



Association of
Title IX Administrators

Title IX Decision-Making for Student and Employee Cases

Vassar College

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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.

Update on the 2024 Title IX Regulations

- **January 9, 2025:** a federal district court in Kentucky vacated the 2024 Title IX Regulations in their entirety
 - The 2024 Title IX Regulations are now “off the books” and **not** in effect for **any** state, institution, or school effective immediately
- Implications:
 - All federal funding recipients are now subject to the 2020 Title IX Regulations
 - Revert to **2020-compliant** policies for sexual harassment
 - Ensure sex discrimination is covered under policy
 - Consult with legal counsel on strategies for handling completed and ongoing complaints initiated under the 2024 Regulations
 - Ensure compliance with all 1975 and 2020 regulatory requirements

Executive Order re: Sex & Gender

- The Executive Order (EO) defines sex as binary – male or female
 - Detaches the notion of gender or gender identity from the term “sex”
- Directs all federal agencies to enforce civil rights laws in alignment with the EO
 - The Dept of Education will **not** interpret Title IX to protect gender identity
 - The Dept of Justice will issue guidance that *Bostock* does **not** apply to Title IX
 - All agencies must ensure that intimate spaces are designated by sex, not identity
 - All Biden administration EOs addressing gender identity are revoked
- Prioritize investigations/litigation to enforce rights and freedoms to express binary nature of sex
- Prohibits grant funding from promoting gender ideology
- Foreshadows attempts to codify EO’s definitions into law
- Notably, the EO does **not** address sexual orientation

Rescinded Prior Guidance

Rescinds all guidance documents inconsistent with the EO or subsequent guidance including:

- White House Toolkit on Transgender Equality
- 2024 Title IX Regulations: Pointers for Implementation
- ED Toolkit: Creating Inclusive & Nondiscriminatory School Environments for LGBTQI+ Students
- Supporting Intersex Students
- Supporting Transgender Youth in School
- Letter of Educators on Title IX's 49th Anniversary
- Confronting LGBTQI+ Harassment in Schools
- Enforcement of Title IX...Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*
- AG's memorandum "Application of *Bostock v. Clayton County* to Title IX"
- EEOC's "Enforcement Guidance on Harassment in the Workplace"

Title IX Compliance Overview

Title IX and Equity

- Title IX is a sex and gender equity law
- Equity refers to the understanding that not all individuals have access to the same resources and opportunities
 - Equity focuses on providing support and resources to reduce disparities in access to the education program
 - Title IX seeks to remedy the inequities created by sexual harassment and sex discrimination
- Ensuring that each complaint is heard by one or more unbiased Decision-makers supports is essential for providing an equitable grievance process

Essential Compliance Elements

The requirements to **Stop, Prevent, and Remedy** guide the institution's equity and compliance work

