The coaches and captains have the password; one captain has shared it broadly with all the seniors on the team.
- The investigator also consulted with the assistant director of information technology.
- The assistant director was able to confirm that someone using the computer lab computer sent the picture from the men's soccer team email account.

CASE STUDY: IVAN & JUANITA

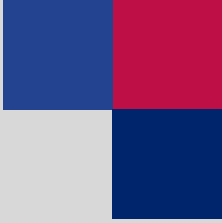
- The picture was inserted into the email via a flash drive, and he was unable to determine which student had logged in to the computer.
- The assistant director received Ivan's consent to inspect his laptop. The photo was on his hard drive but was not sent out via email to anyone.
- Ivan said that when he doesn't have his laptop with him, it is typically inside his locker. Ivan also told the assistant director that he hasn't given anyone else his laptop password.

CASE STUDY: IVAN & JUANITA

- Ivan was notified via the institution's NOIA letter that it is alleged that he violated the institution's sexual harassment policy, specifically the hostile environment provision.
- The definition of Sexual Harassment is conduct on the basis of sex that is:
 - unwelcome,
 - determined by a reasonable person,
 - to be so severe, and
 - pervasive, and,
 - objectively offensive,
 - that it effectively denies a person equal access to the Recipient's education program or activity.

CASE STUDY: IVAN & JUANITA

- Conduct a credibility analysis for both Ivan and Juanita
- What were the significant considerations for each?
- Who did you find to be more credible? Why?



DISCUSSION AND SYNTHESIS

DISCUSSION & SYNTHESIS

- Discuss and synthesize the relevant information
 - Consider the elements of each policy at issue
 - Refer back to relevant evidence cited
 - Refer to the credibility assessment(s)
- Summarize all areas of contested and uncontested facts/evidence
- ATIXA does not recommend making recommendations for findings or final determination

DISCUSSION AND SYNTHESIS EXAMPLE

The parties agree on the order of events on the date of the reported incident including sitting next to each other on the bus, the Respondent asking the Complainant for a blanket, the Respondent placing the blanket over the top of both parties, and the Respondent touching the Complainant's breasts under her shirt without consent.

The parties disagree about the following:

- Whether the Respondent digitally penetrated the Complainant
- Whether the Respondent forced the Complainant to touch his genitals

DISCUSSION AND SYNTHESIS EXAMPLE (CONT.)

During her interview, the Complainant reported that she was wearing a skirt at the time of the alleged incidents and the Respondent moved her underwear to the side in order to digitally penetrate her vagina despite the Complainant pushing his hand away and attempting to cross her legs while sitting in the bus seat. The Respondent denies these allegations. Witness 2 recalls observing the Complainant attempting to turn away from the Respondent in the bus seat and do what appeared to be pulling her legs up closer to her chest.

FINDINGS FOR CASES NOT SUBJECT TO TITLE IX REGULATORY PROCEDURES

- If the case does not fall under Title IX regulatory standards:
 - All cases addressed by the Office of Civil Rights and Title IX involving students will go to a hearing unless informally resolved, and the investigation report will not make a conclusion
 - All cases addressed by the Office of Civil Rights and Title IX involving faculty or staff the investigation report will include a conclusion for the finding and sanction and there will not be a hearing.
 - All cases are subject to appeal.



SHARING EVIDENCE & THE INVESTIGATION REPORT

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
 - Be sent to each party and Advisor
 - Be in an electronic format or hard copy
 - Include evidence upon which the University does not intend to rely
 - Include exculpatory and inculpatory evidence
 - Be made available at any hearing
- **Best practice:** Provide the draft investigation report at the same time.
- After sending the evidence, the investigator must:
 - Allow 10 days for written response
 - Consider response prior to completion of report

EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2

At least 10 days prior to making a determination regarding responsibility:

- The final Investigation Report summarizing relevant evidence must be sent:
 - To each party and Advisor
 - In an electronic format or hard copy
 - For the parties' review
- **Best Practice:** Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties



HEARINGS, SANCTIONING & WRITTEN DETERMINATIONS

LIVE HEARING

- Regulations and university policy mandate live hearing for all Title IX cases and student cases
 - Virtual hearings are permitted
- Must create audio/audiovisual recording, or transcript of hearing and make it available to the parties for inspection and review.
- Must allow live cross-examination to be conducted exclusively by each party's Advisor in Title IX cases
- In Title IX cases, questions come from Advisors and Resolutions Officer
- In non-Title IX cases involving students, the parties may engage in directly questioning the other and the witnesses.
- Role of facilitator?

