



Association of
Title IX Administrators

Gender Equity Foundations for Higher Education

Training and Certification Course

Not for Distribution

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Strategic Risk
Management Solutions



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

Course Introduction



The course focuses on Title IX compliance responsibilities that address sex and gender equity including athletics equity, program equity, pregnancy and related conditions, and LGBTQIA+ protections.



Participants will explore program equity reviews, whether conducted internally or by the U.S. Department of Education's Office for Civil Rights.



Our goal is to provide an in-depth understanding of roles and responsibilities to address gender discrimination and promote gender equity in education.

Content Advisory

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

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

Defining Equity and Discrimination

Title IX and Equity

- Title IX is a gender equity law
- Equity refers to the understanding that not all individuals have access to the same resources and opportunities
 - Equity focuses on providing support and resources to reduce disparities in access to the education program
 - Title IX seeks to remedy the inequities sex and gender discrimination create
- Equity has become a highly politicized issue
 - State laws and local ordinances may intersect or conflict with Title IX

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 gender equity across the entire institution



Title IX Compliance Oversight

Responsibilities:

- Recruit, supervise, and train TIX team
 - Must post training materials on website
- Manage policy and procedures prohibiting sex discrimination and harassment
- Oversee complaint resolution process and program equity
- Assure institution acts reasonably to stop, prevent, and remedy
- Track systemic issues or patterns
 - Take remedial action to prevent recurrence
- Assess compliance efforts and program effectiveness

Title IX Compliance Oversight

Responsibilities:

- Create and disseminate annual compliance report
- Update institutional leadership on Title IX issues
- Maintain records
- Liaise with institutional legal counsel
- Develop and maintain accurate web and print-based Title IX publications
- Respond to government inquiries

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, on both individual and institutional levels

OCR Oversight

- OCR oversees 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
 - Loop legal counsel and other stakeholders, such as public relations
- OCR investigations involve document collection and interviews
- OCR complaints are resource-intensive
 - Cost money, time, and reputation

Review: Scope

- Education program or activity
- Control over the Respondent
 - Climate/culture complaints
- Control over the context of the alleged behavior
- Applies to both student and employee complaints



Title IX: Scope

Sex Discrimination

- Inequitable Treatment
 - Sex characteristics
 - Sex stereotypes
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity
- Exclusion from participation

Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
 - Rape
 - Fondling
 - Incest
- Statutory Rape
- Dating Violence
- Domestic Violence
- Stalking

Retaliation

Discrimination

- The act of treating an individual differently, or less favorably, based upon specific or perceived protected characteristics
 - Discomfort vs. discrimination

1

**Can be connected
with prejudice**

2

**Can be intentional
or unintentional**

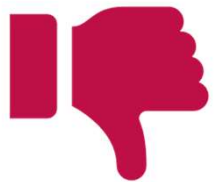
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**Always based on a
protected
characteristic**

Review: Definitions

- **Sex discrimination** encompasses discrimination based on:
 - Inequitable treatment based on sex or gender
 - Sex characteristics
 - Sex stereotypes
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity
 - Exclusion from participating on the basis of sex or gender identity
- **Retaliation**

Types of Discrimination



Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliation or perception of affiliation with protected characteristic



Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups



Harassment

- Quid Pro Quo
- Hostile Environment



Retaliation

- Prohibited if engaged in protected activity
- Suffered adverse academic or employment action

Review: Definitions

Recommended Additional Related Offenses

- Harm/Endangerment
- Discrimination
- Intimidation
- Hazing
- Bullying



Religiously Affiliated Institutions

- Title IX allows exemption of activities of educational institutions **controlled by religious organizations** to the extent that the application of Title IX would be inconsistent with the religious tenets of the organization
 - Sexual Orientation
 - Gender Identity
 - Single-sex programming
 - Hiring practices



Activity: Is it Discrimination?

Student-Athlete Curfew

- The women's volleyball coach has been at the institution for five years
- Each year, he reminds his players to “get to [their] rooms by 10:00 p.m.” because “nothing good happens after 10:00 p.m., and I want [the] girls to be safe”
- The men's volleyball coach does not make the same request

Is this discrimination?

Student-Athlete Curfew

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What if the women's coach has never made curfew a team rule or disciplined any curfew violations?

Student-Athlete Curfew

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- The men's volleyball coach does not make the same request

What if the women's coach makes 10:00 p.m. curfew a team rule and will discipline or dismiss players that violate curfew?

Visitation Policy

- An institution with residence halls has a policy that prohibits students of one gender hosting an individual of another gender in their residence hall room overnight
- A male student complains to housing staff, saying it is not fair that they cannot have their girlfriend spend the night, but a gay student could have their partner spend the night

**Could this be a discriminatory policy?
Why or why not?**

Visitation Policy

- An institution with residence halls has a policy that prohibits students of one gender hosting an individual of another gender in their residence hall room overnight
- A male student complains to housing, saying it is not fair that they cannot have their girlfriend spend the night, but a gay student could have their partner spend the night

What changes could be made to this policy to avoid being discriminatory?

Visitation Policy

- An institution with residence halls has a policy that prohibits students of one gender hosting an individual of another gender in their residence hall room overnight
- A male student complains to housing, saying it is not fair that they cannot have their girlfriend spend the night, but a gay student could have their partner spend the night
- A few weeks after the student filed his complaint, his Resident Assistant documented him for underage alcohol consumption
- The student claims the documentation was in retaliation for his complaint about the visitation policy

What should the Title IX Coordinator do?

Sexual Orientation, Gender Identity, and Gender Expression

Overview

- Title IX does not explicitly prohibit discrimination on the basis of sexual orientation (SO), gender identity (GI), and gender expression (GE)
- *Clayton County v. Bostock* (2020) extends Title VII to SO and GI
 - Extended to Title IX cases
- State laws vary significantly
 - Distinctions based on “biological sex”
 - Prohibitions against training on SO, GI, and GE
- Harassment and discrimination should go through a grievance resolution process

Key Terms

Sex

Chromosomes, hormones, reproductive organs, and genitalia

Gender

Attitudes, feelings, and behaviors that a given culture associates with biological sex

Gender Identity

Internal sense of gender

Gender Expression

Outward expression of gender, often through clothing, behavior, mannerisms, speech patterns, and activities

Sexual Orientation

Sexual or romantic attraction, existing on a continuum (e.g., gay, lesbian, bisexual, heterosexual, asexual)

Transgender

A person whose sense of identity and gender does not correspond with their sex assigned at birth

Key Terms

Cisgender

Gender identity consistent with the sex assigned at birth

Gender Fluid

One's sense of not having a fixed gender

Gender-Variant/Diverse

A person whose behavior or appearance varies from prevailing cultural/social expectations for their gender

Support Through Transitions

- Gender transitions
 - Social
 - Medical
 - Legal
- Common concerns and current challenges include
 - Discomfort vs. Discrimination
 - Educating communities and constituencies
 - Religious concerns and exemptions
 - Resources, services, and programs based on gender binary

Pronouns and Chosen Names

- General rule:
 - Allow students or employees to use chosen name and pronouns
 - Communication among offices and across technology is important
- Practical issues that may present:
 - Privacy concerns
 - Misgendering issues
 - Conflict with religious or academic freedom or First Amendment
 - Deadnaming
 - Technology/recordkeeping systems and identity

Activities, Athletics, and Facilities Access

Where sex-segregated activities and facilities are provided:

- Permit transgender, transitioning, intersex, non-binary, or gender-variant individuals to **participate** in the education program and **access** facilities **consistent** with their gender identity/expression
 - Restrooms and locker rooms
 - Cannot require single-use bathrooms
 - Housing and overnight accommodations
 - Cannot require single-occupancy use
 - Athletics
 - NCAA policies may apply
- **Proposed in NPRM:** Sex-Related Eligibility Criteria for Male and Female Athletic Teams

Activity: Case Study

Case Study: MC

- MC is a second-year student who identifies as a transwoman
- She started her transition during her first year of college
- She is interested in joining a sorority and registers for Panhellenic recruitment, which takes place during the week before fall classes start
- Of the three Panhellenic organizations that have a policy welcoming transgender members, the institution only hosts a chapter for one
- The other organizations with chapters on campus either have a policy against accepting transgender members (which is not public information) or do not have a policy regarding transgender inclusion

Case Study: MC

- During a pre-recruitment preparation meeting, each organization's recruitment chairperson receives the list of potential new members
- Lizzie, the recruitment chairperson for a sorority that has a private policy prohibiting transgender members, notices MC's name on the list
- Lizzie and MC lived in the same residence hall during their first year, and Lizzie is aware that MC is transgender
- Lizzie asks if all organizations must include all potential new members to the first round, during which the women visit each organization in assigned groups

How should the TIXC advise the Fraternity & Sorority Life staff to answer Lizzie's question?