1

STOP discriminatory conduct

2

PREVENT
recurrence, on both individual and institutional levels

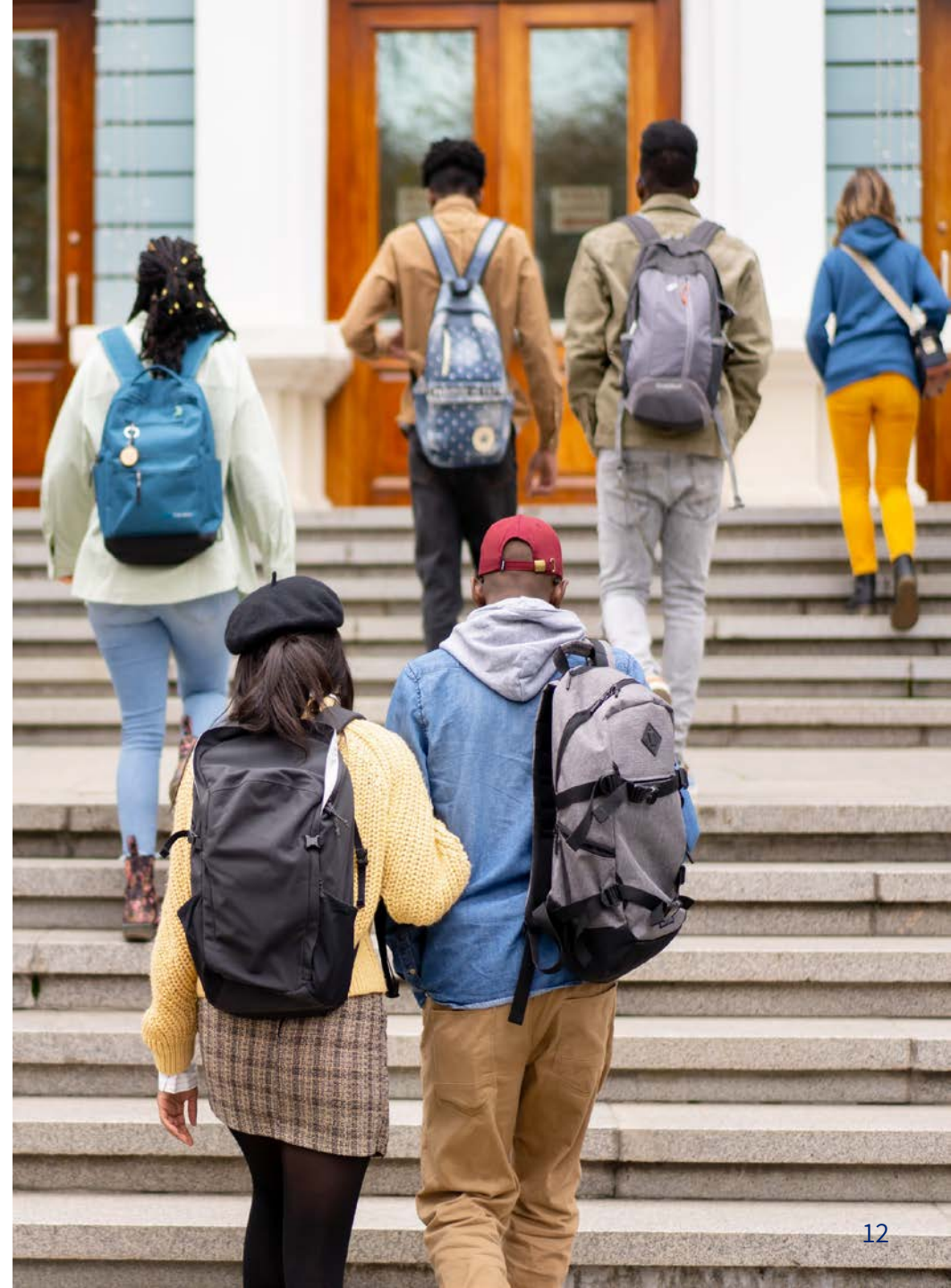
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REMEDY the effects of discrimination, for both the individual and the community

Title IX Scope and Definitions

Review: Applicability

- Education program or activity in the United States
- Control over the Respondent
- Control over the context of the alleged behavior