SANCTIONING FOR STUDENTS

- Sanctions should be commensurate with the determined violation(s). When imposing the sanction(s), the sanctioning body should account for any mitigating and/or aggravating factors including, but not limited to:
 - The facts and circumstances of the underlying conduct,
 - Past misconduct by the student,
 - Failure of the student to comply fully with previous sanctions,
 - Actual and potential harm caused by the violation,
 - Degree of intent and motivation of the student in committing the violation,
 - The severity and pervasiveness of the conduct that constituted the violation.
 - Impairment resulting from voluntary use of alcohol or drugs (i.e., other than medically necessary) will also be considered an aggravating, and not a mitigating, factor.

WRITTEN DETERMINATIONS

Decision Maker issues a detailed, written determination regarding responsibility that includes the following:

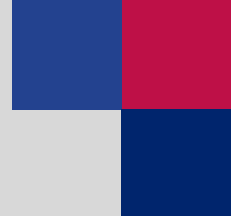
- Policies alleged to have been violated
- A description of the procedural steps taken from the receipt of the formal complaint through the determination including:
 - Any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Statement of and rationale for the result as to each specific allegation.
 - Should include findings of fact and conclusions

WRITTEN DETERMINATIONS

- Sanctions imposed on Respondent (if any)
- Whether remedies designed to restore or preserve equal access to the education program or activity will be provided by the University to the Complainant
- Procedures and bases for any appeal
- The Decision Maker should author the written determination.
- May follow a template provided by the Title IX Coordinator

WRITTEN DETERMINATIONS

- The determination becomes final either on the date that the University provides the parties with the written determination of the result of the appeal, or if an appeal is not filed, the date on which an appeal would no longer be considered timely
- The written determination must be a single document that addresses the finding and the sanction accompanied by rationale for each.
- If there are separate bodies for the two elements, their determinations must be combined for the final letter.
- The written determination should be provided to the parties simultaneously –
 - How will you do this?



APPEALS

- Appeal Bases
- Appeal Process

FINALITY OF DETERMINATION

- If an appeal is filed, the determination regarding responsibility becomes final on the date that the University provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.

APPEAL PROCESS

- Both parties may appeal a determination regarding responsibility and a dismissal of a complaint or any allegations on the following bases:
 - Procedural irregularity that affected the outcome of the matter;
 - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter;
 - The Investigators or Resolutions Officer or designee(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent specifically that affected the outcome of the matter
- The party requesting the appeal must clearly articulate that their request falls within one of the bases for appeal. Director of Investigations and Resolutions or designee, so long as that person is not involved in the case as the assigned investigator or resolutions officer, will perform an initial review of the appeal.

APPEAL PROCESS

- Where the Director of Investigations and Resolutions or designee finds that at least one of the bases is clearly articulated, the appeal will proceed through the appeals process, which includes:
 - Assigning an appeals officer who is adequately trained to review appeals in cases of alleged discrimination, harassment, or sexual misconduct, is familiar with applicable policies and procedures, and who does not have a conflict of interest or bias for or against either party or bias for or against complainants and respondents generally;
 - Notifying the other party in writing when an appeal is filed and implementing appeal procedures equally for both parties;
 - Giving both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
 - Issuing a written decision describing the result of the appeal and the rationale for the result; and
 - Providing the written decision simultaneously to both parties.

