



Association of
Title IX Administrators

TITLE IX OVERVIEW:

Decision-making for Sexual Harassment, Sex Discrimination, and Retaliation Cases



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

Content Advisory

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

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

Introduction



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



Practitioners will be provided an overview of the resolution process for sexual harassment complaints and an in-depth exploration of Title IX Decision-making.



Our goal is to provide you with an overview of each phase of an investigation and an in-depth exploration of Title IX Decision-making.

Applicability and Scope

Applicability

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



Scope

Title IX

Sexual Harassment

Quid Pro Quo

Hostile Environment

Sexual Assault

Dating Violence

Domestic Violence

Stalking

Retaliation

Investigation Scope

- Title IX Coordinator determines the scope of the investigation
- If scope needs to be adjusted during the process, Investigator should consult with Title IX Coordinator



Essential Compliance Elements

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

1

STOP discriminatory conduct

2

PREVENT recurrence, on both individual and institutional levels

3

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

Roles in the Title IX Process

Parties and Advisors

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



Title IX Team Members

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

Title IX Team Members

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



Neutrality, Conflicts of Interest, and Bias

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



What's the Difference?

Conflict of Interest

- Refers to situations in which:
 - An **actual** (or perceived) clash,
 - Between the DM's role and
 - A current or previous relationship/situation with one of the Parties
 - Prevents neutrality or objectivity
 - Ex: A Residence Director deciding a complaint filed by a current Resident Assistant on their building staff

Bias

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

Definitions

Definitions: Sexual Harassment

▪ **Quid Pro Quo Sexual Harassment**

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

▪ **Hostile Environment Sexual Harassment**

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

(“sexual exploitation” or “complicity” that meets this definition may constitute sexual harassment under Title IX)

Definitions: Sexual Assault - Rape

- Forcible or nonforcible sex offense

Rape:

- The carnal knowledge of a person (sexual intercourse/slight penetration),
- without the consent of the victim,
- including instances where the victim is incapable of giving consent because of their:
 - age; or
 - temporary or permanent mental or physical incapacity.

Definitions: Sexual Assault - Fondling

Fondling:

- The touching of the private body parts,
- of another person,
- for the purpose of sexual gratification,
- without the consent of the victim,
- including instances where the victim is incapable of giving consent because of their:
 - Age or temporary or permanent mental or physical incapacity

Consent Construct: Three Questions

1. Did the Respondent use **force** used to obtain sexual or intimate access?
2. Was the Complainant **incapacitated**?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated
3. What **clear words or actions** by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

Definitions: Dating Violence

- Violence committed by a person,
- who is or has been in a social relationship of a romantic or intimate nature with the victim.

The existence of such a relationship shall be determined based on consideration of the following:

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

Definitions: Domestic Violence

- felony or misdemeanor crimes of violence,
- committed by:
 - a current or former spouse of the victim
 - an intimate partner of the victim,
 - a person with whom the victim shares a child in common,
 - a person who is cohabitating with the victim as a spouse or intimate partner,
 - a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction, or
 - any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

Definitions: Stalking (on the basis of sex)

- Engaging in a course of conduct,
- directed at a specific person,
- that would cause a reasonable person to:
 - fear for his or her safety or the safety of others, or
 - suffer substantial emotional distress.

(“Cyberstalking” may constitute Stalking as defined in this Policy.)

- **Course of conduct:** two or more acts, including, but not limited to acts in which the Respondent directly, indirectly, or through third Parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person’s property
- **Reasonable person:** reasonable person under similar circumstances/identities to the Complainant
- **Substantial emotional distress:** significant mental suffering or anguish

Mandatory Reporting

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

Intake Process

Intake Meeting

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

Emergency Removals

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



Dismissals

MANDATORY

A formal sexual harassment complaint, or any allegations therein, **must** be dismissed if the alleged conduct, if proven:

1. would not constitute sexual harassment;
2. did not occur within the educational program or activity; or
3. did not occur against a person in the United States.