- Applies to both student and employee complaints



Review: Sexual Harassment Definitions

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking



Review: Sex Discrimination

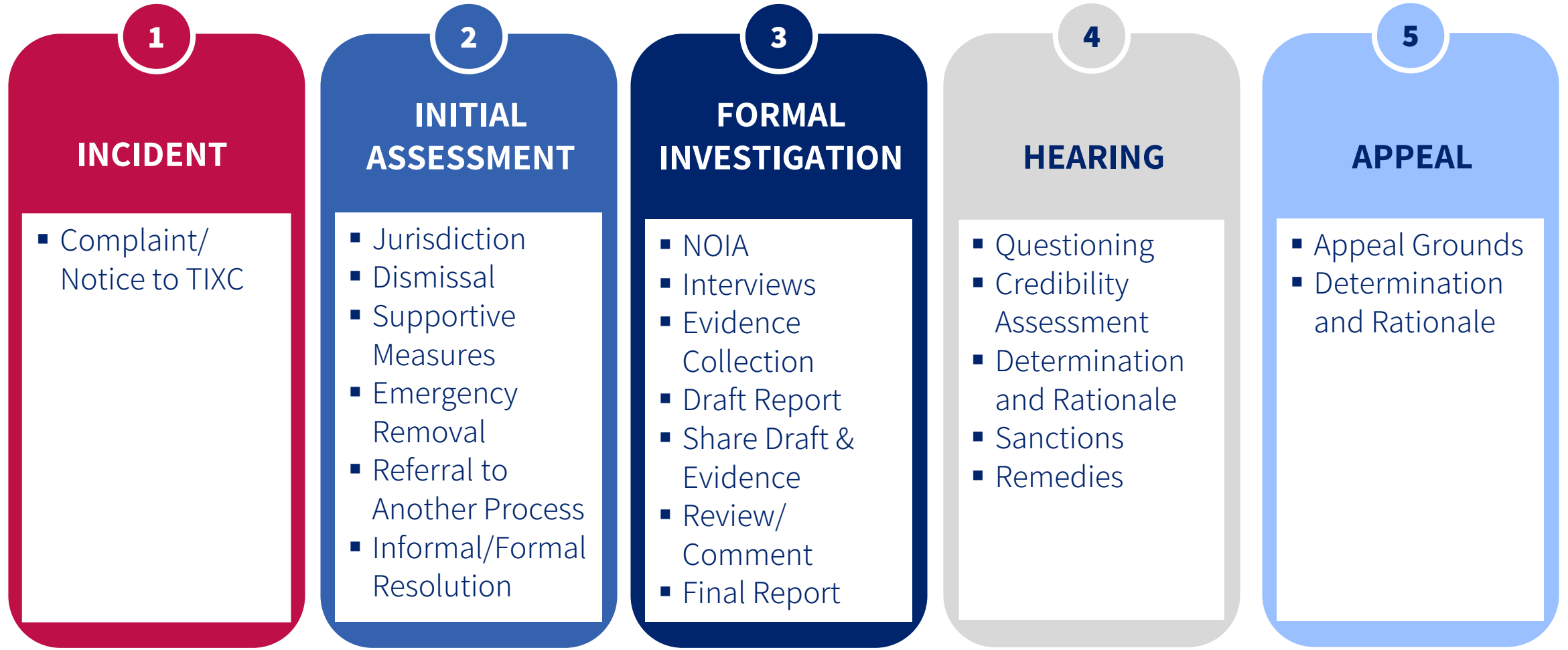
- **Sex discrimination** encompasses:
 - Inequitable treatment based on sex or gender
 - Sex/gender
 - Sexual orientation
 - Gender identity
 - Exclusion from participating on the basis of sex or gender

