



Association of  
Title IX Administrators

# Implementing the 2020 Title IX Regulations for Higher Education Overview

Training and Certification Course

# WELCOME!

- Please log in to your ATIXA Event Lobby each day to access the training slides, supplemental materials, and to log your attendance.
- The ATIXA Event Lobby can be accessed by the QR code or visiting [www.atixa.org/atixa-event-lobby](http://www.atixa.org/atixa-event-lobby) in your Internet browser.
- Links for any applicable training evaluations and learning assessments are also provided in the ATIXA Event Lobby. You will be asked to enter your registration email to access the Event Lobby.
- If you have not registered for this training, an event will not show on your Lobby. Please email [events@atixa.org](mailto:events@atixa.org) or engage the ATIXA website chat app to inquire ASAP.





Strategic Risk  
Management Solutions



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

# Content Advisory

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, 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 to Title IX Compliance

# 2020 Title IX Regulations

- The 2020 Regulations apply **only** to sex discrimination alleged to have occurred **on or after** August 14, 2020
  - For conduct alleged to have occurred prior to August 14, 2020, the policies in place at the time the alleged behavior occurred will apply
- Institutions need to maintain/update policies, procedures, and training that are compliant with the **2020** Regulations
  - If the institution is not fully compliant with 2020, now is the time

# Title IX and Equity

- Title IX is a sex and gender equity law
- The principles of equity recognize that not all individuals have access to the same resources and opportunities
  - Equity focuses on increasing access by reducing disparities and barriers in order to increase access
  - Title IX imposes a duty on institutions to stop, prevent, and remedy the inequities created by sex and gender discrimination

# Essential Compliance Elements

The requirement to **Stop, Prevent,** and **Remedy** guides Title IX Coordinators in their equity and compliance work

**1**

**STOP**

discriminatory  
conduct

**2**

**PREVENT**

recurrence, on both  
individual and  
institutional levels

**3**

**REMEDY** the effects  
of discrimination,  
for both individuals  
and the community



# Title IX Compliance Oversight

## Who is the Title IX Coordinator (TIXC)?

- Role mandated by Title IX Regulations
- Oversees institutional Title IX compliance
- Responsibilities fall into two categories:
  - Responding to reports or complaints of sex-based harassment, sex discrimination, and retaliation
  - Leading efforts to ensure sex and gender equity across the entire institution



# Office for Civil Rights (OCR) Oversight

- OCR enforces Title IX compliance
- Conducts equity compliance reviews
  - Responds to complaints
- Reasons for OCR investigations
  - Athletics equity issues
  - Investigations regarding single-sex programming
  - Failure to accommodate pregnant individuals
  - Failure to stop, prevent, and remedy
  - Failure to investigate



# Title IX Coordinator and OCR

- TIXC serves as the point person for OCR inquiries
  - If OCR makes contact, loop legal counsel and other stakeholders, such as public relations, President's office, etc.
- OCR investigations involve document collection and interviews
- Responding to OCR complaints is a resource-intensive process
  - Costs money, time, resources, and reputation
  - Also adds significant levels of stress
- May also contact OCR for technical assistance

# Title IX Compliance Oversight

## Responsibilities:

- Manage policy and procedures prohibiting sex discrimination, sex-based harassment, and retaliation
  - Including pregnancy and LGBTQIA+ discrimination
  - Ensure institution acts reasonably to **stop, prevent, and remedy**
- Provide notification of nondiscrimination and Title IX information to current and prospective community members, including students and employees and union/contract employees
- Develop and maintain accurate web and print-based Title IX publications
- Train all institutional employees on Title IX compliance
- Recruit, supervise, and train Title IX Team
- Serve as point person for all reports and complaints

# Title IX Compliance Oversight

- Oversee complaint Grievance Process and program equity
- Monitor for barriers to reporting and take steps to address them
  - Track systemic issues or patterns
  - Take remedial action to prevent recurrence
- Assess compliance efforts and program effectiveness
  - Create and disseminate annual compliance report
- Update institutional leadership on Title IX issues
- Liaise with institutional legal counsel
- Create/maintain records
- Respond to government inquiries/investigations