DISCRETIONARY

A formal sexual harassment complaint, or any allegations therein, **may** be dismissed, at the discretion of the Title IX Coordinator, if :

1. Complainant withdraws their complaint or allegations therein;
2. The Respondent is no longer enrolled in or employed by the recipient; or
3. Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Due Process

Parties' Rights in the Grievance Process

- Receive detailed, written Notice of Investigation and Allegations (NOIA)
 - Include information about the Formal Grievance Process
 - Provide sufficient time to prepare for any initial interview
- Be accompanied by Advisor of their choice
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Present witnesses, including expert witnesses
- Present inculpatory and exculpatory evidence
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare

Parties' Rights in the Grievance Process, Cont.

- Inspect and review directly related evidence and investigation report
- Opportunity to propose questions for other Parties and witnesses
 - To Investigator(s) during the investigation
 - Through Advisor during a live hearing
- Opportunity to appeal the determination
- Reasonable expectation of privacy
- Respondent presumed not responsible until a determination is made
- Written outcome notification

Due Process in Procedure

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

Due Process in Decision-Making & Sanctioning

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

Who Should Investigate?

- Investigator(s) may not be Decision-maker(s) for the same complaint
- Tasks:
 - Conduct prompt, thorough, and impartial investigations
 - Collect the maximum amount of relevant information available
 - Write comprehensive investigation report summarizing all relevant evidence

**Full-Time
Investigator(s)**

**Investigator
Pool**

**External
Investigator**

**Coordinator as
Investigator**

Advisor Role

Advisors

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

Party-Selected Advisor

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

Institution-Appointed Advisor

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

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

Role of the Advisor

Advisor support may take various forms:

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

Advisor Expectations

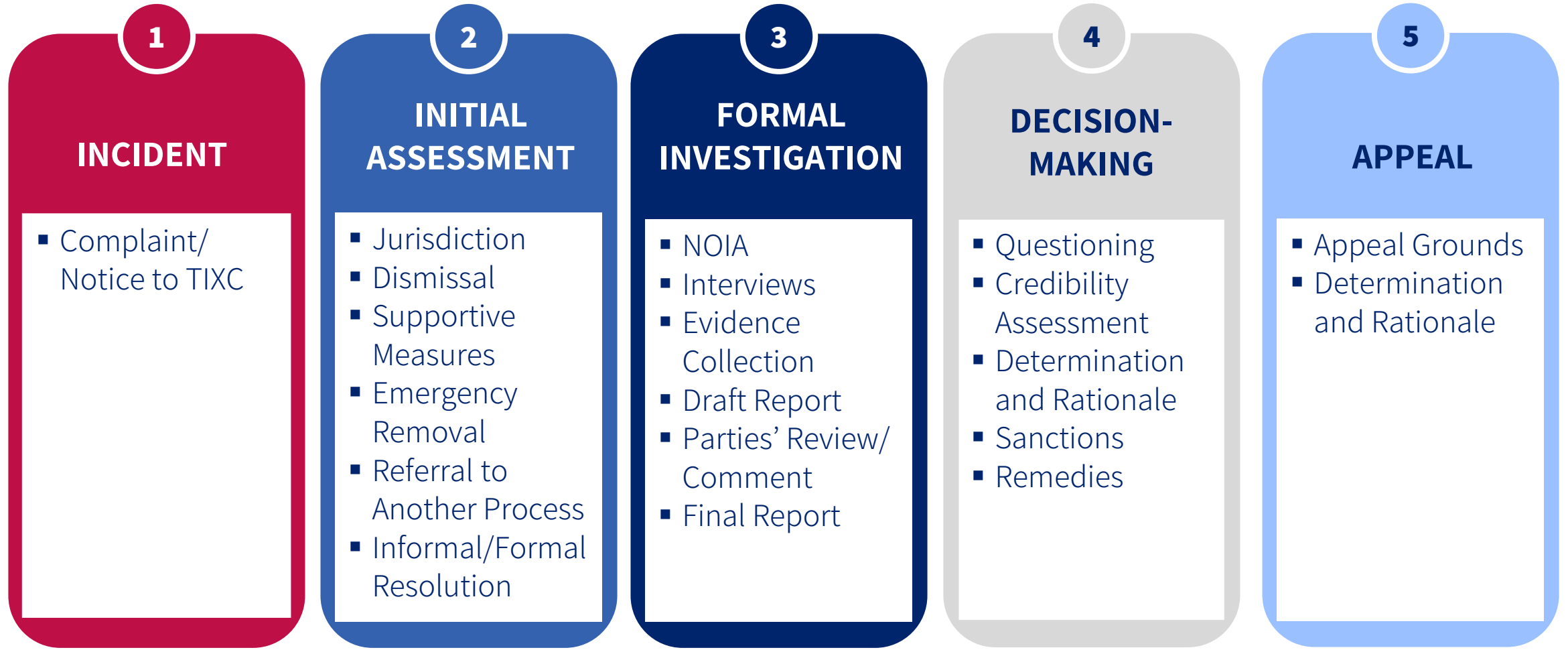
Advisors should not:

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



Formal Grievance Process

Formal Grievance Process Overview



Formal Grievance Process Overview

Prompt Resolution

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

Fair Resolution

- Treat all Parties fairly
- Ensure that all Parties have opportunity to fully participate in the grievance process
- Operate without bias and/or conflicts of interest

Investigation Oversight and Supervision

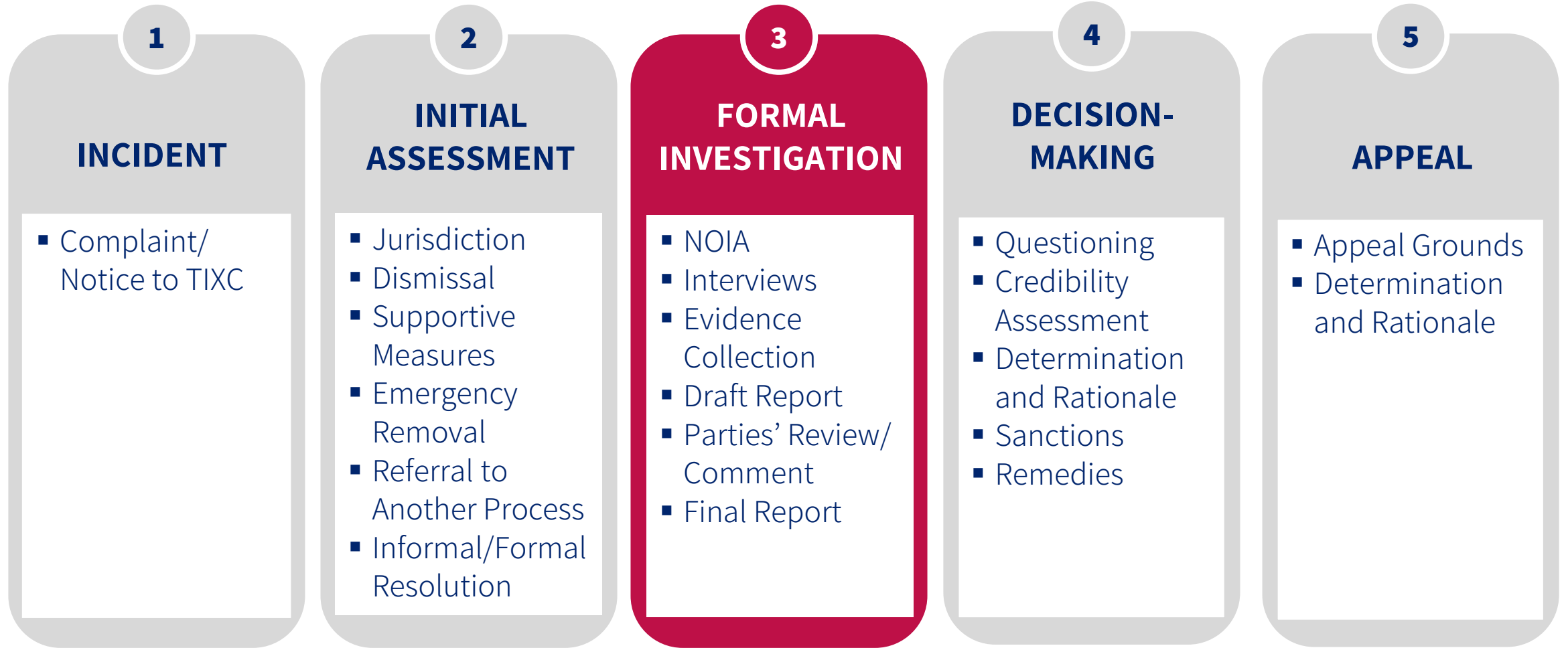
Title IX Coordinator (TIXC) responsibilities:

- Appoint Investigators and ensure training
- Consult and strategize with Investigators
- Ensure timeline compliance
- Oversee recordkeeping
- Serve as Parties' primary point of contact



Notice of Investigation and Allegations

Investigation



Notice of Investigation and Allegations

- A letter sent to all Parties, simultaneously, in writing, prior to the investigation
- **The NOIA includes:**
 - Allegations and known details, such as Party identities
 - Description/date/location of the alleged conduct
 - Relevant policy/procedures/Party rights
 - Presumption Respondent is not responsible
 - Retaliation is not permitted
 - Informal Resolution options

Updating the NOIA

- NOIA may need to be updated for any of the following reasons:
 - Original NOIA was deficient
 - TIXC receives additional allegations
 - Allegations are withdrawn
 - Policy provision no longer applies, based on details of incident
 - Counter-complaint is initiated

Investigation Strategy

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

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

Counter-Complaints

- Respondents may file a **counter-complaint** against the Complainant if there is Complainant misconduct but NOT for retaliatory purposes
- Reporting other alleged misconduct (e.g., drug dealing, academic misconduct) is not considered a counter-complaint
- Counter-complaints may arise prior to, during, or after the investigation of the original complaint
- If a Parties mentions (even casually) discrimination or harassment that could serve as a basis for a counter-complaint, but it is unclear if they wish to make a complaint, Investigator should clarify or have the TIXC contact them to clarify

Formal Investigation

Formal Comprehensive Investigation



THOROUGH



RELIABLE



IMPARTIAL



PROMPT



FAIR

Evidence Collection

- Active process to gather evidence
- Identify potential sources of information
- Seek to verify/authenticate evidence obtained
- Document efforts to gather, even when not successful



Investigation Report

Draft Investigation Report Sections

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

- Introduction/Complaint Information
- Allegations Overview
- Jurisdiction
- Investigation Scope
- Applicable Policies and Relevant Definitions
- Standard of Evidence
- Evidence List
- Investigation Timeline
- Relevant Background
- Incident Timeline
- Relevant Evidence Summary
- Credibility Assessment
- Discussion and Synthesis
- Recommended Findings and Final Determination
- Conclusion
- Appendices
- Directly Related Evidence File

Parties and Advisors Review Draft Investigation Report

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

Parties may:

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

Final Investigation Report

After the 10-day review, the Investigator must:

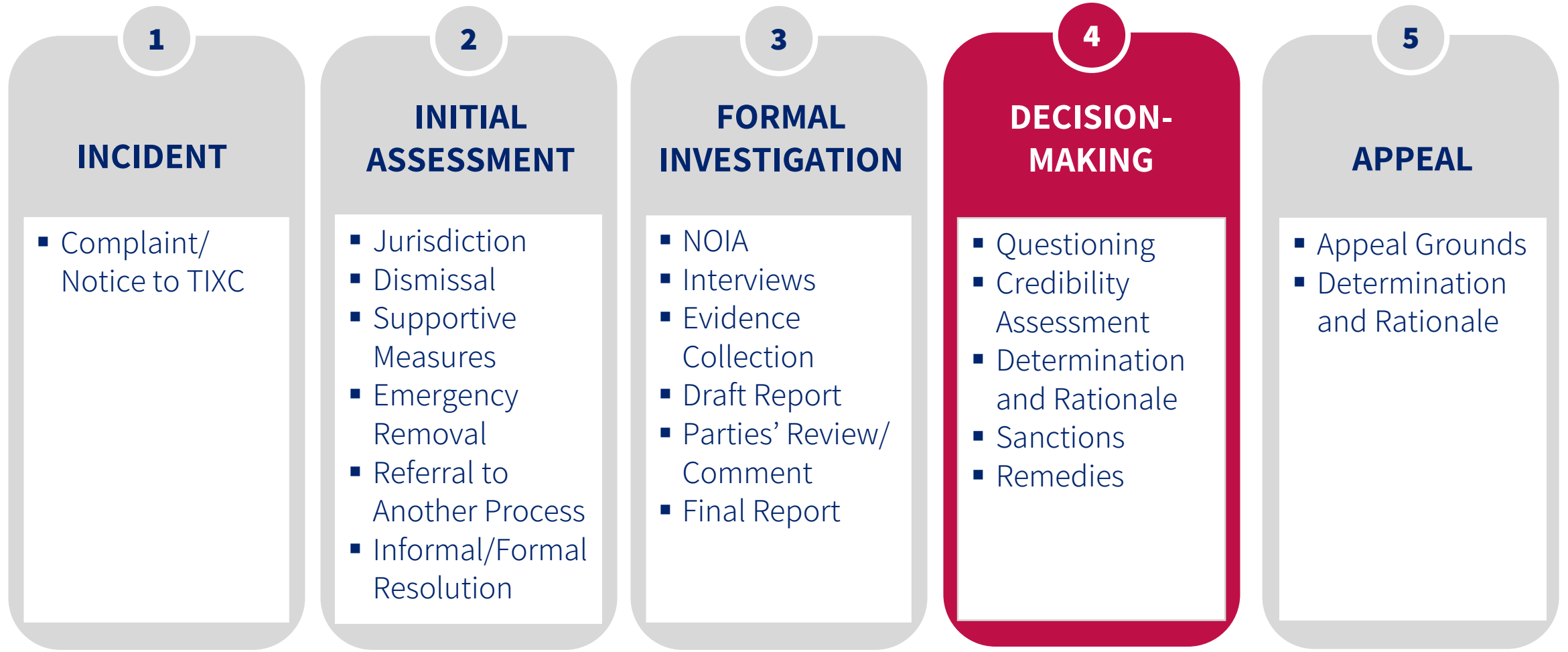
- Consider Parties' feedback
- Incorporate where appropriate
- Document rationale for not making recommended changes as appropriate

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

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

Post-Investigation: Decision-Making and Hearings

Decision-Making



Decision-Maker Role and Responsibilities

Rank your top three responsibilities as a Decision-maker

Finding the
truth

Providing a
just result

Providing an
educational process

Making a safe
community

Upholding the
institution's policy

Ensuring a fair
process

Protecting the
institution from
liability

Punishing
wrongdoing

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

Primary Questions for Decision-Makers

1

Is this information
relevant?

2

Is this information
reliable?

3

Will we rely upon it
as evidence
supporting a
rationale?

Decision-Making Oversight

Title IX Coordinator

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

Decision-Maker(s)

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

Decision-Making

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

Initial Materials Review

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

Materials Review

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

Notice of Investigation and Allegations

- The Notice of Investigation and Allegations (NOIA) is critical to fundamental fairness and due process
- It provides a roadmap for the Decision-maker(s)
- You cannot find a Respondent in violation for allegations not included in the NOIA

Policy Elements and Procedures

Policy

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

Procedures

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

Live Hearings

- All sexual harassment complaints must be resolved through a live hearing unless an Informal Resolution is reached
- Investigator may be asked to participate as a witness in the live hearing and be questioned by the DM(s) and/or Parties through their Advisors
- DM manages the hearing and questioning to limit to relevant evidence
- Hearing can be held in a physical location or virtually
- Must record hearing or create transcript