Review: Other Related Definitions

- Retaliation
- Common additional offenses
 - Sexual Exploitation
 - Harm/Endangerment
 - Intimidation
 - Hazing
 - Bullying

TIX Grievance Process

Title IX Grievance Process Overview



Title IX Grievance Process Overview

Prompt Resolution

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



Title IX Grievance Process Overview

Equitable Resolution

- Treat all parties equitably
- Ensure that all parties have opportunity to fully participate in the grievance process
- Make certain that all Title IX team members operate without bias and/or conflicts of interest



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

Title IX Coordinator Role

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 sexual harassment and sex discrimination
 - Leading efforts to ensure sex and gender equity across the entire institution



Title IX Compliance Oversight

Responsibilities:

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

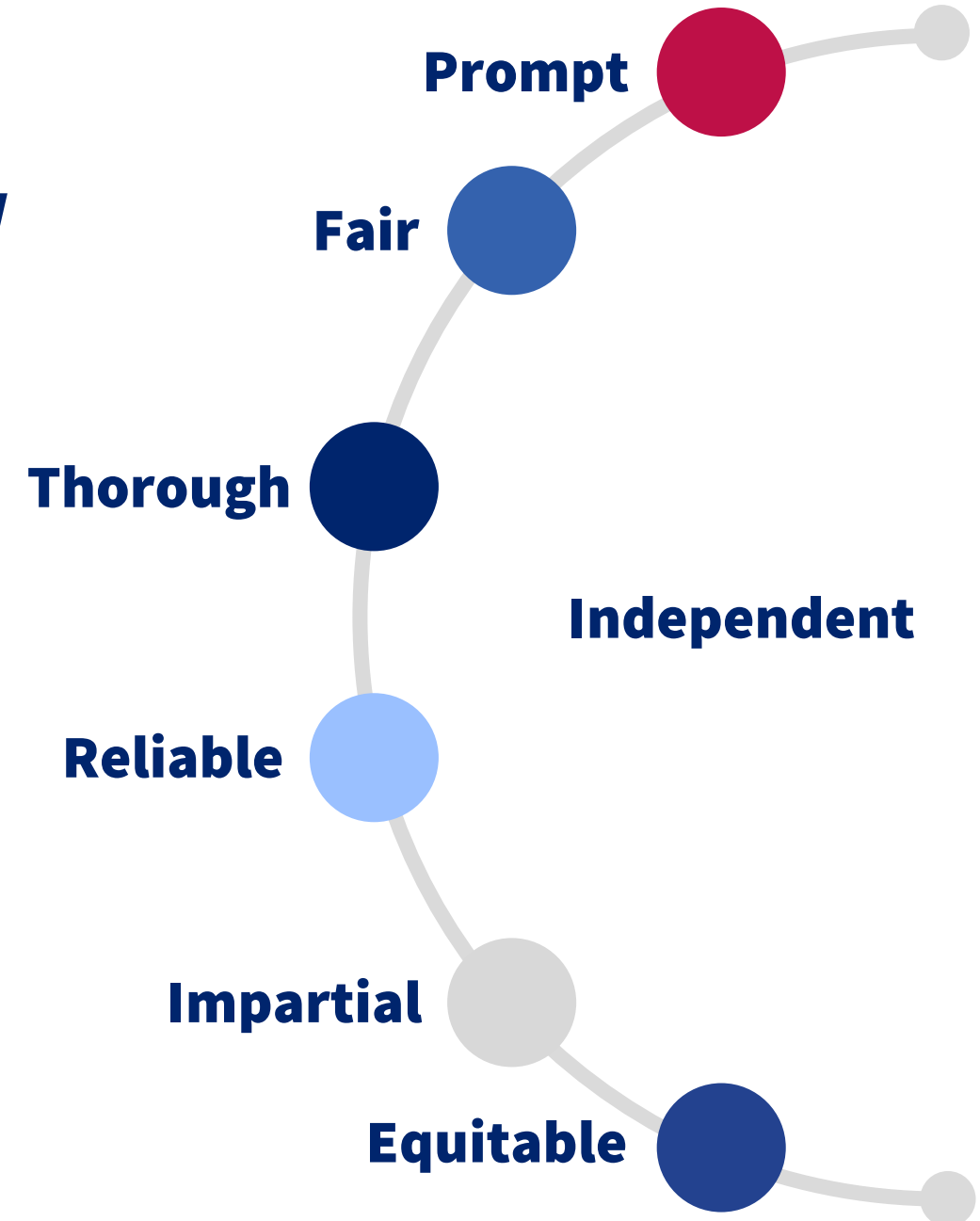
Title IX Compliance Oversight

- Oversee Grievance Process and program equity
- Track systemic issues or patterns
 - Take remedial action to prevent recurrence
- Assess compliance efforts and program effectiveness
 - Create and disseminate annual compliance report (best practice, not a requirement)
- Update institutional leadership on Title IX issues
- Liaise with institutional legal counsel
- Create/maintain records
- Respond to government inquiries/investigations

Investigator Role

Civil Rights Investigations Overview

- Investigations focus on gathering all available, relevant information
- The institution is responsible for gathering evidence—not the parties



Bias and Conflicts of Interest

- Title IX Investigators have no “side” other than the **integrity of the process**
- Title IX regulations **prohibit conflicts of interest or bias** against parties generally, an individual party, or the substance of the complaint
- Investigators identifying a potential conflict of interest or bias should **immediately notify** and disclose the information to the TIXC



Decision Maker Role

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
- All 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-Making Oversight

Title IX Coordinator

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

Decision-Maker(s)