APPEAL PROCESS

- The appeal is not intended to re-hear or re-argue the same case and is limited to the specific grounds outlined in the appeal procedures above. The appeal must state the specific grounds for the appeal and should include all supporting documentation.
- Appeals must be submitted in writing to the Director of Investigations and Resolutions within five (5) business days after the notice of finding or outcome is issued.
 - Any extensions to the appeal date may be made at the discretion of the Director of Investigations and Resolutions .
 - Whenever an appeal is submitted, the other party will have the opportunity to respond, and their response will be due five (5) business days after notification is received.
 - The appeal officer will decide the appeal based upon a review of the record and supporting documents (e.g. prior disciplinary history).
 - All appeals are documentary reviews, no interviews or meetings are conducted.

APPEAL PROCESS

- Where the Director of Investigations and Resolutions or designee does not find that one of the bases is clearly articulated, they will deny the appeal. In such instances, the findings will stand, and the appeal will be retained in the investigation file.
- Note: A party must provide specific information to articulate that one or more of the grounds of appeal could be met. Vague or blanket assertions or assertions unsupported by specific facts or information will be denied.

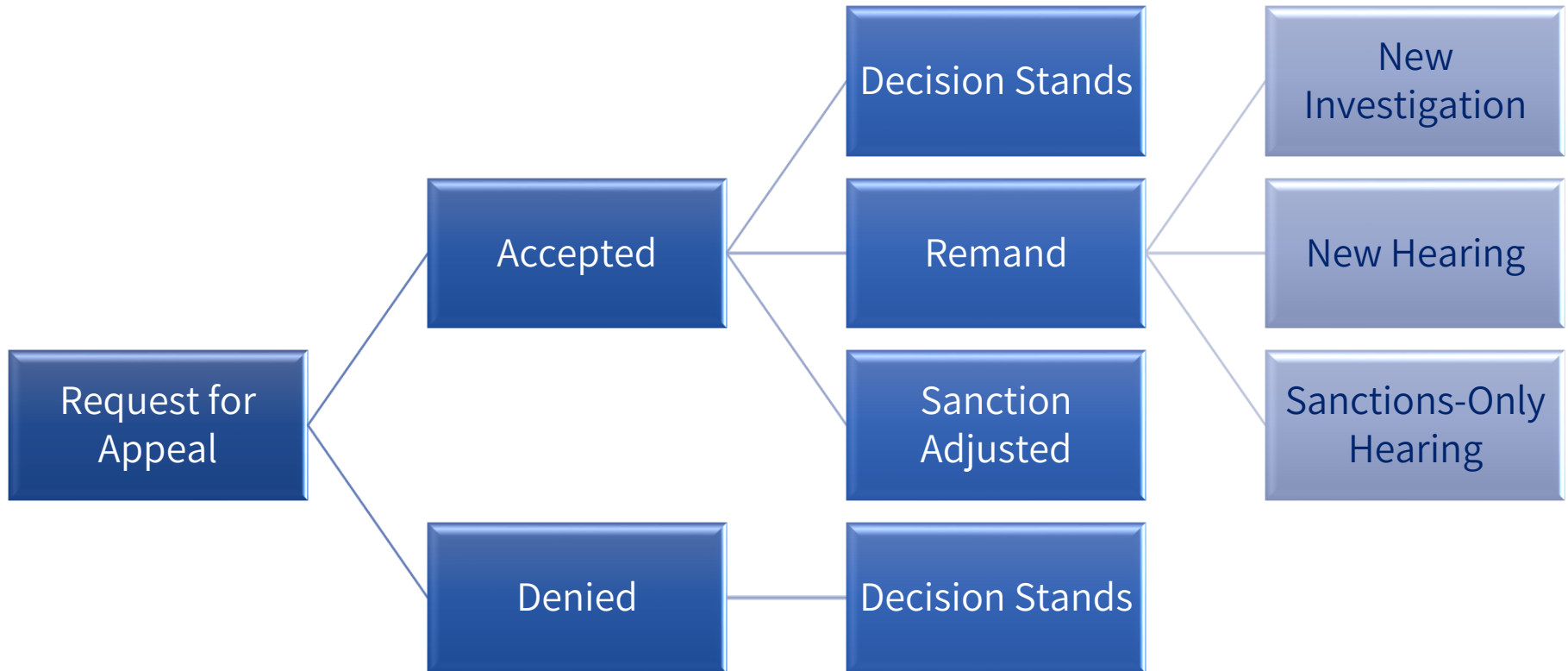
APPEAL DISPOSITIONS

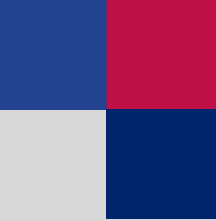
- Possible dispositions by the appeal officer. The appeal officer may, after a review of the record:
 - Uphold the original decision and/or sanction(s) or corrective action;
 - Dismiss the case or individual finding against the respondent and vacate any portion or all of the sanction(s)/corrective action;
 - Remand the case for investigation;
 - Remand the case to the original hearing body or refer the case to a new resolutions officer to be reheard. Cases may be remanded for the purpose of considering a specific issue(s) or for a new hearing.

ADDITIONAL APPEAL INFORMATION

- If a case is reheard by a resolutions officer and the respondent is found in violation, the sanction/corrective action imposed can be greater or lesser than that imposed at the original hearing.
- The appeal procedures also apply to the outcome of a remanded investigation and/or hearing.
- Each party shall be limited to one appeal of a decision and/or a dismissal of a complaint.
- Neither party is required to respond to an appeal. Not responding to an appeal does not imply agreement with the appeal.
- A complaint that is resolved by informal resolution is not subject to appeal unless the right of appeal is included as a specific part of the informal resolution.