Standard of Evidence

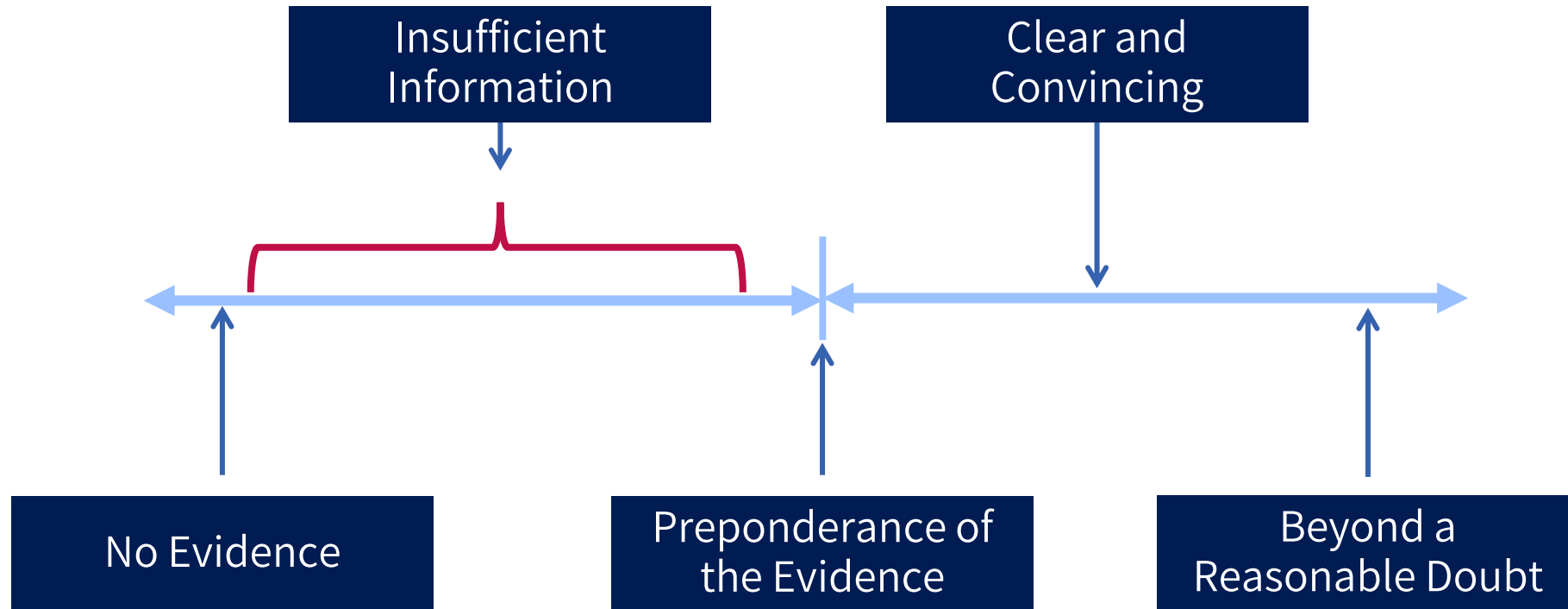
Preponderance of the evidence:

“More likely than not”

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

Same standard for complaints against students and employees, including faculty

Standard of Evidence



Preponderance of the Evidence is the current industry standard

Credibility Determinations

Credibility

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



Credibility Assessment

Consider the following elements to establish credibility:

- **Corroborating Evidence:** evidence that can be verified by an independent and objective individual
- **Inherent Plausibility:** information that is believable on its face/by context
- **Consistency of evidence/testimony**
- **Motive to Falsify**

*Less probative

Party and Witness Credibility

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



Credibility Considerations

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

Credibility Factors

Corroboration

- Aligned testimony and/or physical evidence

Inherent Plausibility

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

Motive to Falsify

- Do they have a reason to lie?

Past Record

- Is there a history of similar behavior?

Demeanor

- Do they seem to be lying or telling the truth?



Writing Determinations

Written Determinations

Finding

Whether the conduct occurred, by the standard of evidence

Final Determination

Whether the conduct proven to have occurred violates policy

Written Determinations

- **Written Determination**

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

- **Finality**

- the date an Appeal Decision-maker provides a written appeal determination; or
- the date when an appeal would no longer be timely

Written Determination Elements

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

Making a Finding and Final Determination

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

Sanctions and Remedies

Sanctions

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

Remedies

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

Determining Sanctions

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

Common Student Sanctions

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

Common Employee Sanctions

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



Skills: Analyzing Consent Evidence using the Consent Construct

Consent Analysis

What **clear words or actions** gave the Respondent permission for each specific sexual or intimate act that took place as it did?