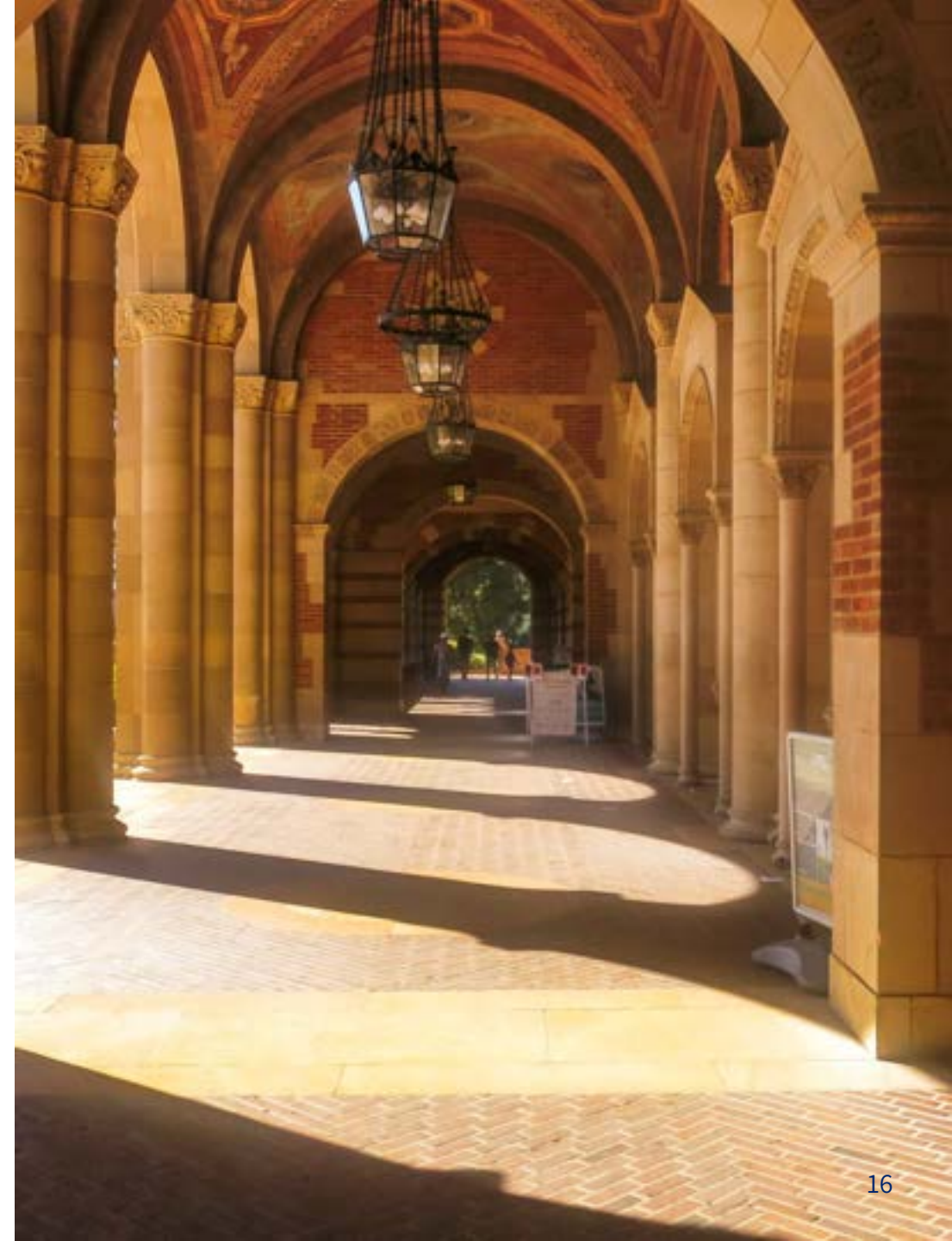
# Title IX Regulatory Requirements

- Terminology & Definitions
- Grievance Process
- Informal Resolution
- Title IX Potpourri

# Terminology & Definitions

# Selected Terminology

- Actual Knowledge
- Consent
- Complainant
- Formal Complaint
- Recipient
- Respondent
- Sexual Harassment
- Supportive Measures





# Sexual Harassment

- Includes (the “Big Six” offenses):
  - Quid Pro Quo (QPQ)
  - Hostile Environment
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking
- No consent definition provided
  - ATIXA recommends adopting a definition in institutional policy

# Sexual Harassment

Title IX Regulations require each Recipient to define **Sexual Harassment** as conduct on the basis of sex that satisfies one or more of the following:

- **Quid Pro Quo:** 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.
- **Hostile Environment:** Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the Recipient's education program or activity
  - Education program or activity means employment, too!
- “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)

# Hostile Environment: “Unwelcome”

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

# Hostile Environment: “Reasonable Person”

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

# Hostile Environment: “Severe”

- Physical conduct is more likely to be severe without need for repetition
  - Sexual assault and many dating/domestic violence incidents are almost always sufficiently severe
  - Other physical conduct that does not meet the 34 C.F.R. § 106.30 definitions for sexual assault or dating/domestic violence may also rise to the level of “severe”
- Consider the circumstances (e.g., ability for Complainant to escape the harassment)
- Assess whether accompanied by threats or violence
- Assess whether there was a degree of embarrassment or humiliation

# Hostile Environment: “Pervasive”

- Widespread
- Openly practiced; occurring in public spaces
- Well-known among students or employees – reputation of a department, person, etc.
- Frequency, intensity, and duration of the conduct
- Unreasonable interference with school or job
- Incidents occurring in concert or with regularity are more likely to be considered pervasive
- Consider the specific circumstances and facts

# Hostile Environment: “Objectively Offensive”

- Reasonable person standard in context
- “I know it when I see it...”
- Age and relationships of Complainant and Respondent
- Number of persons involved
- Frequency
- Severity
- Physically threatening
- Humiliating
- Intimidating
- Ridiculing
- Abusive

# Hostile Environment: Totality of the Circumstances

- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”
- In evaluating the totality of the circumstances, consider:
  - Frequency, nature, and severity of the conduct
  - Whether the conduct was physically threatening
  - Whether the conduct was humiliating
  - Identity of and relationship between the Respondent and the Complainant
  - Age and sex of the Respondent and the Complainant
  - Size of the school, location of the incidents, and context in which they occurred