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

Decision-Maker Role and Responsibilities

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

Informal Resolution Facilitator Role

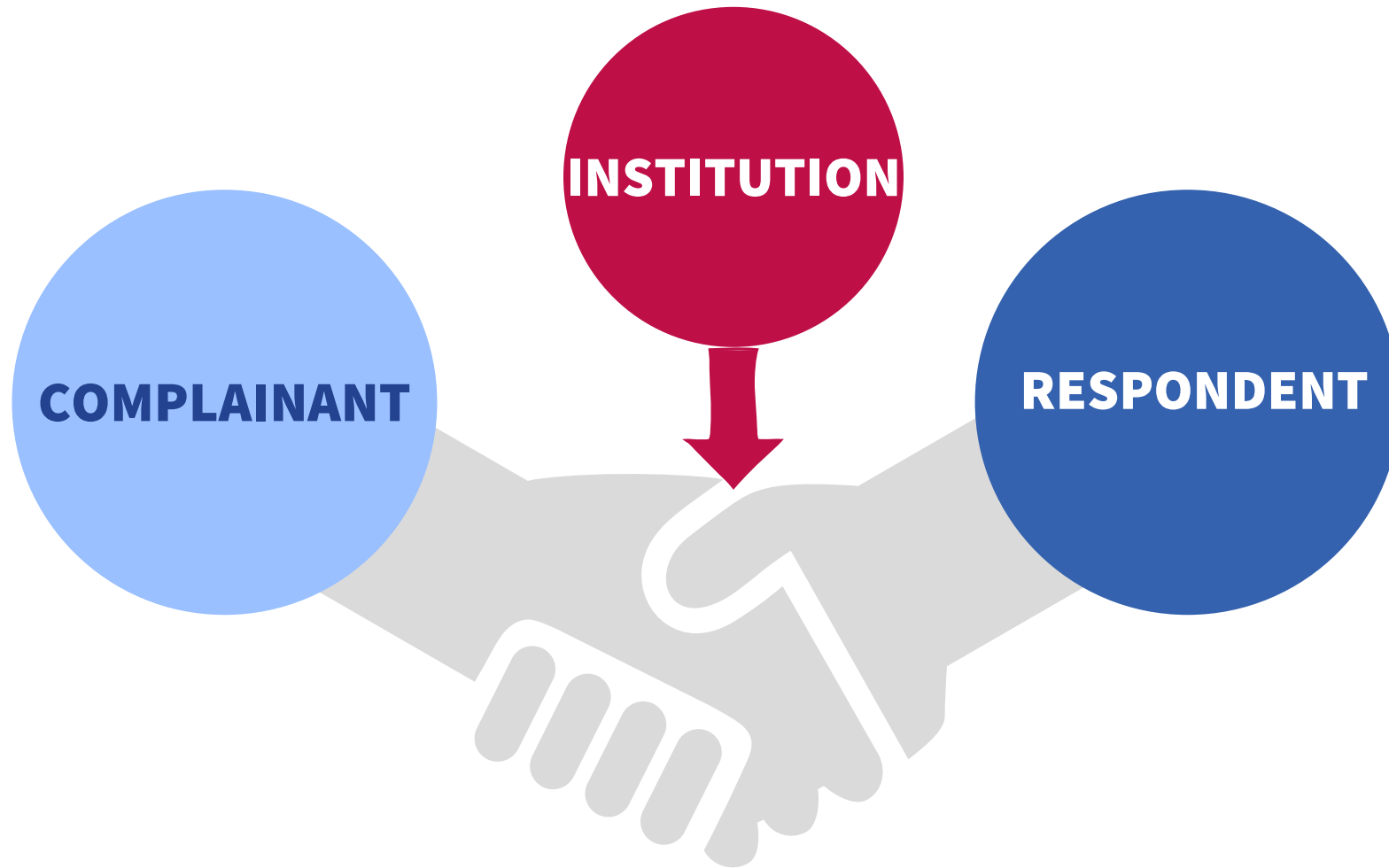
Informal Resolution Foundations

- Safety (physical, psychological, and emotional)
- Focus on needs
- Mutually serving
- Intentionality
- Informal ≠ casual
- Presence
- Meet parties where they are
- Pre- and post-process support and resources

Informal Resolution Benefits

- Can be an effective way of addressing reports and complaints for parties and impacted communities
- Resolution focuses on the people vs. focusing on the policy
- Empowers choice and agency over the resolution
- Provides a needs-based process to both address past harm and prevent future harm
- Focuses on ensuring educational access and restoration
- Honors privacy similar to the Administrative Resolution Process
- Offers a space for communication and understanding among parties, if desired

Three-Party Model



Conflicts of Interest and Bias

Conflicts of Interest and Bias

- Title IX Team Members must **not have a conflict of interest or bias** for or against the following:
 - Complainants, generally
 - Respondents, generally
 - 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 in fact
 - 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 DM 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 or employee 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

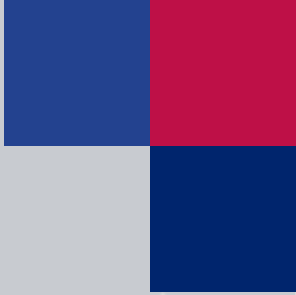
Bias

- 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 Member roles requires us to recognize it and mitigate its effects

Identifying and Correcting Bias

Strategies to mitigate bias:

- Consider hearing panels vs. individual DM or investigation team vs. investigator
- Ask panel members/investigation team members to review each other's questions in advance
- Comply with institutional policy and procedure
- Identify evidentiary gaps and seek relevant evidence to fill gap
- Review rationale as part of all panel members' responsibilities
- Ensure TIXC reviews the rationale and investigation report
- Be conscious of own biases
 - Counteract them and ensure they do not influence decisions



Making Findings, the Final Determination, and Sanctioning

Written Determinations

Finding

Whether the conduct occurred, by the standard of evidence

Final Determination

Whether the conduct proven to have occurred violates policy

Making a Finding and Final Determination

- Finding(s) must be based upon information gathered during the investigation and decision-making phases only
 - No outside information should influence decision-making
- Separate the **determination** from the **sanction**:
 - Do not use impact-based rationales for policy violation findings and determinations
 - Use impact-based rationales for sanctions only
 - Impact is **not** relevant to the policy violation question
 - Same with prior misconduct, unless a pattern is alleged/proven
- Institutions can identify a separate individual to determine sanctions **OR** permit the DM to determine sanctions, if any