Discrimination on the Basis of Pregnancy or Parental Status

Pregnancy and Title IX: Scope

- Students
- Employees
- Actual or Potential Pregnancy
- Family status
- Marital status
- Parenting status
- “Head of household”
- Academics & Access to Course Offerings
- Admissions
- Athletics
- Break time for employees
- Employment, Recruitment, & Hiring
- Extra-curricular activities
- Facilities
- Financial Assistance
- Funding
- Lactation
- Health Insurance
- Housing
- Lactation
- Leaves of Absence
- Salaries & Benefits

Current Title IX Regulations

The regulations specify that Recipients may not:

Have a rule which treats a student differently on the basis of a student's actual or potential

- parental,
- family, or
- marital status

Exclude any student from its education program or activity on the basis of such student's

- pregnancy,
- childbirth,
- false pregnancy,
- termination of pregnancy,
- or recovery therefrom

Proposed Regulations (NPRM)

- Must not adopt or apply any **policy, practice, or procedure**
 - concerning a student or employee's parental, family, or marital status
 - that treats students or employees differently on the basis of sex
- Must not discriminate in its education program or activity against any student or employee based on the student's pregnancy or related condition

Proposed Regulatory Definitions

Pregnancy or Related Conditions

Pregnancy, childbirth, termination of pregnancy, or lactation;

- Related medical conditions; OR
- Recovery therefrom

Parental Status

The status of a person who, with respect to another person who is under the age of 18, is:

- A biological parent;
- An adoptive parent;
- A foster parent;
- A stepparent;
- A legal custodian or guardian;
- In loco parentis with respect to such a person; or
- Actively seeking legal custody, guardianship, visitation, or adoption of such a person

Title IX Coordinator's Role

Policies, Practices, or Procedures

Support and Resources

Reporting

Training

Supportive Measures

Documentation

Outreach and Intake

TIXC should inform the individual of the institution's obligation to:

- Prohibit sex discrimination
- Provide supportive measures and modifications
- Allow access, on a voluntary basis, to any separate and comparable portion of the institution's education program or activity
- Allow a voluntary leave of absence
- Ensure lactation space availability
- Maintain grievance procedures for alleged discrimination

Supportive Measures and Reasonable Accommodations

- Supportive Measures
 - Provided on an individualized and voluntary basis
 - May not require healthcare provider certification
 - Subject to fundamental alteration analysis
- Allow individuals to choose the best (available) options for their circumstances
- Some pregnancy-related conditions could qualify as a temporary disability
- Reasonable accommodations are one form of supportive measures
 - Students must complete and meet the academic standards of the course

Examples of Supportive Measures

Breaks

Absences

**Remote
Participation**

**Course
Flexibility**

Extensions

Counseling

Physical Space

Elevator Access

Common Challenges

- Lack of clear process for requesting supports/modifications
 - Ad hoc and uncoordinated approach
 - No or poor communication with individual regarding options
- Faculty or staff failing to consult with the TIXC
- Failing to engage in an iterative process



Key Takeaways

**Policies and
Procedures**

Training

Recordkeeping

Remedies

Activity: Sasha Case Study

Case Study: Sasha

- Sasha is a sophomore theatre major and just found out she is pregnant
- Sasha is having a very rough first trimester and is having to miss a lot of rehearsal time for a play in which she was recently cast as the lead role
- Professor Alexa, Sasha's Acting II instructor and the director of the production Sasha is in, has a very strict attendance policy when it comes to missing rehearsals
- Professor Alexa's policy prohibits a student from missing more than two rehearsals, otherwise they are removed from their role
- Sasha has now missed her third rehearsal and has been removed from the lead role and the play altogether

Case Study: Sasha

- Sasha is mad that she has been removed from the cast of the show and reports to the TIXC that she is being discriminated against based upon her sex and pregnancy status
- Professor Alexa states that Sasha's removal has nothing to do with her sex or pregnancy status and has everything to do with the attendance policy which is applied equally to all students in productions
- Furthermore, according to the national theatre accrediting body, each production must include a minimum of twenty rehearsal hours for each actor prior to the first full dress rehearsal in order for the play to be considered of educational quality, and for it to count toward the student's degree requirements

Case Study Discussion: Sasha

- Rehearsals take place one day per week for six hours each session
- Missing one rehearsal is the equivalent of missing three weeks of course material
- Sasha's three absences have significantly impacted the others involved in the production, including other students not having the ability to rehearse scenes with her, which has in turn decreased their total number of rehearsal hours
- Sasha tells the TIXC that she has been rehearsing during the weekends with her scene partners and knows her lines despite missing the three class periods

What should the Title IX Coordinator do?

Title IX & Disability

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Equity and Disability Laws

- Section 504 of the Federal Rehabilitation Act
 - Section 504 and Title IX share similar language
 - Section 504 protects individuals from discrimination on the basis of their disability
- Title IX Coordinators and Section 504/ADA Coordinators share similar responsibilities
 - Ensuring compliance with anti-discrimination law
 - Publication of non-discrimination notice
 - Oversight of a grievance process
 - Investigation and resolution of grievances

Key Points

- TIXC and 504/ADA Coordinator may be the same person
- Section 504/ADA Coordinator should **not** be the same person as the accessibility/disability services coordinator
 - Their duties would create a conflict of interest
- TIXCs often navigate disability accommodations
 - Should have working knowledge of accommodation process
 - Communication and collaboration will smooth overlap between processes

Title IX and Athletics

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Overview

- Since the 1970s, Title IX has spotlighted athletic program equity
 - Accommodation of interests and abilities
 - Equitable distribution of resources
 - Equitable treatment
- TIXC provides oversight, may delegate
 - Senior Woman Administrator
- Compliance requirement applies to
 - Intercollegiate and interscholastic athletics
 - Intramurals
 - Club sports

Accommodating Interests and Abilities: Three-Part Test

Part 1: Opportunities for males and females substantially proportionate to their respective enrollments

Part 2: Where one sex has been underrepresented, a continuing practice of expansion responsive to interests and abilities of underrepresented sex

Part 3: Where one sex is underrepresented and there is no continuing practice of expansion, demonstrate that interests and abilities of underrepresented sex have been fully and effectively accommodated by present program

Equitable Treatment: “The Laundry List”

Equipment & Supplies	Scheduling	Locker Rooms & Facilities	Housing & Dining
Coaching	Scholarships	Publicity	Travel & Per Diem
Medical and Training Services	Tutoring	Recruitment	Support Services

Common Sources of Complaints

Eliminating teams

Inequitable treatment

Scholarship funding

Coach's conduct "rules" for team

Single-Sex Programs and Facilities

Defining Terms

Single-Sex Program

- Activity or program designated men-only or women-only
- Members of each sex are only permitted to participate in programs designed for their sex

Preferred Sex Program

- Open to all but are advertised or named to suggest participation by one sex is preferred
- **Best Practice** approach

Exceptions

- Title IX prohibits sex discrimination in education programs or activities receiving Federal financial assistance
- There are several **exceptions** that may apply to higher education institutions or K-12 schools (or both), including:

- Academic Scholarships
- Admissions
- Athletic Teams
- Chorus
- Classes
- Family Events
- Fellowship, Leadership, or Advancement
- Fraternities & Sororities
- Physical Education
- Religiously Affiliated Institutions
- Single-Sex Housing

Activity: Case Study

Case Study: Hank

- Hank is a student who frequently uses the school/institution's open gym hours to lift weights and use the cardio machines
- Recently, Hank was turned away from the gym because he arrived during Women Only Wednesdays—a time period on Wednesday evenings that the gym is reserved for women only
- Hank filed a complaint alleging that Women Only Wednesdays is a discriminatory practice
- In his complaint, Hank suggested three resolution options:
 1. Maintain a women's only time but introduce a men's alternative for fairness
 2. Keep the women's only time but charge men less in student fees for the time they cannot access the facility
 3. Do away with single-sex gym times altogether

Case Study: Hank

- The female students who originally petitioned the gym staff to create Women's Only Wednesdays becomes aware of Hank's complaint
- They inform the TIXC that the women's only gym time is necessary because when men are in the gym with women, they create a hostile environment through the comments they make and by staring at women who are exercising

How should the TIXC handle this complaint?

Which, if any, of Hank's suggested solutions would best resolve this situation?