# Hostile Environment: Totality of the Circumstances

- Totality of the circumstances to consider:
  - Effect on the Complainant's mental or emotional state
  - Whether the conduct was directed at more than one person
  - Whether the conduct unreasonably interfered with the Complainant's educational or work performance
  - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
  - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection

# Clery Act Definitions

- May use the Clery Act definitions, rather than the FBI UCR definitions
  - Four, instead of six, subparts to Sexual Assault definition
    - Rape
    - Incest
    - Statutory Rape
    - Fondling
  - Dating Violence
  - Domestic Violence
  - Stalking
- Sexual Assault with an Object and Sodomy do not have Clery Act definitions
  - Do not need to include these in Title IX policy if using the Clery definitions

# Retaliation – Regulatory Definition

## § 106.71 Retaliation

- Retaliation prohibited. No Recipient or other person may **intimidate, threaten, coerce, or discriminate** against any individual **for the purpose of interfering with any right or privilege secured by Title IX or this part**, or because the individual has **made a report or complaint, testified, assisted, or participated** or ***refused to participate*** in any manner in an investigation, proceeding, or hearing under this part...

# Retaliation – Regulatory Definition

- (Cont.)...Intimidation, threats, coercion, or discrimination, including **charges against an individual for code of conduct violations that do not involve sex discrimination or Sexual Harassment**, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or Formal Complaint of Sexual Harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

# Retaliation

## § 106.71 Retaliation.

- The Recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a Formal Complaint of Sexual Harassment, any Complainant, any individual who has been reported to be the perpetrator of sex discrimination, any Respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA Regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder...

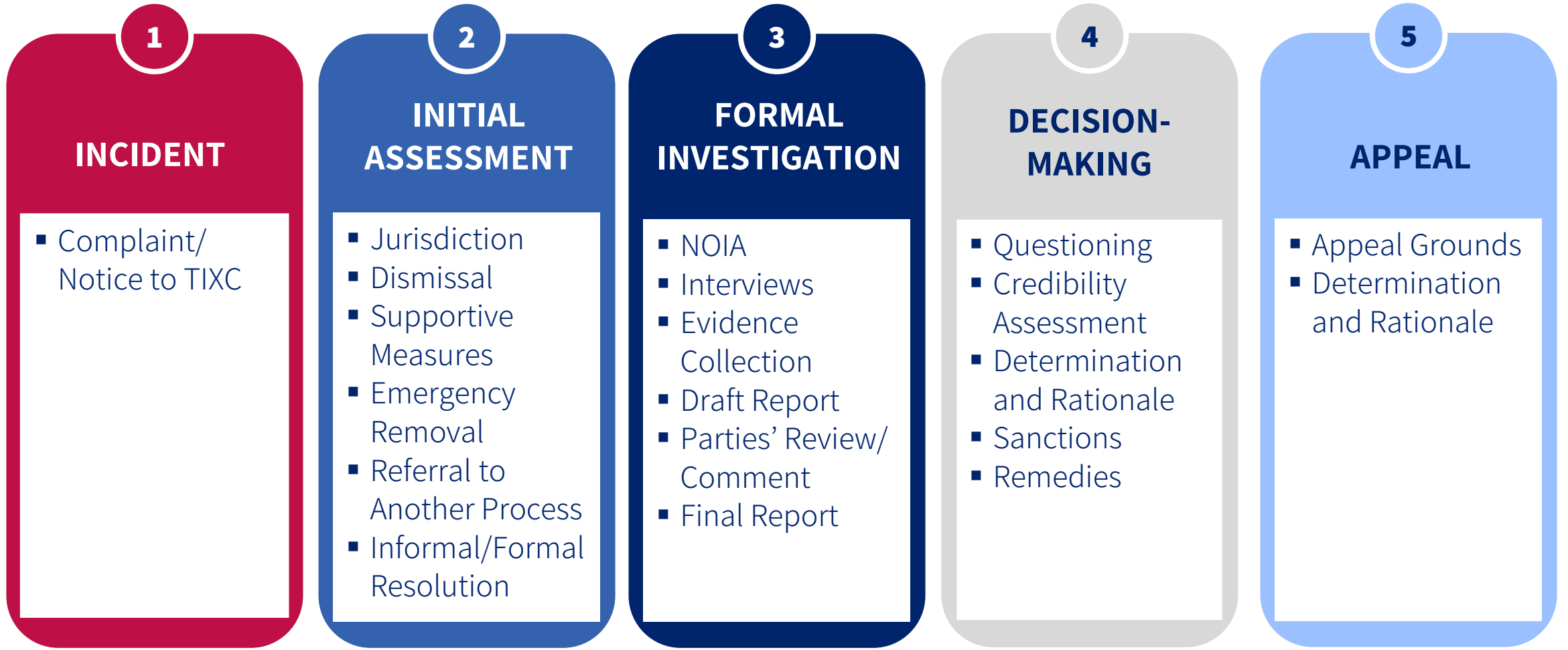
# Retaliation

- (Cont.)...Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).
- Specific circumstances.
  - (1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.
  - (2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any Party made a materially false statement in bad faith.