Written Determinations

Written Determination

- Authored by Decision-maker(s)
- TIXC/Legal counsel reviews
- TIXC communicates to the parties simultaneously in writing
 - No FERPA concerns

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
- Finding and Final Determination
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal

Sanctions and Remedies

Sanctions

- Only implemented after a determination of responsibility
- Nexus between sanctions and misconduct
- Goal: stop, prevent, and remedy
- TIXC does not issue sanctions but oversees the process
- TIXC assures sanction compliance
 - Failure to comply could lead to discipline

Remedies

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

Determining Sanctions

- Primary purpose should stop, prevent, and remedy the discrimination
 - Each sanction should have a rationale
- DM may consider:
 - Nature and severity of the conduct, including the circumstances surrounding the violation
 - Aggravating or mitigating circumstances
 - Precedent, prior misconduct, proven pattern (if alleged), acceptance of responsibility, collateral violations, or multiple violations
 - The Respondent's disciplinary history
 - The need for sanctions or other responsive actions to stop, prevent, and remedy the discrimination, harassment, and/or retaliation
 - The impact on the parties
 - Any other information deemed relevant by the Decision-maker(s)

Common Student Sanctions

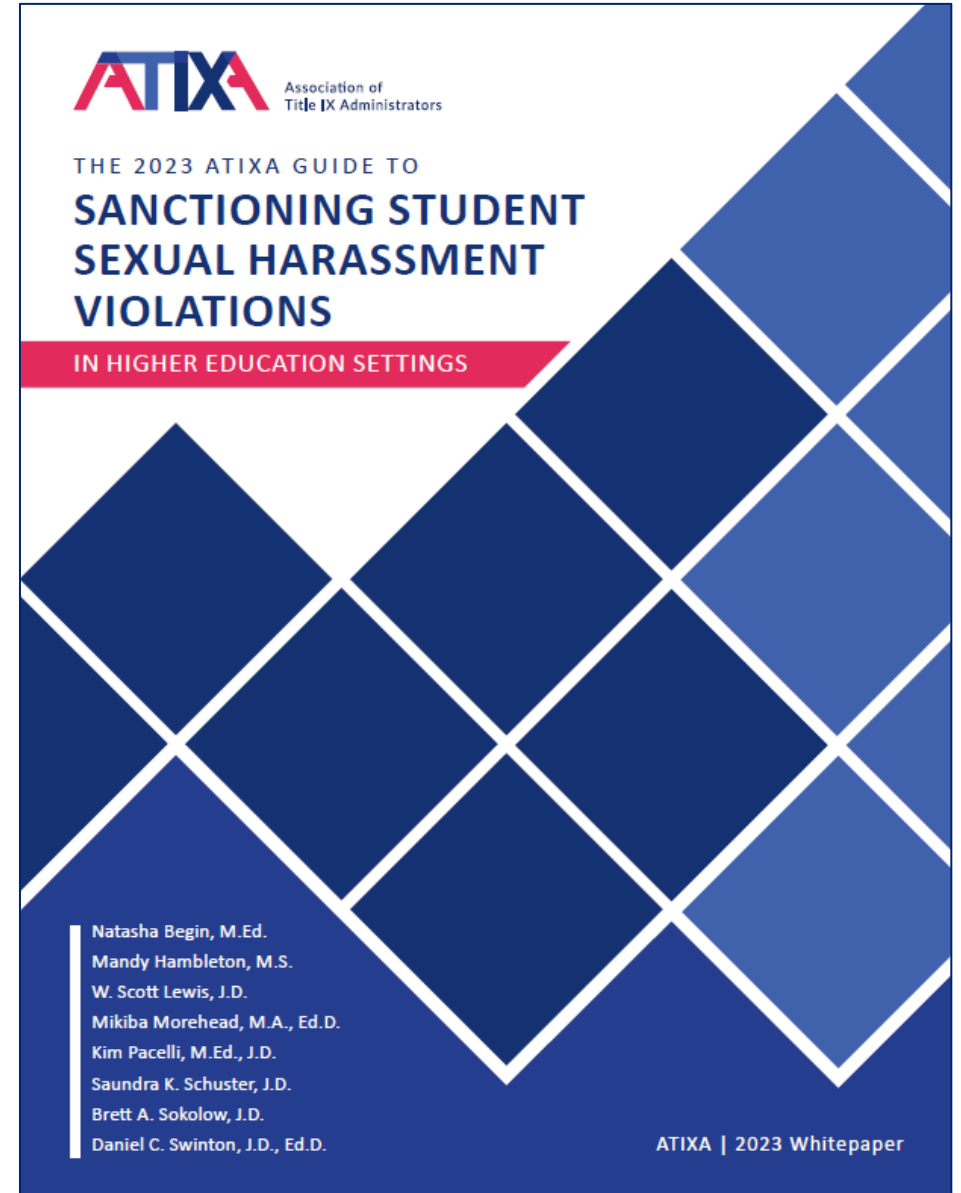
- Warning (preferably written)
- Probation
- Loss of privileges
- Counseling
- No contact order
- Residence hall relocation, suspension, or expulsion
- Limited access to campus
- Service hours
- Online education
- Alcohol and drug assessment and counseling
- Discretionary sanctions
- Parental notification
- College suspension
- College expulsion