Formal Grievance Process Overview

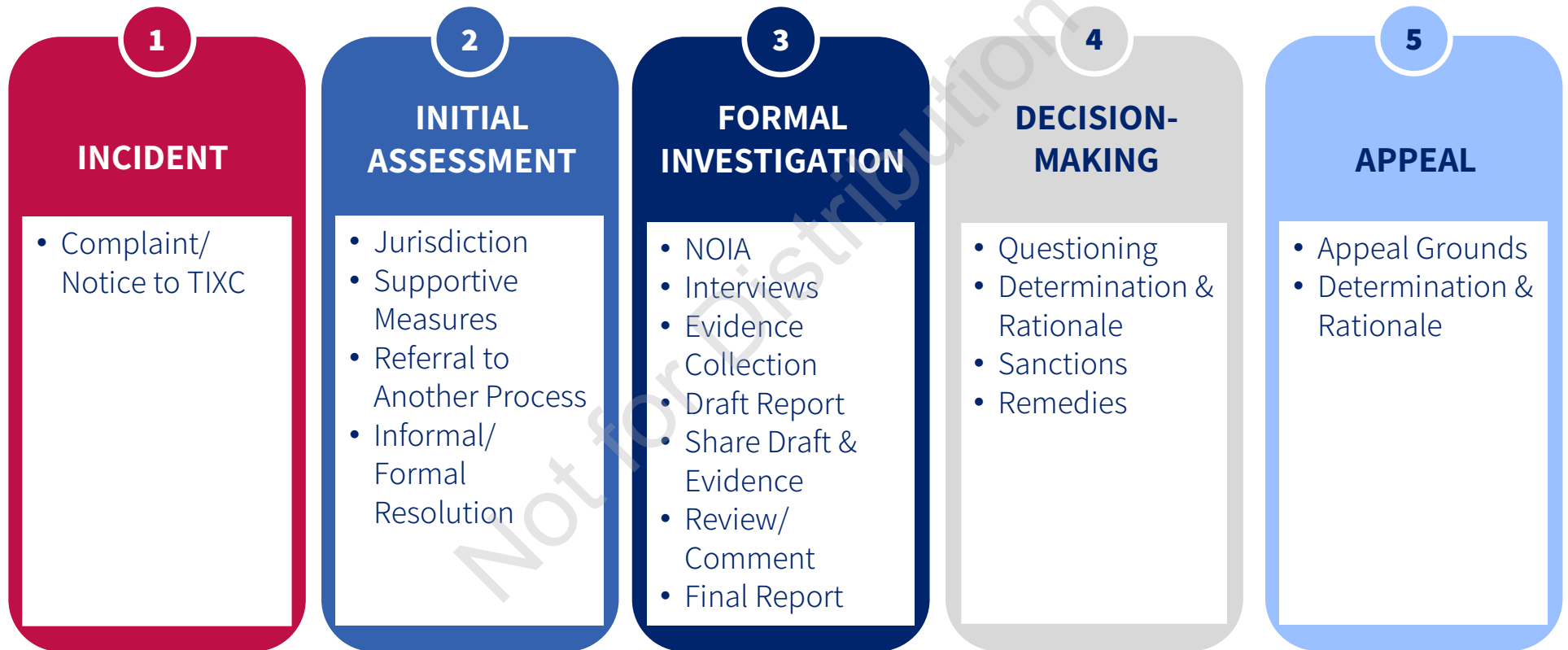
Grievance Process for Sex Discrimination

- The 2020 regulations do not mandate a detailed grievance process for sex-discrimination (SD) complaints
- However:
 - Must still stop, prevent, and remedy promptly and equitably
 - 2022 NPRM foreshadows a grievance process for SD complaints

Grievance Process for Sex Discrimination

- ATIXA recommendations, rather than regulatory requirements
 - Model Policy – 1P2P
 - “Process B”
 - Borrows elements from 2020 grievance process, including key due process protections
 - Ensures a fundamentally fair process
- ATIXA Best Practice and compliant under the current regulations
 - Prepare and ease transition to new regulations

Grievance Process Overview



Grievance Process Overview

Prompt Resolution

- Complete without undue delay
- Grievance process may take longer than expected
 - Anticipate, mitigate, and document delays
 - Communicate with parties regarding delays

Grievance Process Overview

Equitable Resolution

- Treat all parties equitably
- Ensures 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 conflict of interest

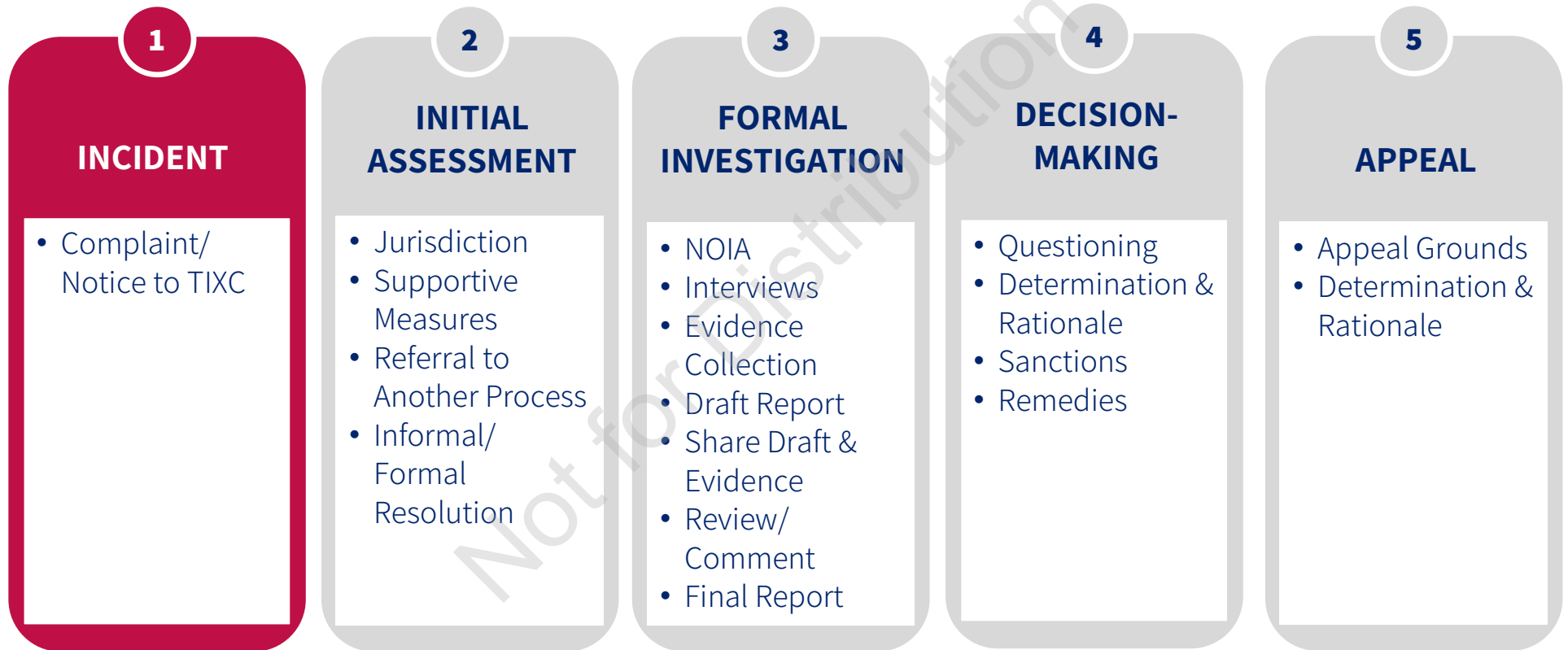


Due Process Best Practices

- Present witnesses and other evidence
- Gather and present relevant evidence without restriction
- Discuss the allegations under investigation without restriction
- Be accompanied by Advisor of party's choice
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Review and respond to evidence gathered in the investigation

Reports, Complaints, and Notice to the Institution

When is the Institution “On Notice?”