# Grievance Process

- Due Process
- Required Elements
- Conflicts of Interest/Bias
- Notice/Actual Knowledge
- Initial Assessment
- Formal Investigation
- Decision-Making/Live Hearings
- Appeals

# Formal Grievance Process Overview





# Due Process

# 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 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 Decision-maker may rely upon in their decision
  - Right to review and comment on that evidence to the Decision-maker
- Access to recording of any hearing
- Receive a written rationale explaining the basis for the Decision-maker decision
- Appeal

# Required Elements

# General Equity of Rights

- Apply any provisions, rules, or practices other than those required by this section equally to all Parties.
- Treat Complainants and Respondents equitably by providing remedies to a Complainant where a determination of responsibility for Sexual Harassment has been made against the Respondent.
- Remedies must be designed to restore or preserve equal access to the Recipient's education program or activity.
- Such post-determination remedies may include the same individualized services described in § 106.30 as “supportive measures” and can be disciplinary or punitive and need not avoid burdening the Respondent.

# Training Requirements

- Train Title IX Coordinators, Investigators, Decision-makers, and Informal Resolution Facilitators, as applicable, on:
  - The definition of Sexual Harassment in § 106.30
  - How to apply definitions used by the Recipient with respect to consent consistently, impartially, and in accordance with the other provisions of § 106.45.
  - The scope of the Recipient's education program or activity
  - How to conduct an investigation and Grievance Process including hearings, appeals, and informal resolution processes
  - How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
  - Any technology to be used at a live hearing
  - Issues of relevance of questions and evidence
  - Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

# Training Requirements

- Ensure that any materials used to train Title IX Coordinators, Investigators, Decision-makers, and Informal Resolution Facilitators, must not rely on sex stereotypes and must promote impartial investigations and adjudications of Formal Complaints of Sexual Harassment.





# Promptness

## Prompt Resolution

- Complete without undue delay
- Title IX Regulations do not define “prompt”
  - 60-90 business days is a good guide
- Grievance process may take longer than expected
  - Anticipate, mitigate, and document delays
  - Communicate with Parties regarding delays



# Advisor of Choice

- Provide the Parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the Advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of Advisor for either the Complainant or Respondent in any meeting or grievance proceeding.
  - Recipients don't have to provide attorneys or equivalently talented Advisors to one Party just because the other Party has one.
- Establish policy regarding the extent to which the Advisor may participate in the proceedings, as long as the restrictions apply equally to all Parties.

# Burden of Gathering Evidence

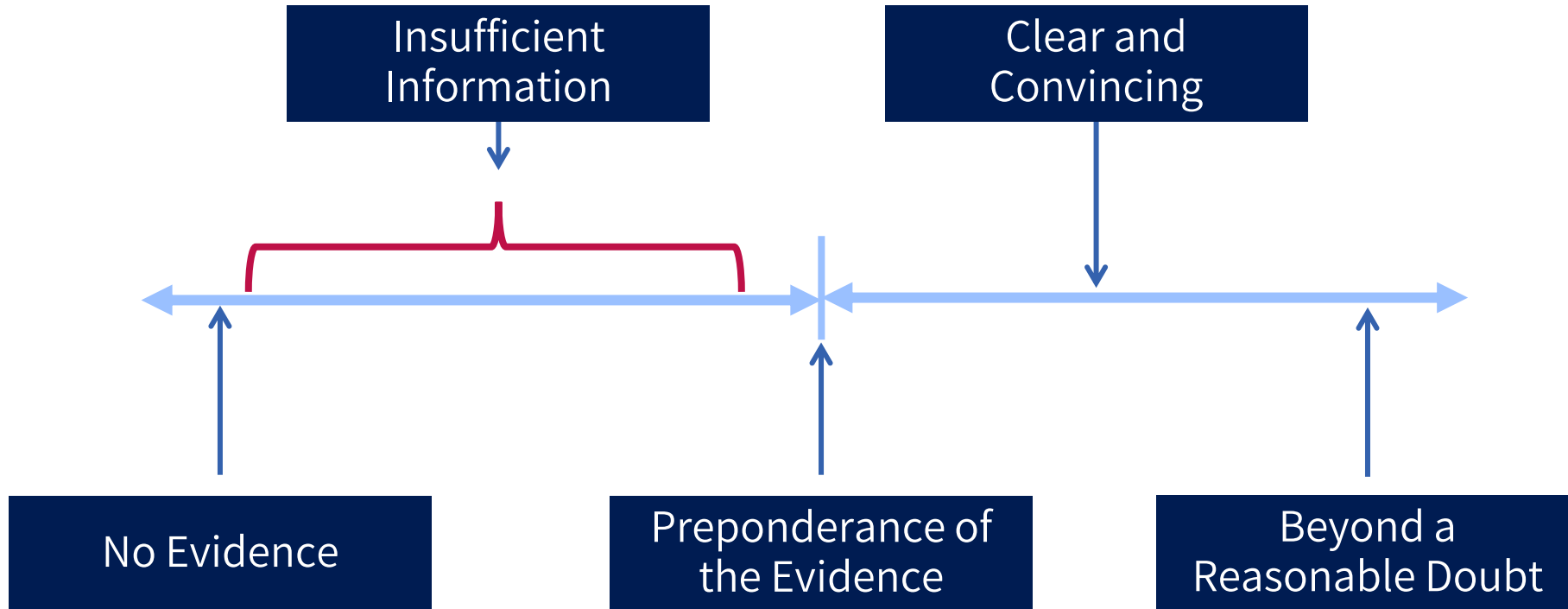
- Ensure that the burden of proof and burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the Recipient and not the Parties.
  - While burden of gathering is on Recipient, the option to gather is broadly granted to the Parties by the Regulations.