Common Employee Sanctions

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

Sanctioning Pitfalls

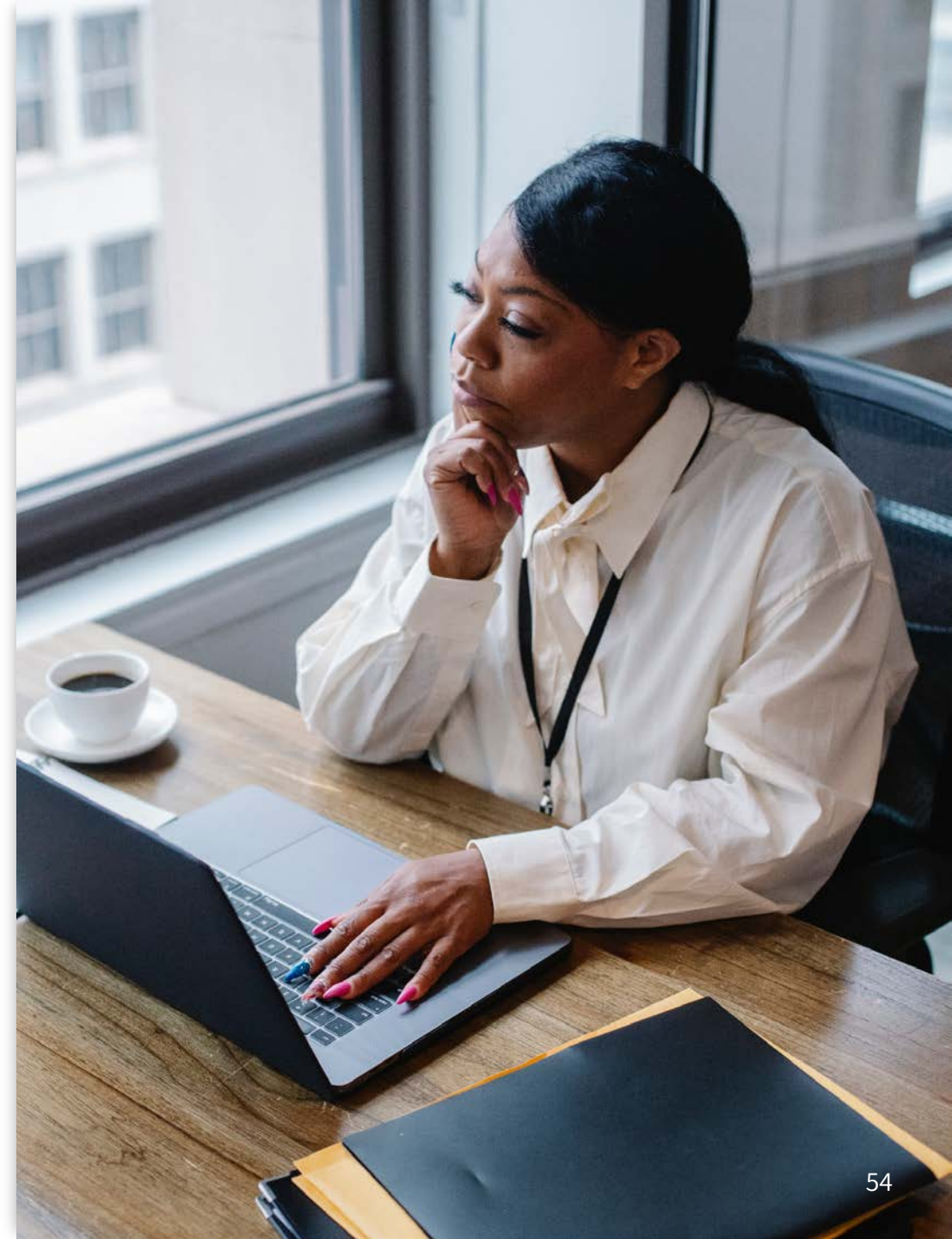
- Failure to stop, prevent, and remedy
- Conflating the finding, the determination, and the sanctioning
- Unwillingness to expel, suspend, or terminate
- Inconsistent or disparate sanctions for similar behavior
- Failure to consider aggravating or mitigating circumstances
- Lockstep or prescribed sanctioning;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