Point Person for Reports and Complaints

- TIXC receives all reports or complaints of sex/gender discrimination
 - Recipient may designate multiple entry points for receipt of information
 - Deputy Title IX Coordinator(s)
- TIXC contact information must be included within:
 - The institution's website
 - All handbooks or catalogs provided to applicants, students, employees, and unions

Mandatory Reporting

- ATIXA recommends that **all employees** are **mandated reporters** (except for confidential resources) under Title IX
 - Ensures information gets to those trained to respond
 - Enables institution to best support individuals
 - Supports tracking patterns
 - Provides for simpler, uniform, and universal training and reporting
- Many employees will also have reporting responsibilities under other state and federal laws or institutional policy

Reporting

Confidentiality vs. Privilege vs. Privacy

1

CONFIDENTIALITY

Those who receive reports from students (and sometimes employees) and need not report to the TIXC

2

PRIVILEGE

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

3

PRIVACY

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

Report vs. Complaint

Report

- Notifies the TIXC of an incident and
- Obligates the TIXC to offer supportive measures and explain the process

Complaint

- Alleges sex-based discrimination
- Request to initiate an investigation

Reporting Considerations

**Online Reporting
Form**

Anonymous Reports

**Confidentiality
Requests**

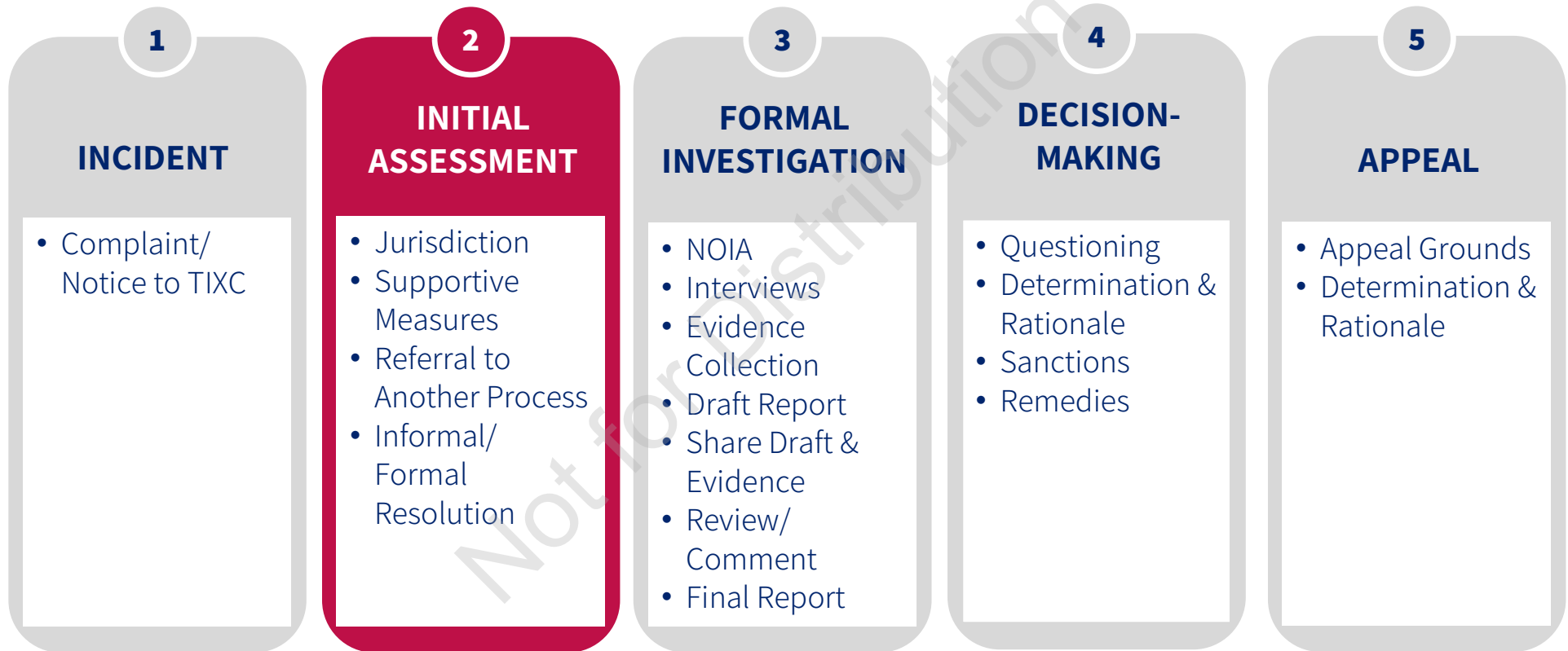
Complainant's Wishes

No Formal Action

Initial Assessment

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Initial Assessment



Initial Assessment

- TIXC is responsible for conducting an initial assessment to determine Title IX jurisdiction:
 - Does the alleged conduct, if proven, meet one of the policy definitions of sex/gender discrimination?
 - Who is the Complainant?
 - Who is the Respondent?
 - Does the institution have control over the context of the alleged behavior?



Initial Assessment

- **Yes, or Arguable:** move forward with the grievance process
- **No:** determine whether an alternate policy or process applies
 - Document the rationale
 - Refer to other process



SD Initial Assessment Challenges

- First Amendment protection implications
 - Free speech and expression
 - Academic freedom for faculty
- Disparate Impact or Disparate Treatment complaints
- Specificity of allegations
 - Need to determine scope and applicable policies
- Title IX Sexual Harassment (SPOO)

Outreach and Intake

- After receiving a report, TIXC (or designee), should always reach out to the Complainant
- **Outreach** includes:
 - Introduction to Title IX and staff
 - Reason for the outreach
 - Offer to meet/speak over the phone; include right to Advisor (if applicable)
 - Available resources and resolution options
 - Discuss supportive measures and resources
 - Follow up in writing with resources and information

Outreach and Intake

- **Intake** includes:
 - Setting the table
 - Having written materials to reference and for parties to take with them
 - Follow up with an email containing these materials, too
 - Include access to medical care, including evidence preservation
 - Exploring facts, but not interviewing
 - Discussing supportive measures
 - Discussing Complainant's options
 - Answering questions
 - **DO NOT** answer the question “What should I do?”

After Outreach and Intake

- Consider if new information affects jurisdictional assessment
- Implement any requested supportive measures and/or remedies

If complaint is filed:

- Determine whether to refer to another process or proceed with formal investigation
- Evaluate whether complaint is appropriate for potential **Informal Resolution**

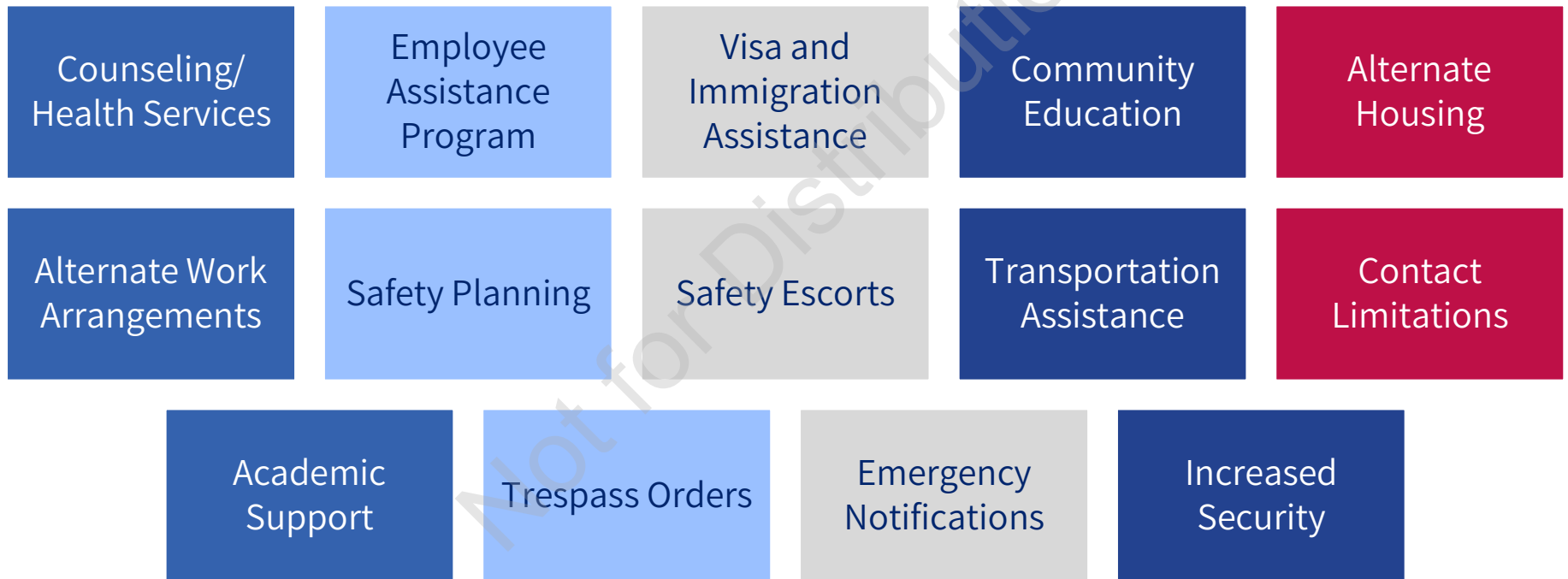
If no complaint is filed:

- Evaluate whether TIXC needs to sign a complaint
- Assess other options to stop, prevent, and remedy
 - Focused on remedies

Supportive Measures

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

Supportive Measures



Activity: Supportive Measures

Activity: Supportive Measures

- A graduate student has on-campus employment in a research lab
- The research necessitates having a researcher in the lab around the clock
- The professor responsible for managing the lab only assigns male students to monitor the lab after 9:00 p.m.
- When a male student asked the professor about it, the professor said, “I have daughters and would not want them walking through a parking lot by themselves late at night”
- The male student reported the professor for sex discrimination and now receives half as many shifts

What supportive measures should be considered?