# Presumption of Non-Responsibility

- Include in the Grievance Process a presumption that the Respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the Grievance Process by the applicable standard of evidence.

# Standard of Evidence



- **Preponderance of the Evidence** is the most common industry standard
- Standard of Evidence must be consistent for **all** Formal Complaints of Sexual Harassment

# Sanctions

- Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the Recipient may implement following any determination of responsibility.
  - Mirrors Clery Act language

# Complainant's Sexual Predisposition and Prior Sexual History

- Implement a policy that questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the Complainant's prior sexual behavior are offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

# Privileged and Medical Information

**A Party must provide permission to obtain and/or include:**

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





# Understanding Evidence

- **Evidence** is any kind of information presented to help determine what occurred
- **Relevant evidence** is evidence that tends to prove or disprove the underlying allegations
- **Directly related evidence** is connected to the complaint, but is neither inculpatory nor exculpatory



# 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	Not eyewitness, but compelling
Hearsay Evidence	Statement from outside the interview presented as truthful
Character Evidence	Evidence of a person's character or character traits

# Conflicts of Interest/Bias

# Conflicts of Interest and Bias

- Title IX Coordinators, Investigators, Decision-makers, and Informal Resolution Facilitators must **not have a conflict of interest or bias** for or against the following:
  - Complainants, generally
  - Respondents, generally
  - The Parties involved with a complaint
  - Subject matter or details of the complaint itself
- Consider a perception of a conflict or bias, even if none exists
  - Not required, but TIXC may choose to substitute a Title IX team member based on perception alone

# What's the Difference?

## Conflict of Interest

- Refers to situations in which:
  - An **actual** (or perceived) clash,
  - Between the Title IX team member's role and
    - A current or previous relationship/situation with one of the Parties
  - That prevents neutrality or objectivity
  - **Example:** A Residence Life Director serving as Investigator for a complaint filed by one of their Resident Assistants

## Bias

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

# Conflicts of Interest

- Evaluated on a case-by-case basis
- Simply knowing a student or employee is **not** enough to generate a conflict of interest, as long as objectivity is not compromised
  - Previously disciplining a student is likewise **not** enough
- Title IX team members must bring potential conflicts to the TIXC's attention
  - Parties may also do so
  - TIXC will make a recusal determination, or a Title IX team member may recuse themselves
  - Policy may have a recusal provision

# Bias

- Bias can be a significant problem for Title IX team members
  - Explicit or implicit
  - The often implicit and unconscious nature can lead to unexpected outcomes
- Formed from stereotypes, societal norms, cultural experiences, expectations of the people around you
- Can affect our perceptions of Complainants **and** Respondents
- Common pre-conceptions about Complainants and Respondents
- Can affect our perceptions of others within the process or associated with the process
- Title IX team roles require us to recognize it and mitigate its effects

# Notice/Actual Knowledge



# Actual Knowledge

## Actual knowledge:

- Notice of Sexual Harassment or allegations
- In an education program or activity
- Against a person in the United States
- To a TIX Coordinator, or
  - Any official with authority to institute corrective measures on behalf of college or university
  - Any employee of an elementary or secondary school

# Actual Knowledge

- Individual notifies the Title IX Coordinator or “official with authority to institute corrective measures” (OWA)
  - Deans?
  - Conduct staff?
  - Recipient police or campus safety?
- What about K-12?
  - All employees
- What about Responsible Employees?
  - ATIXA recommends that Recipients require all employees to report, unless confidential. Preferred term is Mandated Reporter.

# Actual Knowledge Requirements

What is required after **Actual Knowledge**?

- A prompt response that is not deliberately indifferent
  - Outreach to Complainant
  - Optional supportive measures
  - Take wishes of Complainant into account
  - Information about how to file a “Formal Complaint”



# Initial Assessment

# When does Title IX apply?

- Title IX complaint **must** be dismissed if did not occur against a person in the U.S., but...
  - May take action under your code of conduct or other policies
- Title IX applies, and jurisdiction is required, when the Recipient has:
  - Control over the Respondent AND control over context of the harassment
    - Includes any building owned or controlled by an officially recognized student organization
    - At the time of filing a complaint, Complainant must be participating in or attempting to participate in the Recipient's education program or activity

# When does Title IX apply?

## Jurisdiction

- Covered Programs (all programs)
- Jurisdictional Limitations
  - Geographic
  - Temporal
- When is a student a “student”?
  - Application-Admission-Registration-Attendance-Breaks
- When is a Complainant “participating in or attempting to participate in the Recipient’s education program or activity”?
- When is an employee an employee?