Supportive Measures

Supportive Measures

- Provided to parties throughout the process:
 - Non-disciplinary, non-punitive
 - Individualized, no-cost
 - Restore or preserve equal access
 - Without **unreasonably** burdening other party
 - Protect safety of parties or environment, or deter sex discrimination
- Avoid unnecessary disclosures about SMs to faculty, supervisors, etc.
- Consult with disability services when appropriate
- If not provided, document the rationale for refusal



Supportive Measures

Counseling/ Health Services	Employee Assistance Program	Visa and Immigration Assistance	Community Education or Programs	Alternate Housing
Alternate Work Arrangements	Safety Planning/Escorts	Mediate with Faculty or Supervisor	Transportation Assistance	Contact Limitations
Academic Support	Policy Revision	Training	Climate/Culture Assessment	Alternate Course Completion Options

Assessing Unreasonableness Example

- Complainant has requested that Respondent be moved to another residence hall as a supportive measure
- Potential Considerations:
 - Whether Respondent will be separated from a living learning community, student-athlete housing, scholarship housing, or other similar type of grouped housing
 - Whether a comparable facility has space
 - Whether Respondent will have an increased distance to travel to their classes, campus employment, or other services that may have impacted their housing selection
 - Whether Respondent will lose access to any other facilities (e.g., study space, dining options) by moving
 - Whether the institution can provide any resources or supports to offset anything that might make the move unreasonable (e.g., assistance packing/moving, shuttle service)

Retaliation

Narrowly Defined

- The Title IX definition of retaliation is typically **not as broad** as what community members may consider to be retaliatory
 - Complaints alleging “retaliation” may not meet the definition
 - Social media gossip **may not** be retaliation if it does not meet the requirements
 - First Amendment concerns
- Only applies to retaliation in cases involving sex/gender
 - Helpful to have a general retaliation provision in codes of conduct



Retaliation Construct

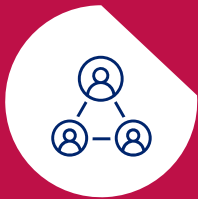
Step 1: Does the complaint satisfy the required elements for a retaliation complaint under Title IX?

Step 2: Does the Respondent offer a non-retaliatory reason for the adverse action?

Step 3: Is there evidence that the offered reason is pretext for discrimination?

Step One: Complaint

Step 1: Does the complaint satisfy the required elements for a retaliation complaint under Title IX?



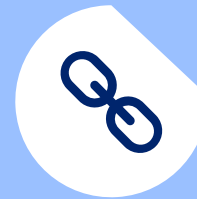
1(a)

Does the complaint implicate a protected activity involving a sex/gender issue?



1(b)

Does the complaint identify an adverse action?



1(c)

Does the complaint assert that the adverse action was because of the protected activity?

Step Two: Non-Retaliatory Reason

- Interview the Respondent about the allegations:
 - Ask about the **why** behind the adverse action
 - “What led to the decision to deny Sally’s tenure application?”
 - “Describe what led to the student receiving a C+ in your class”
 - Gather any evidence that supports their rationale
 - Respondent may need to direct the Investigator to potential sources for that evidence, rather than providing it themselves
- Investigator should seek corroboration of any offered non-retaliatory reason(s)
 - Analyze the Respondent’s reason(s) in light of relevant evidence

Step Three: Pretext Analysis

- **Pretext** occurs when an adverse action occurred for retaliatory reasons, but the Respondent asserts that there was a legitimate reason for the action
- When determining whether an alternative explanation for the adverse action is pretextual, consider whether:
 - The explanation makes sense
 - Other actions taken are inconsistent with the explanation
 - The explanation is inconsistent with past policy or practice
 - There is evidence of other individuals being treated differently in similar situations
 - There is witness testimony, including experts
 - The timeline of events aligns



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