Activity: Supportive Measures

- A pregnant student alleges that their chemistry professor will not discuss any accommodations or modifications to her chemistry lab course, insisting she complete the course as designed
- The student is concerned about exposure to chemicals in the lab and the date of their final exam, which is right around her due date

What supportive measures should be considered?

Activity: Supportive Measures

- A transgender student is repeatedly misgendered by their major's sole academic advisor
- The academic advisor insists they do not mean to offend their student, but their religious beliefs prevent them from recognizing preferred pronouns

What supportive measures should be considered?

Informal Resolution

- **Voluntary** Informal Resolution (IR) may be made available at the discretion of the TIXC at any time prior to a final determination
 - Likelihood of resolution
 - Power dynamics
 - Goals and motivation of the parties to participate
 - Complexity and timing of the complaint
- Not recommended for most employee-on-student behavior
 - Recall: Not permitted for sexual harassment complaints under regulations
- Institutions may choose available resolution mechanisms
- IR Facilitators must receive training and be free of bias or conflicts of interest
 - ATIXA recommends IR Facilitators not serve in any other roles within the same complaint resolution

Informal Resolution

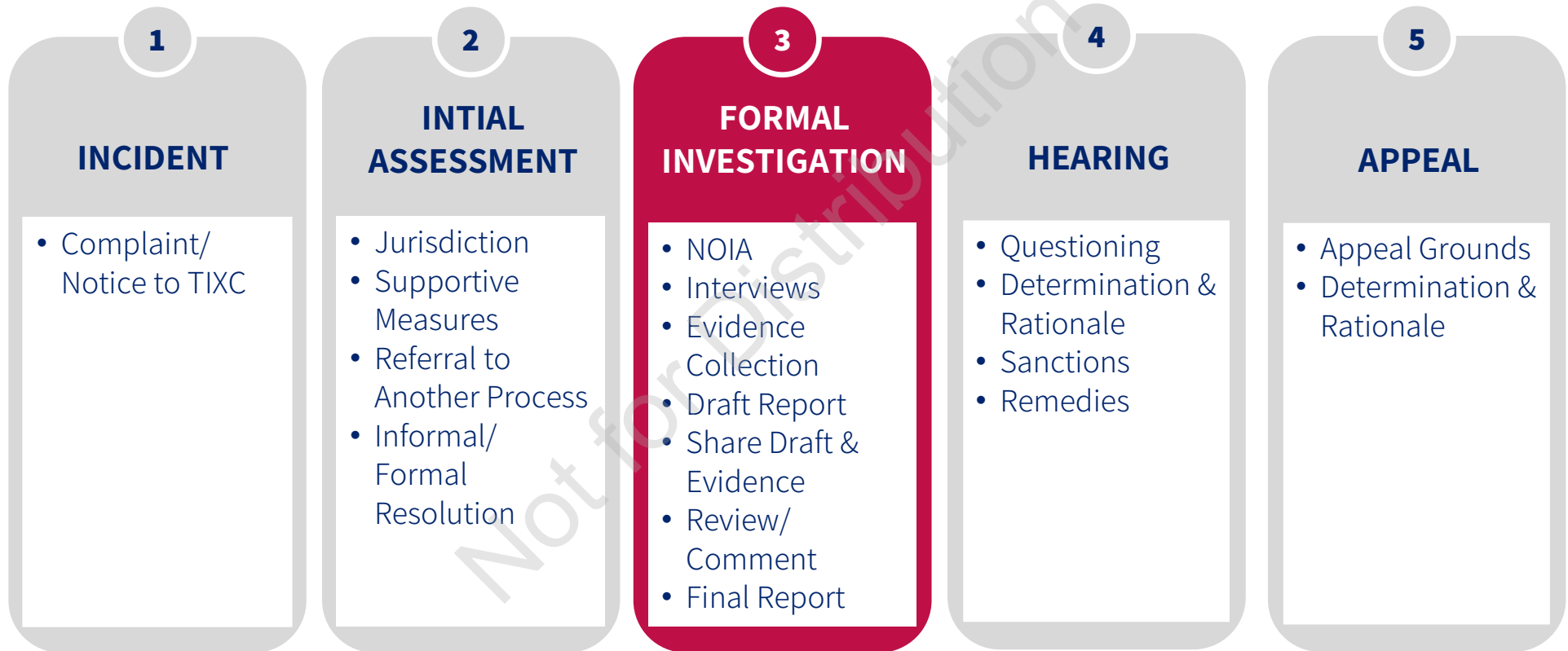
- Procedural Recommendations:
 - Complaint documentation
 - Written notice of the allegations, IR procedures, records created, and potential consequences
 - Parties' voluntary, written consent
 - Must still stop, prevent, remedy
- May withdraw from IR to start or resume Grievance Process at any time



Investigation

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Investigation



Determining a Basis for Investigation

There are three bases for investigations:

- **Incident:** a specific incident or period
 - May involve one or multiple alleged violations
- **Pattern:** repetitive or similar behaviors or targets chosen by the same Respondent over a period
 - Tend to involve multiple Complainants
- **Climate/Culture:** discriminatory policies, processes, and environments
 - May have no identifiable Respondent
 - May be useful tool for DT/DI complaints
 - May lead to named respondents or individual/pattern investigations

Investigation Scope

- TIXC determines the scope of the investigation
- **Scope** refers to the investigation allegations, timeframes, and parties
- Considerations:
 - Allegations outside of jurisdiction
 - Individual vs. Group
 - Multiple Complainants or Respondents
 - Counter-complaints
 - Complaint consolidation
 - Retaliation
- May need to adjust scope during process

Who Should Investigate?

- ATIXA recommends Investigator(s) not be Decision-maker(s) in the same process
 - More flexibility to assign roles in SD complaints
- Tasks:
 - Conduct prompt, thorough, and impartial investigations
 - Collect the maximum amount of relevant information available
 - Write comprehensive investigation report summarizing all relevant evidence

Bias and Conflicts of Interest

- Conflict of Interest
- Bias
- Investigators must not have a conflict of interest or bias for or against the following:
 - Complainants
 - Respondents
 - Specific individuals involved with a complaint
 - Subject matter or details of the complaint itself
- Remember, Investigators have no “side”

Investigation and Decision-Making Models

Four Corners Approach: Every Title IX team member serves a distinct role with no overlap in the same complaint

Pros:

- Avoids perceptions of bias
- Does not bog TIXC down with fulfilling other roles so they can provide process oversight
- Title IX team members may develop expertise in certain roles or types of complaints

Cons:

- Need personnel and budget for training
- Coordinating team member schedules
- Each new Title IX team member needs to review complaint material to get up to speed, less familiarity with specific complaints

Investigation and Decision-Making Models

TIXC Serves as Investigator: Separate Decision-maker(s) chosen from TIX team

Pros:

- Middle ground to reduce perceptions of bias
- Helpful structure for resource-strapped institutions

Cons:

- Decision-maker(s) must commit to thoroughly understanding the facts to render a fair and accurate decision
- TIXC must juggle dual roles
- TIXC cannot consult with Decision-maker(s)
- TIXC becomes witness in Decision-making phase

Investigation and Decision-Making Models

Single Investigator Model: Investigator also serves as the Decision-maker

Pros:

- Investigator is the individual most familiar with the facts of the complaint
- Has established rapport with parties and witnesses
- Can reduce time and staffing needs

Cons:

- Perception of bias
- Only one perspective/viewpoint on the complaint
- May miss critical information

Investigation and Decision-Making Models

ATIXA recommends:

- Investigators make non-binding recommended findings and recommended final determinations
- Separate Decision-maker makes findings, policy violation determination, and sanctions/remedies
- Robust appeal opportunity



Investigation Oversight

10 Steps of Investigations:

1. Receive Notice/Complaint
2. Initial Assessment
3. Establish 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 & Evidence
9. Parties Review Draft Report & Evidence
10. Final Investigation Report

INCIDENT INVESTIGATION
SUMMARY

Incident Date:
Review Date:

by:
Summary:

Root Causes:

Notice of Investigation and Allegations

- The next step is the Notice of Investigation and Allegations (NOIA) letter
 - Sent to all parties, simultaneously
 - Sexual harassment regulatory requirements represent best practices
- The NOIA includes:
 - Notice of the allegations and known details, such as identities of the parties
 - A description of the alleged conduct and relevant policy provisions
 - The date and location of the alleged conduct
 - Information about grievance procedures
 - Any Informal Resolution options

Notice of Investigation and Allegations

The NOIA must outline the parties' right to:

- Present witnesses, including expert witnesses
- Present inculpatory and exculpatory evidence
- Freely discuss the allegations
- Be accompanied by an Advisor of their choice
- 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
- Review all relevant and directly related evidence before the investigation report is finalized

Notice of Investigation and Allegations

The NOIA should also include:

- Presumption Respondent is not responsible
- Statement prohibiting retaliation
- 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 during the course of the investigation
- Include or reference current policy and procedures

What if the institution or a department is the Respondent?