# When does Title IX apply?

## Jurisdiction for Off-Campus Incidents:

- When sufficient Recipient control is established
- Or when the off-campus conduct has an in-program effect that meets the definition of 34 C.F.R. § 106.30
- If Title IX jurisdiction is not present, the behavior could still violate:
  - Institutional harassment/discrimination policies
  - Student Handbook/Conduct policies
  - Technology/Acceptable Use policies
  - Employee Handbook/policies
  - Professionalism standards

# Jurisdiction for Off-Campus Incidents

- Mandatory jurisdiction means Title IX applies
  - Requires application of Regulations
  - Other policies may also apply
  - Collateral misconduct
- Discretionary jurisdiction means the Recipient may address incidents occurring off-campus or on non-school owned/controlled property
  - Under other policies or codes of conduct
  - Outside of the Title IX process



# Formal Complaint

## Formal Complaint:

- Required to initiate the Grievance Process (investigation and hearing)
- Document or electronic submission requesting an investigation
- Filed by Complainant or signed by TIX Coordinator
- Alleging Sexual Harassment

# Consolidation of Formal Complaints

- Decide whether to consolidate Formal Complaints for allegations of Sexual Harassment against more than one Respondent, or by more than one Complainant against one or more Respondents, or by one Party against the other Party, where the allegations of Sexual Harassment arise out of the same facts or circumstances.
  - This requires clear policy/protocols.
  - Consider this the floor of what is allowed.

# Mandatory Dismissal – Four Grounds

**The Title IX Coordinator MUST dismiss a Formal Complaint at any time during the investigation or hearing:**

- 1) If the conduct alleged in the Formal Complaint would not constitute Sexual Harassment as defined in the Title IX Regulations even if proved, and/or
- 2) If the conduct did not occur in the Recipient's education program or activity,\* or
- 3) If the conduct did not occur against a person in the United States, or
- 4) If at the time of filing a Formal Complaint, a Complainant is not participating in or attempting to participate in the Recipient's education program or activity, and based on the available information, the Title IX Coordinator has determined that they do not need to sign a Formal Complaint on behalf of the Recipient

# Discretionary or Permissive Dismissal

**The Title IX Coordinator MAY dismiss a Formal Complaint if at any time during the investigation or hearing:**

- 1) If a Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the Formal Complaint or any allegations; and/or
- 2) If the Respondent is no longer enrolled or employed by the Recipient; and/or
- 3) If specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination regarding the Formal Complaint or any allegations.

# Notice of Dismissal

- Upon a mandatory or permissive dismissal, the Title IX Coordinator should promptly send written notice of the dismissal and reason(s) therefor simultaneously to the Parties
  - Dismissal is appealable

# Initial Assessment in Summary

- Has there been a Formal Complaint?
- Does the TIXC need to sign/initiate a Formal Complaint?
  - Pattern, Predation, Threats, Violence, Weapons, Minors, Employees
- Does the alleged conduct meet the required definitions?
- Does jurisdiction exist?
- Can/should Recipient remedy informally or without discipline?
- Mandatory/Discretionary dismissal considerations
- If dismissed, should an alternate process begin?



# Initial Assessment in Summary

## 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 all actions taken
- 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

# Emergency Removals

- Individualized risk and safety analysis
- Immediate threat to health or safety
- Due Process requires opportunity to challenge removal, usually after it is implemented
  - May allow equitable participation of Complainant, unless the decision does not directly relate to Complainant
- Does not apply to non-student employee administrative leave
- Emergency Removal decisions may be made at any point and include decisions to remove from any educational program or activity



# Administrative Leave

- May place employees on administrative leave during **pendency** of the Resolution Process
- Student employees
  - May be placed on leave from employment responsibilities if doing so would not violate other regulatory provisions
  - Must comply with Grievance Process before any disciplinary sanctions are imposed

# 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 and/or medical/health services
- Referral to the Employee Assistance Program
- Visa and immigration assistance
- Community or community subgroup education
- Altering housing situation (if applicable)
- Altering work arrangements for employees
- Safety planning
- Providing school safety escorts
- Transportation assistance
- 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

# Supportive Measures

- The Recipient must maintain as “confidential” any supportive measures provided to the Complainant or Respondent, to the extent that maintaining such confidentiality would not impair the ability of the Recipient to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.



# Formal Investigation

# Investigation Steps

## 10 Common Steps of TIX Investigations:

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



# Notice of Investigation and Allegations (“NOIA”)

- The Notice of Investigation and Allegations (NOIA) letter is sent to all Parties simultaneously in writing
- The NOIA includes:
  - Notice of the allegations and known details, such as identities or 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

# Notice of Investigation and Allegations (“NOIA”)

## **The NOIA must outline the Parties’ rights in the Formal Grievance Process:**

- To present witnesses, including expert witnesses
- To present inculpatory and exculpatory evidence
- To freely discuss the allegations
- To be accompanied by an Advisor of their choice
- To receive written notice of all details and purpose, with sufficient time to prepare, of any investigation interview or other meeting they are requested to attend
- To review all relevant and directly related evidence before the investigation report is finalized