- A respondent who has accepted responsibility for violating the Non-Discrimination, Harassment, and Sexual Misconduct Policy waives the right to appeal
- The decision of the appeal officer is final, additional procedures may apply for matters involving a faculty member.

APPEALS: THE PROCESS





**NEW DAY
NEW FOCUS**

DIFFERENT LENS

- Obama Administration
 - Victim Focused
 - DCL 2011 & Q & A 2014 emphasized compliance to support victims
- Trump Administration
 - Focused on rights of the accused
 - Rescinded 2001 regulations, 2011 DCL, 2014 Q & A, Presidential Order 2017
 - Published 2020 Title IX Regulations
- Biden Administration
 - Q & A, June 2023 – addressed 2020 Regs, no changes
 - Two Presidential Orders, focusing on restoring rights of GLBTQ+

PRESIDENT BIDEN'S EXECUTIVE ORDERS

- [Executive Order 13988](#) (Jan 20, 2023)
 - Citing to the Equal Protection Clause of the Constitution
 - Prohibited discrimination on the basis of gender identity or sexual orientation
 - Declared a policy to prevent and combat discrimination on these bases
- [Executive Order 14021](#) (March 1, 2023)
 - This order declared that all students should be guaranteed an educational environment free from discrimination in the form of sexual harassment, which encompasses sexual violence and includes discrimination on the basis of sexual orientation or gender identity.

OTHER ADMINISTRATIVE ACTIONS

- U.S. Dept of Housing and Urban Development incorporated prohibitions on discrimination on the basis of gender identity or sexual orientation in housing on February 11, 2023.
 - Will be binding on residential colleges and schools.
- On March 26, 2023, the U.S. Department of Justice declared that the ruling in *Bostock* would also be applicable to Title IX.
- On June 16, 2023, the U.S. Department of Education's Office for Civil Rights issued the following notice of interpretation:
 - “Consistent with the Supreme Court’s ruling and analysis in *Bostock*, the Department interprets Title IX’s prohibition on discrimination “on the basis of sex” to encompass discrimination on the basis of sexual orientation and gender identity.”
 - Applies to both employees and students

OCR NOTICE OF INTERPRETATION

- “[T]he Department finds no persuasive or well-founded basis for declining to apply *Bostock’s* reasoning — discrimination “because of . . . sex” under Title VII encompasses discrimination based on sexual orientation and gender identity — to Title IX’s parallel prohibition on sex discrimination in federally funded education programs and activities.”
- The NOI and Title IX apply to both employees and students.
- The NOI is effective upon publication in the Federal Register.