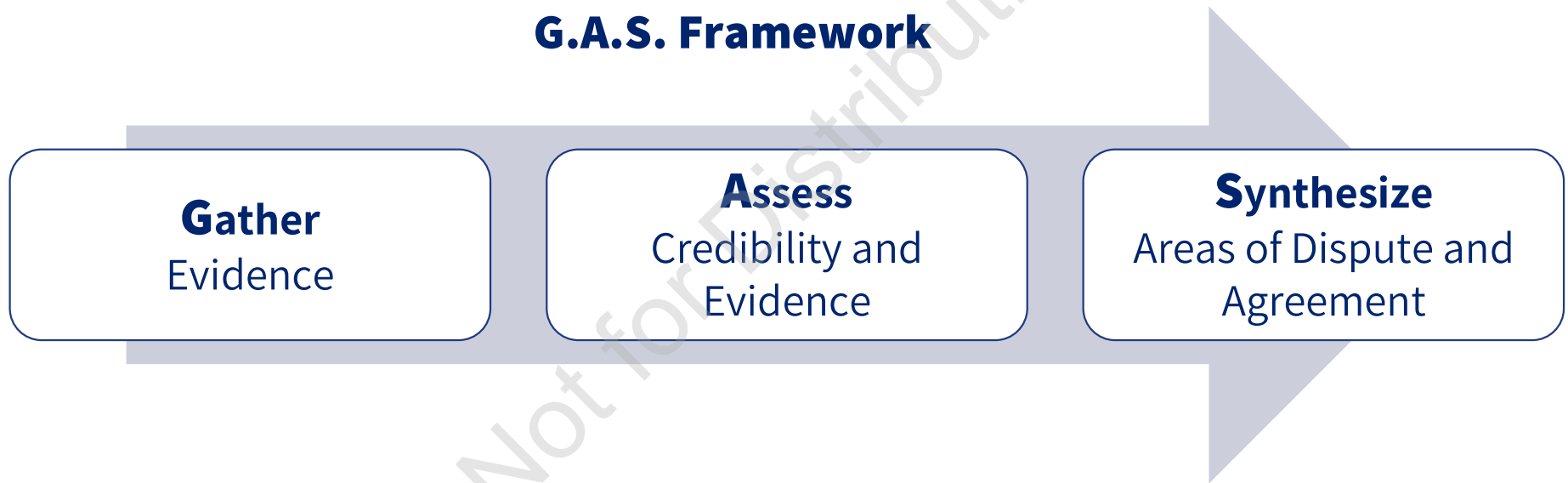
Investigation Strategy

TIXC consults with Investigator(s) to strategize and plan the investigation:

- Challenges with the type of complaint and the parties involved
 - Respondent identity
 - Disparate impact or treatment
 - Similarly situated comparator
 - Substantial legitimate justification lens
 - Legitimate non-discriminatory justification/pretext
- Preliminary undisputed and disputed facts and their significance
- Initial witnesses and interview order
- Other types of evidence and the plan to acquire such evidence
- A working timeline for the investigation

Formal Investigation

G.A.S. Framework



The burden to gather evidence is on the institution, not the parties.

Understanding Evidence

- Duty to collect **relevant** 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
 - Inculpatory and exculpatory evidence
 - Some evidence may only be relevant to assessing credibility
- Collect **all** relevant and reasonably available evidence



Types of Evidence

Documentary Evidence	Supportive writings or documents
Electronic Evidence	Photos, text messages, and videos
Real Evidence	Physical objects
Direct or Testimonial Evidence	Personal observation or experience
Circumstantial Evidence	Factual inferences
Hearsay Evidence	Statement from outside the interview presented as truthful
Character Evidence	Evidence of a person's character or character traits

Credibility

- **Credibility:** largely a function of corroboration and consistency
- **Credibility Assessment** involves evaluating the extent to which evidence is believable and reliable (accurate or truthful)
 - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Note:** memory errors alone do not necessarily diminish witness credibility, nor does some evasion



Evidence Activity

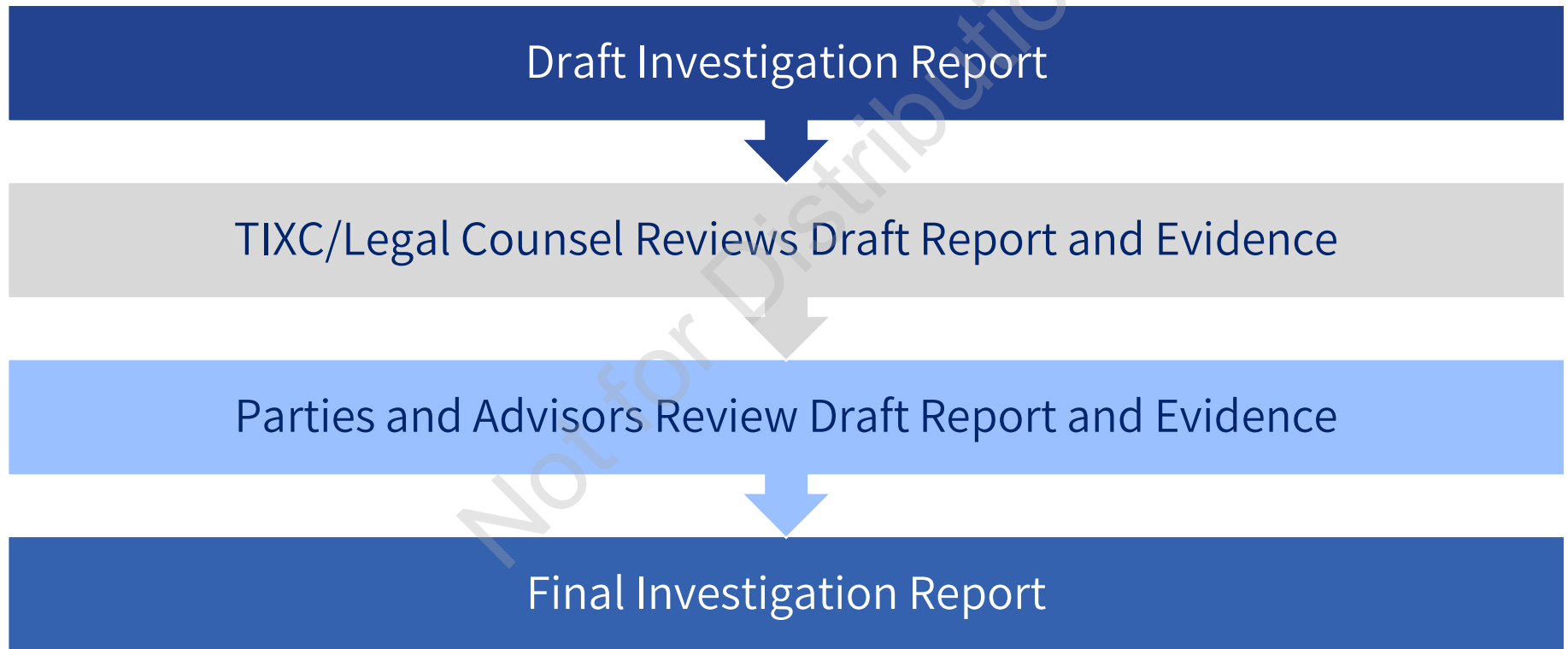
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Evidence Activity

- Deidre, a queer student, alleged that her faculty member has exhibited discriminatory and queerphobic conduct against her
- According to Deidre, her faculty member frequently cuts off Deidre during class but does not do so for other students in the seminar, all of whom Deidre knows, and none of whom identify as queer
- The faculty member also delays responding to Deidre's emails, although other students report prompt responses
- Deidre approached the faculty member during office hours to express her concerns about the faculty member's behavior
- Later, despite strong peer reviews, Deidre received a poor grade on her capstone project
- Deidre believes the grade is retaliation for speaking up

What kinds of evidence may be available in this situation?