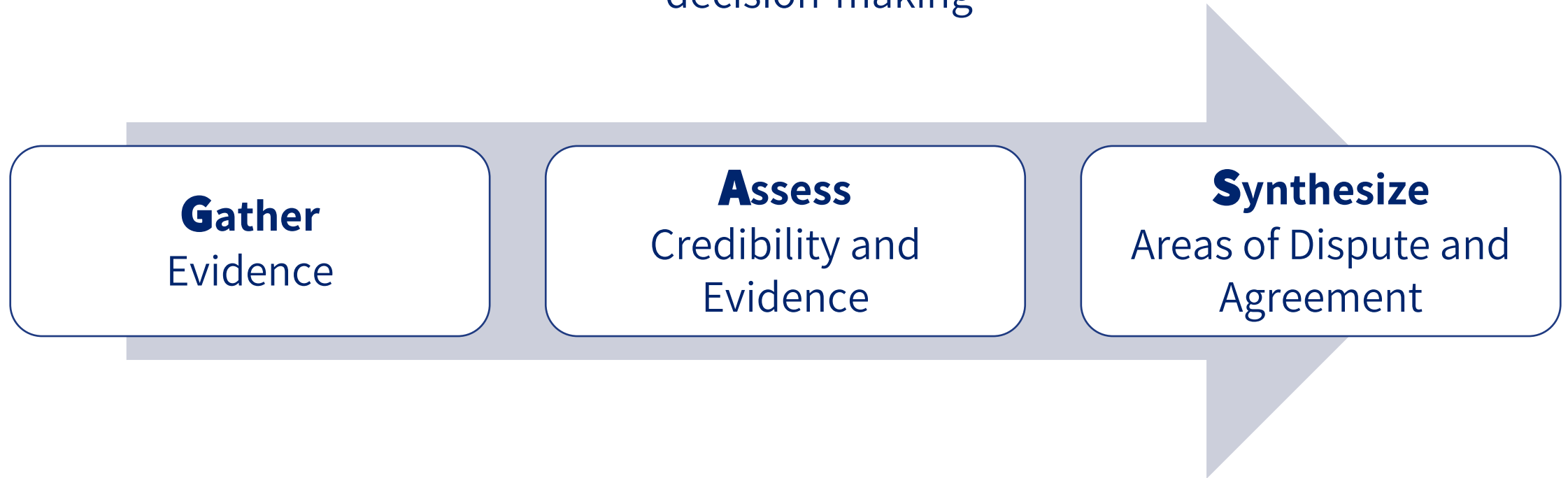
# Notice of Investigation and Allegations (“NOIA”)

## The NOIA must also include:

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

# Formal Investigation

The **G.A.S. Framework** describes the work of the Investigator to prepare for decision-making



# Parties' and Advisors' Review of Report and Evidence File

- Draft report and directly related evidence must:
  - Be sent to each Party and Advisor in an electronic format or hard copy
  - Include evidence upon which the Recipient does not intend to rely
  - Include exculpatory and inculpatory evidence
- Investigator must:
  - Allow 10 days for written response
  - Consider Parties' feedback and incorporate where appropriate
- Investigator sends the final investigation report to the Parties and Advisors for review at least 10 days prior to the hearing



# **Decision-Making/Live Hearings**

# Decision-Making Under Title IX

- Decision-maker (DM) could be a single person or a panel (typically three)
  - Institutional community members (typically faculty or staff) or external contractors
- Under the 2020 Title IX Regulations, all postsecondary institutions must hold a live hearing
  - DM can ask relevant questions
  - Advisors can ask relevant questions on behalf of Parties
- TIXC and Investigator may not serve as Decision-maker

# 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 good questions
  - Decision-making procedures and management
  - Evidence and 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

# Live Hearings

- Investigator may be asked to participate as a witness in the live hearing and be questioned by the DM and/or Parties through their Advisors
  - Example: Why did you decide some evidence relevant; other evidence was not?
- DM manages the hearing and questioning to limit to relevant evidence
- Hearing can be held in a physical location or virtually
- Must record hearing or create transcript

# Hearing Technology

- At the request of either Party, the Recipient must provide for the live hearing to occur with the Parties located in separate rooms with technology enabling the DM and Parties to simultaneously see and hear the Party or the witness answering questions. Hearings may be conducted with all Parties physically present in the same geographic location or, at the Recipient's discretion, any or all Parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.
- Create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the Parties for inspection and review.



# Questioning & Cross-Examination

- Policy should clarify that the DM cannot draw an inference about the determination regarding responsibility based solely on a Party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.
- Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the Party's Advisor of choice and never by a Party personally.

# Excluded Questions

- The DM must explain to the Party proposing the questions any decision to exclude a question as not relevant.
  - The regs establish a questioning protocol. The Advisor poses the question, process pauses while the DM considers the relevance of every question, and then decides whether to permit the question, explaining any decision to exclude.
  - The regs are silent on whether the DM can instruct other options beyond excluding a question, such as rephrasing or asking the Advisor to reframe.
  - Abusive and unduly repetitious questions are not relevant.
  - Regs leave open question of whether Advisor can/should make a showing of relevance to the DM

# 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

# Written Determinations

- **Written Determination**
  - Authored by Decision-maker(s)
  - TIXC/Legal counsel reviews
  - TIXC communicates to the Parties simultaneously in writing
- **Finality**
  - On the date the Recipient provides a written appeal determination
    - OR the date when an appeal would no longer be timely

## Written Determination Elements

- Applicable policy
- Procedural steps from complaint through determination
- Statement of and rationale for the result of each specific allegation
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal

# Sanctions and Remedies

- The Title IX Coordinator is responsible for effective implementation of any sanctions and remedies.
  - Who determines?
  - Do Decision-makers recommend?
  - Can/should this be influenced by impact statements?