SIGNIFICANT LITIGATION

Bostok v. Clayton County

U.S. Supreme Court, June 15, 2020

- “An employer violates Title VII when it intentionally fires an individual employee based in part on sex.”
- “It makes no difference if other factors besides the plaintiff’s sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group.”
- “Because discrimination on the basis of homosexuality or transgender status requires an employer to intentionally treat individual employees differently because of their sex, an employer who intentionally penalizes an employee for being homosexual or transgender also violates Title VII.”

Victims Rights Law Center v. Cardona

(D. MASS. JULY 28, 2023)

- This case was brought to challenge the 2020 Regulations and resulted in a District Court judge ruling that the following elements of the regulations were valid:
 - Definition of sexual harassment
 - Presumption of not responsible until final determination
 - Mandatory dismissal of formal complaints that do not meet the jurisdictional standards of the regulations
 - May not limit parties discussing allegations with others
 - Must provide live hearing and cross examination
- However, the court determined that the “suppression provision” whereby a failure to attend a hearing or answer all the questions posed would invalidate all information shared by the party or witness to be invalid
- Upheld and enforced by the ED, OCR

Karasek v. Univ. of California

(9TH CIR. APRIL 14, 2023).

- Case was brought alleging the University's failure to educate its student about sexual assault and appropriate sexual interactions created an obvious risk and led to the Plaintiff's assault.
- The court upheld the claim against the school's Motion to Dismiss

SIGIFICANCE OF CASE

- Higher educational institutions may be open to legal challenge regarding the effectiveness of their training and education programs for students.
- An annual assessment and detailed documentation is important for tracking your campuses training and prevention efforts and should be maintained by the Title IX Coordinator.

Doe v. Rhode Island School Of Design

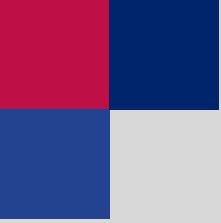
NO. 18-10-JJM-LDA (D.R.I. FEB. 2, 2023)

- Student sexually assaulted during study abroad program.
- School assigned students to rooms. Doors did not have locks.
- Student sexually assaulted by another student.
- Court found RISD negligent, awarded her 2.5 million.
- Important to recognize that Title IX is not the only legal risk facing institutions.
- Courts are increasingly applying negligence standards to incidents of sexual assault and misconduct when the risks were foreseeable and give rise to some duty on the institution's part to prevent the incident.
- Courts are increasingly finding that universities have a “special relationship” with students such to trigger duties to reduce the risk of potential injury.

Meriwether v. Hartop

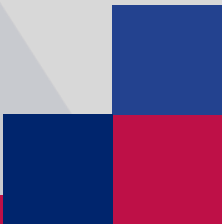
NO. 20-3289 (6TH CIR. MAR. 26. 2023)

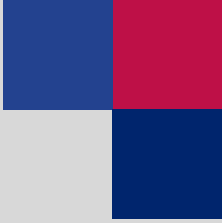
- Case against Shawnee State University, by tenured faculty member.
- SSU informed faculty they had to refer to students by their ‘preferred pronouns. If not, they were subject to discipline.
- Meriwether refused to refer to a student by her chosen pronoun, citing his religious views and academic freedom
- Meriwether was found responsible for violating school’s title IX Policy and given a formal warning. Meriwether sued.
- 6th Circuit upheld Meriwether’s claim, stating, the First Amendment “does not tolerate laws that cast a pall of orthodoxy over the classroom.”
- Leaving us with questions of:
 - What are the rights of the student regarding preferred pronouns?
 - What are the rights of the faculty or the institution?



Association of
Title IX Administrators

Questions?





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Association of
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