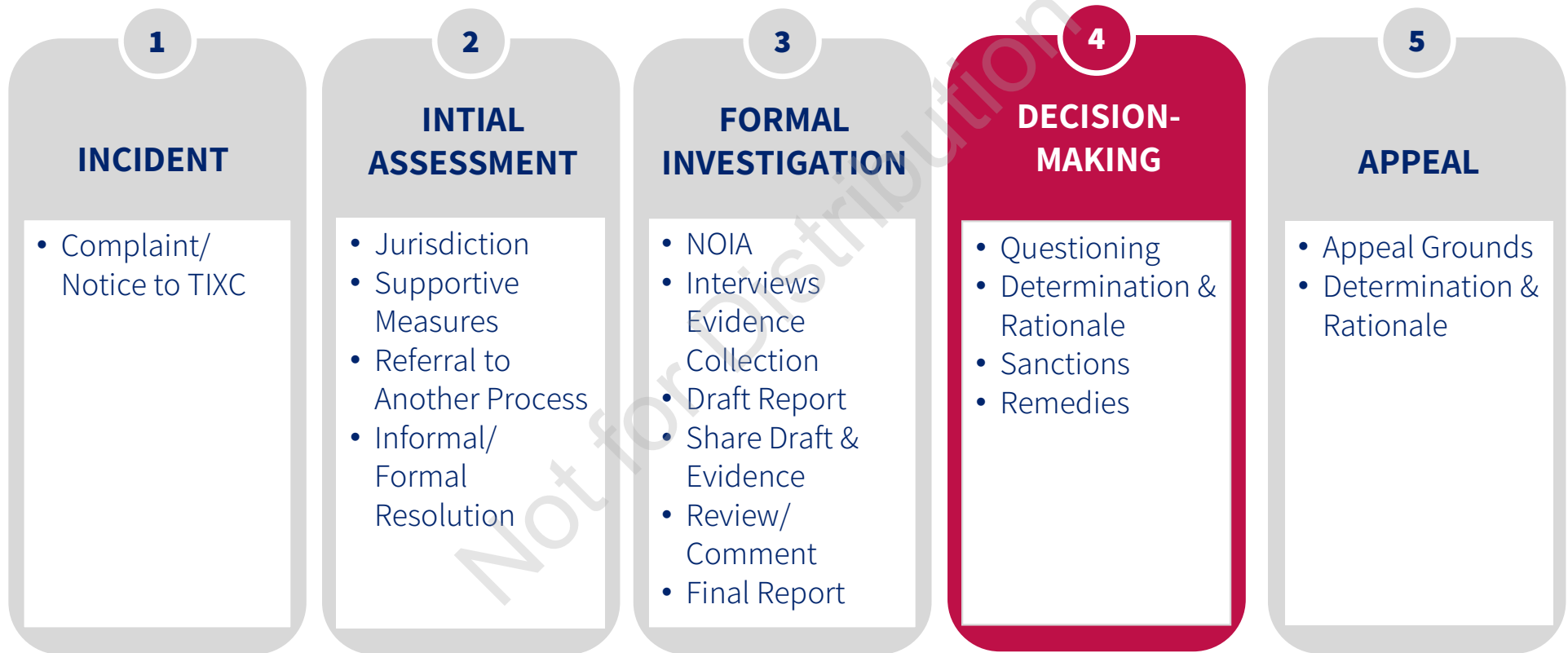
Drafting, Reviewing, and Finalizing the Investigation Report



Decision-Making

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Decision-Making



Decision-Making Process Options

- No prescribed decision-making process for sex discrimination claims
- ATIXA Model Policies outline streamlined, informal “hearing”
 - Decision-maker reviews evidence, can ask questions of parties, and make findings and a final determination
- No live hearing requirement, but a hearing could be required based on:
 - State or local requirements
 - Terms of a collective bargaining agreement

Decision-Making

Roles may be separate or combined.

Title IX Coordinator

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

Decision-Maker(s)

- Conducts Pre-Hearing Meetings (if any)
- Facilitates hearing process, including questioning (if any)
- Determines relevance
- Assesses credibility
- Makes a finding of fact
- Determines whether policy was violated
- Assigns sanctions (if applicable)
- Writes determination rationale

Live Hearings

If offering a live hearing for sex discrimination complaints:

- Ensure basic fairness, due process, and neutral Decision-maker(s)
- Impose reasonable decorum rules
- The parties' Advisors and/or Decision-maker(s) should ask the questions
 - If the party does not have an Advisor, the institution can provide an Advisor
 - Decision-maker should make relevance determinations
- Hearing can be in one location or virtually through technology
- Recommend recording the hearing

Decision-Making

Making a Finding

- Decision-makers determine what occurred based on the standard of evidence

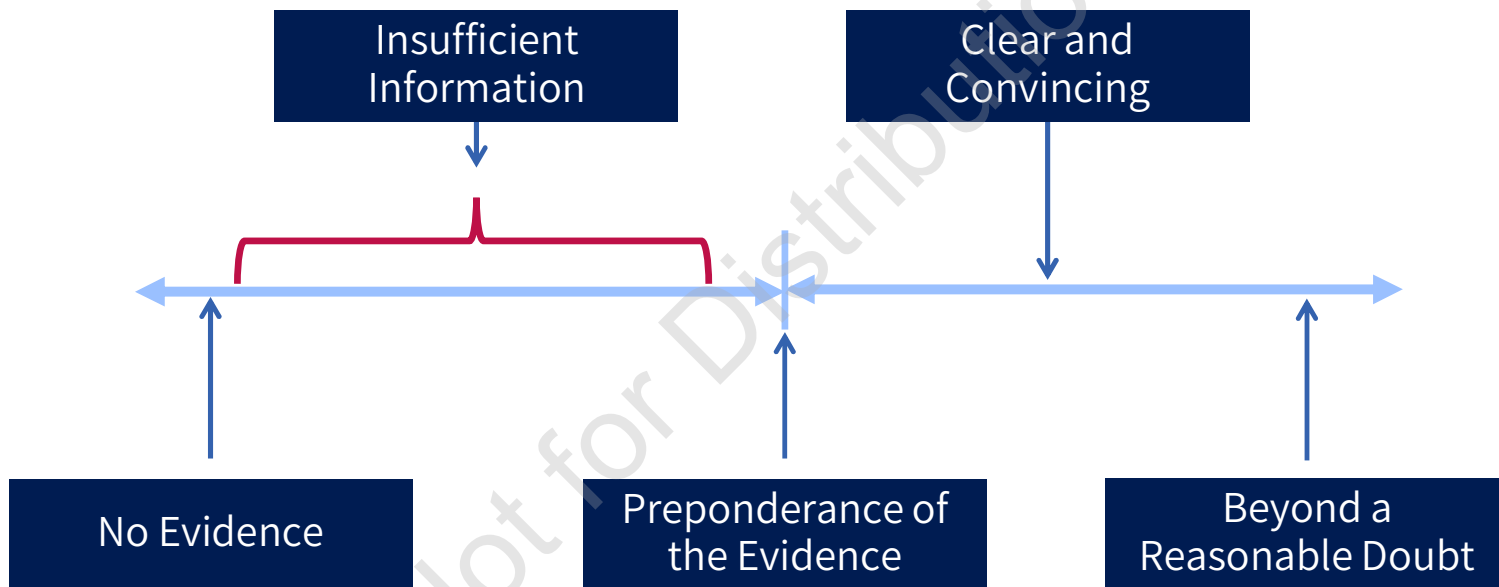
Making a Determination

- Decision-makers determine whether what occurred is a policy violation based on the standard of evidence
- Each allegation is considered individually for each Respondent

Standard of Evidence

- Preponderance of the evidence or clear and convincing evidence
- Standard of evidence should be consistent for all SD complaints

Standard of Evidence



Preponderance of the Evidence is the current industry standard

Sanctions and Remedies

Sanctions

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

Remedies

- May be implemented before or after a determination
- TIXC determines remedies that are equitable and not clearly unreasonable given the circumstances
- Goal: preserve or restore access to education program and activity
- TIXC ensures remedies are implemented
- Remedies may take time or significant resources to implement

Remedy Recommendations



Remedies should seek to restore affected individuals to their pre-deprivation status



Recover any lost work, education time, economic, or access impacts



Restore opportunities, if applicable



Repair damage from misconduct

Sanctioning Pitfalls

- Conflating the finding, the determination, and the sanctioning
- Failure to stop, prevent, and remedy
 - Unwillingness to expel, suspend, or terminate
 - Failing to consider prior misconduct or precedent
 - Prescribed sanctioning
 - Inconsistent or disparate sanctions for similar behavior
- Impact or mitigation statements influencing findings
- Failure to consider aggravating or mitigating circumstances

Written Determinations

Written Determination

- Authored by Decision-maker(s)
- TIXC/Legal counsel reviews
- TIXC communicates to the parties simultaneously in writing

Finality

- On the date the institution provides a written appeal determination
 - OR the date when an appeal would no longer be timely