# Appeals

# Appeal Grounds

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

**1**

Procedural irregularity that affected the outcome of the matter

**2**

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

**3**

Conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter

**Institutions have the discretion to add additional appeal grounds**

# Appeal Decision-Maker and Outcomes

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



# Informal Resolution

# Informal Resolution

- Informal resolution does not involve a full investigation and adjudication and may be offered at any time prior to reaching a determination regarding responsibility, as long as:
  - It is not required as a condition of enrollment/continuing enrollment
  - It is not required as a condition of employment/continuing employment
  - It is not required as a condition of any other right
  - The Parties are not required to waive their right to an investigation and adjudication of Formal Complaints of Sexual Harassment to engage in informal resolution

# Informal Resolution

- Recipient may not require the Parties to participate in an informal resolution process and may not offer an informal resolution process unless a Formal Complaint is filed
- Must obtain the Parties' voluntary, written consent to the informal resolution process
- May not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

# Requirements of Informal Resolution

- The Parties receive a written notice disclosing:
  - The allegations
  - The requirements of the informal resolution process including the circumstances under which it precludes the Parties from resuming a Formal Complaint arising from the same allegations
  - At any time prior to agreeing to a resolution, any Party has the right to withdraw from the informal resolution process and resume the Grievance Process with respect to the Formal Complaint
  - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

# Title IX Potpourri

# Record Keeping

- Must maintain for a period of seven years records of –
  - Each Sexual Harassment investigation including any determination regarding responsibility.
  - Any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section
  - Any disciplinary sanctions imposed on the respondent
  - Any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity
  - Any appeal and the result therefrom
  - Any informal resolution and the result therefrom

# Record Keeping

- All materials used to train Title IX Coordinators, Investigators, Decision-makers, and Informal Resolution Facilitators
- Records of any actions, including any supportive measures, taken in response to a report or Formal Complaint of Sexual Harassment.
  - In each instance, document the basis for the conclusion that its response was not deliberately indifferent
  - Document that it has taken measures designed to restore or preserve equal access to the Recipient's education program or activity
  - If a Recipient does not provide a Complainant with supportive measures, then the Recipient must document the reasons why such a response was deliberately indifferent. The documentation of certain bases or measures does not limit the Recipient from providing additional explanations or detailing additional measures taken in the future.

# Training Records

- Make all materials used to train Title IX Coordinators, Investigators, Decision-makers, and Informal Resolution Facilitators publicly available on its website, or if the Recipient does not maintain a website, the Recipient must make these materials available upon request for inspection by members of the public.
  - The most recent materials used to train the Title IX Team should be posted.
  - While seven year of materials need to be maintained, only most recent need to be posted.
  - This requirement is not retroactive, so seven years starts August 14, 2020.



# Looking Ahead

2024 Title IX Regulations

# 2024 Title IX Final Rule

- Issued **April 19, 2024**
- Effective and enforceable **August 1, 2024**
- Apply to incidents occurring **on or after August 1, 2024**, regardless of when the incident is reported
  - Incidents occurring from August 14, 2020, to July 31, 2024, will still be resolved using 2020 Regulations training and procedures, in perpetuity
- Combination of 2011 Dear Colleague Letter, 2020 Regulations, and new approaches
- 1561 pages total (1504 Preamble and 57 Regulations)
- More flexibility for Recipients in how to structure and staff resolution processes

# 2024 Title IX Regulations Litigation

- Opponents of the 2024 Title IX Regulations sought, and were granted, **injunctions** to delay or halt implementation of the Regulations
  - **Injunction:** A court order requiring an individual or entity to either perform or stop performing a specific action
- Generally, courts granted injunctions based on questions around the validity of the gender identity provisions and the hostile environment definition
- If the 2024 Regulations are not enforceable as a result of an injunction, schools, districts, and institutions in those states should continue to follow the **2020 Regulations**
  - The 2024 Regulations also are not enforceable in some individual schools and institutions

# 2024 Title IX Regulations Litigation

- Implementation will be unsettled for the foreseeable future
  - Appeals will continue and, eventually, trials
  - Consult legal counsel to determine implementation plans and risk strategy
- **Note:** Some states also have “Do Not Implement” directives from state officials
  - Independent from any federal lawsuits or injunctions
- Track developments on ATIXA’s Regulations website, [www.atixa.org/regs](http://www.atixa.org/regs)
  - State-by-state information on injunctions and Do Not Implement directives
  - Lists of individual schools or institutions impacted by the Kansas injunction

# Looking Ahead

- Continue to fulfill obligations under the 2020 Title IX Regulations
- Steps to Take Now:
  - Educate yourself on the 2024 Title IX Regulations
  - Prepare to educate your community on the changes
  - Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)
  - Determine how you will manage policy changes
  - Plan for the training needs for your community
  - Consider state laws, court decisions, and other Regulations that may affect your institutional approach



**Questions?**



Association of  
Title IX Administrators

**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 licensed 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 CFR Part 106.8(f)(3), requiring all training materials to be available for inspection upon request. ATIXA does not permit any licensee/purchaser to publicly display, share, or publish these materials. If you have lawfully obtained ATIXA materials by registering for an ATIXA training, you are licensed to use the materials provided for that training. Licensees may download and save a PDF version of training materials for their completed training to provide them to a third-Party for inspection upon request in compliance with federal Regulations. No right to disseminate, post, or provide a copy of the materials publicly or to any third-Party is permitted.

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.