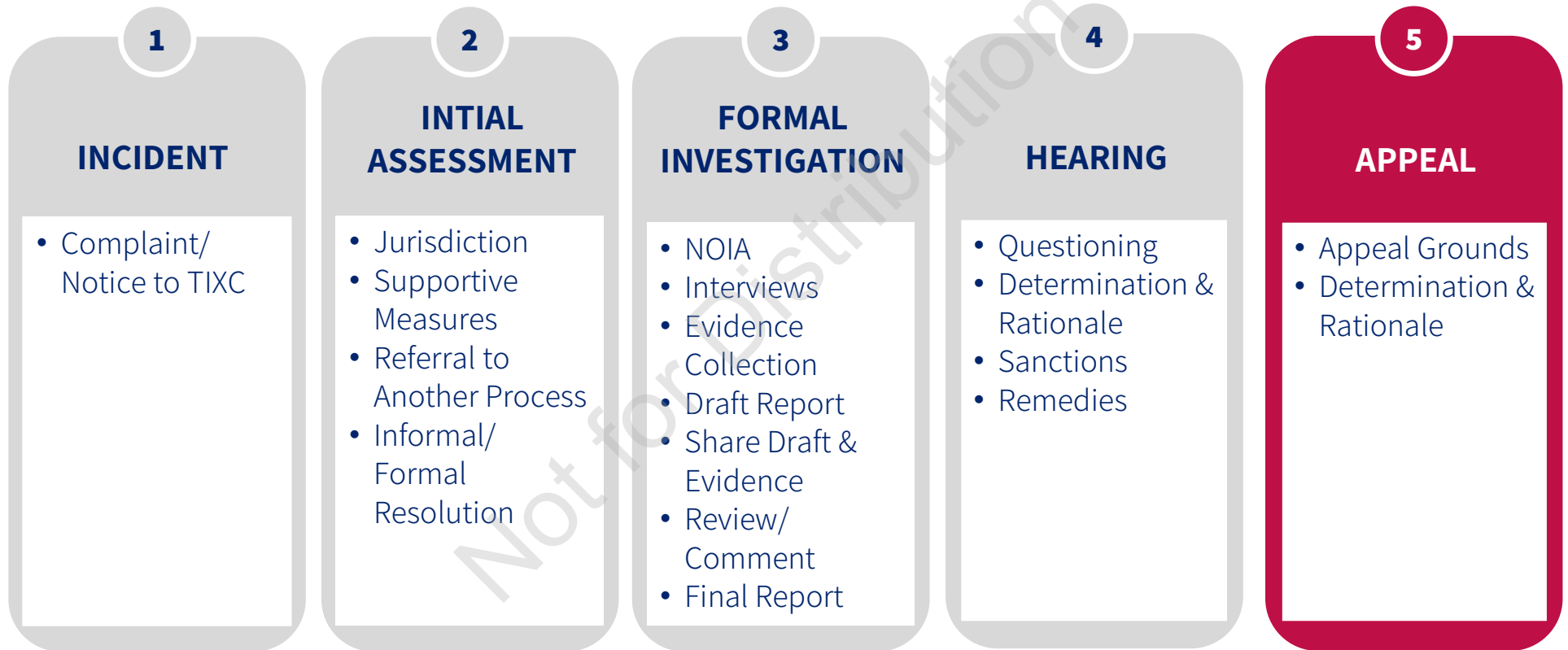
Written Determination Elements

- 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

Appeals

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Appeals



Appeals

ATIXA recommends 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 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

Appeals

Appeal Decision-maker

- Should 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
 - **Modifying** the original determination and/or sanctions (if any)
 - **Overturing** the determination (not recommended)
- Cannot be TIXC or serve another role in the same complaint resolution

Activity: Appeals

Notice Distribution

Activity: Appeals

In the following scenarios, what may be an appropriate action for the Appeal Decision-maker to take?

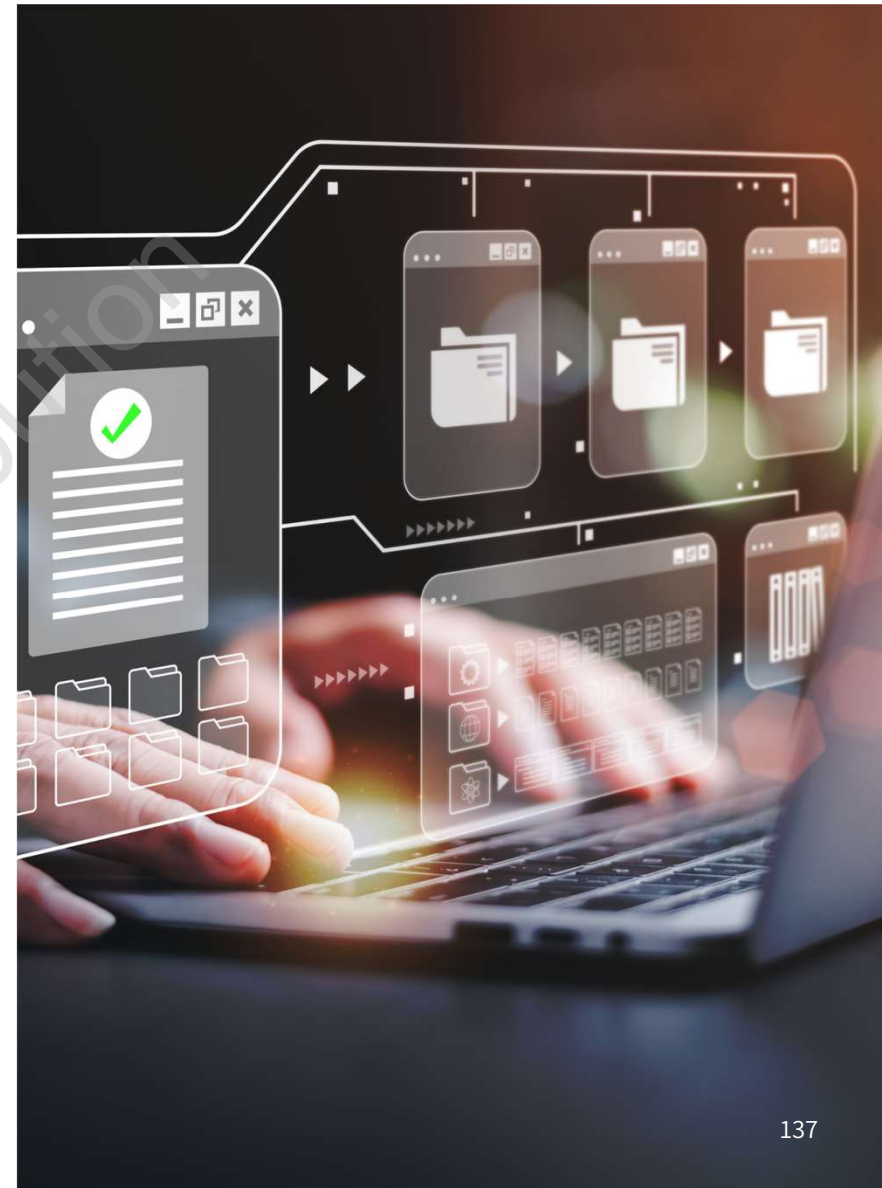
- A. Respondent argues the Investigator had a conflict of interest because the Investigator had previously investigated a Title IX matter in which the Respondent was a witness
- B. Complainant says new evidence obtained from faculty returning from sabbatical abroad demonstrates that departmental chair had history of sexist comments
- C. Complainant argues the Decision-maker was biased because the Decision-maker belongs to the same social club as the Respondent
- D. Respondent argues the Investigator did not promptly complete the investigation, did not interview all of Respondent's suggested witnesses, and failed to respond to Respondent's feedback on the draft report

Recordkeeping

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Recordkeeping

- Recipient should maintain records for a minimum of **seven** years:
 - SD complaints, including determination and sanctions and/or remedies
 - Appeals and results
 - Rationales for all determinations
 - Informal Resolution
 - Supportive Measures
 - Measures taken to preserve/restore access
 - All training materials
 - All support provided to pregnant and parenting students.



Monitoring and Gender Equity Audits

Gender Equity Audits

- Audits are intermittent assessments to measure program equity
- Factors such as cost and personnel capacity impact regularity



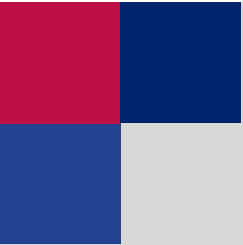
Activity: Gender Equity Audits

Activity: Gender Equity Audits

- A faculty member reports to the Title IX office that he believes his department is biased against men in its hiring, evaluation, and promotion practices – which in turn impacts compensation
- As evidence, he cites:
 - Recent hiring decisions to hire female faculty members despite the recruiting pool being overwhelmingly male
 - Recent performance concerns mentioned by the department chair, who is female, toward a handful of male faculty members
 - A recent decision by the department chair to pass him over for tenure in favor of a faculty member with fewer years of experience and fewer publications in the field

How might the TIXC structure an audit in response to this concern?

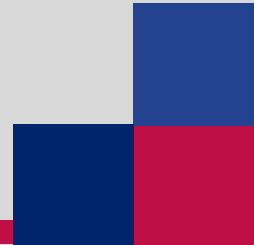
What other actions might the TIXC take?



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Questions?

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