- Evaluate relevant sexual or intimate pattern or history between the parties
- Consider whether verbal and/or non-verbal cues were present during any acts or portion of the encounter that the parties agree were consensual
 - Contemporaneous communication
- Critical to gather evidence regarding detailed and specific intimate behaviors
- Analysis has objective and subjective elements

Definition: Consent

- **Consent** is not defined by the Title IX regulations, but institutions are required by law to provide a definition (some states prescribe a definition applicable in that state)
- ATIXA's Definition:
 - Informed, knowing, and voluntary (freely given)
 - Active (not passive)
 - Creates mutually understandable permission regarding the conditions of sexual activity
 - No means no, but nothing also means no; silence and passivity do not equal consent
 - To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
 - Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally
 - Consent to one form of sexual activity does not necessarily imply consent to other forms of sexual activity

The Consent Construct

1. **Force:** Did the Respondent use force to obtain sexual or intimate access?
2. **Incapacity:** Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated
3. **Consent:** What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

Force

Did the Respondent use force to obtain sexual or intimate access?

Physical Violence:

- Hitting, restraint, pushing, kicking, etc.

Threats:

- Objective and subjective analysis of the viability of the threat

Intimidation:

- Implied threat that menaces and/or causes reasonable fear

Coercion:

- Unreasonable amount of pressure for sexual access
(Consider: isolation, frequency, intensity, and duration)

Incapacity

Was the Complainant incapacitated?

- **Incapacitation:** a state where an individual cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent:
 - Unable to understand who, what, when, where, why, or how
 - Incapacity ≠ impaired, drunk, intoxicated, or under the influence
 - Insufficient situational awareness
 - Lack of consequential awareness
 - Blackout and incapacity are **not** synonymous:
 - Blackout means memory is not formed
 - Incapacitation is about decision-making capacity

Evidence of Incapacity: Potential Context Clues

- Slurred speech
- Scent of alcohol on the breath
- Shaky equilibrium; disorientation
- Passing out/unconsciousness
- Throwing up
- Known blackout
- Outrageous/unusual behavior (requires prior knowledge)

**Incapacitation determination is made contextually,
in light of all the available relevant evidence**



Incapacity Analysis

- If the Complainant **was not** incapacitated, move to the Consent Analysis
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know, **AND**
 - The Respondent would not have **reasonably known** of the Complainant's incapacity = no policy violation, move to Consent Analysis
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it** = policy violation
 - The Respondent **should have known it** = policy violation

Note: The Respondent's own intoxication can not be used as a reason they did not know of the Complainant's incapacity

Prior Knowledge Construct

- Did the Respondent previously know the Complainant?
 - If so, was the Complainant acting differently than in previous similar situations?
- Evaluate what, if anything, the Respondent observed the Complainant consuming or ingesting
 - Use a timeline analysis
- Determine if the Respondent provided any substances to the Complainant
- Pace of consumption and amount of consumption can both be relevant

Skills: Weighing and Analyzing Evidence

Applying Facts to Policy

- DM must presume the Respondent is not in violation unless and until the standard of evidence is met
- The DM analyzes facts against each policy element to determine whether the Respondent violated policy
 - Written rationale will have to cite to specific evidence supporting conclusion
- Assess credibility of evidence and evidentiary weight
 - Assess statements as factual, opinion-based, or circumstantial
- Apply evidentiary standard to determine if policy has been violated
- Based only upon evidence in the investigation report or presented at the hearing

DM Questioning Goals

- May ask questions to ensure a **comprehensive** understanding of information and evidence gathered during the investigation:
 - Including asking additional questions about relevant evidence regarding what happened during the incident(s)
 - DM does not have to ask questions but must have the opportunity to do so
 - If necessary to assess credibility, DM should ask
- **DM should use questions to:**
 - Resolve conflicting information as it relates to the policy elements
 - Elicit details, eliminate vagueness, fill in gaps

Step One: Parsing the Policy

A key part of weighing and analyzing evidence is identifying the elements of each policy provision:

- **Stalking:**
 - Engaging in a course of conduct,
 - On the basis of sex,
 - Directed at the Complainant,
 - That would cause a reasonable person to:
 - Fear for their safety or the safety of others; or
 - Suffer substantial emotional distress

Step Two: Applying Facts to Policy

Map relevant and credible facts to the applicable policy element

Policy Element:

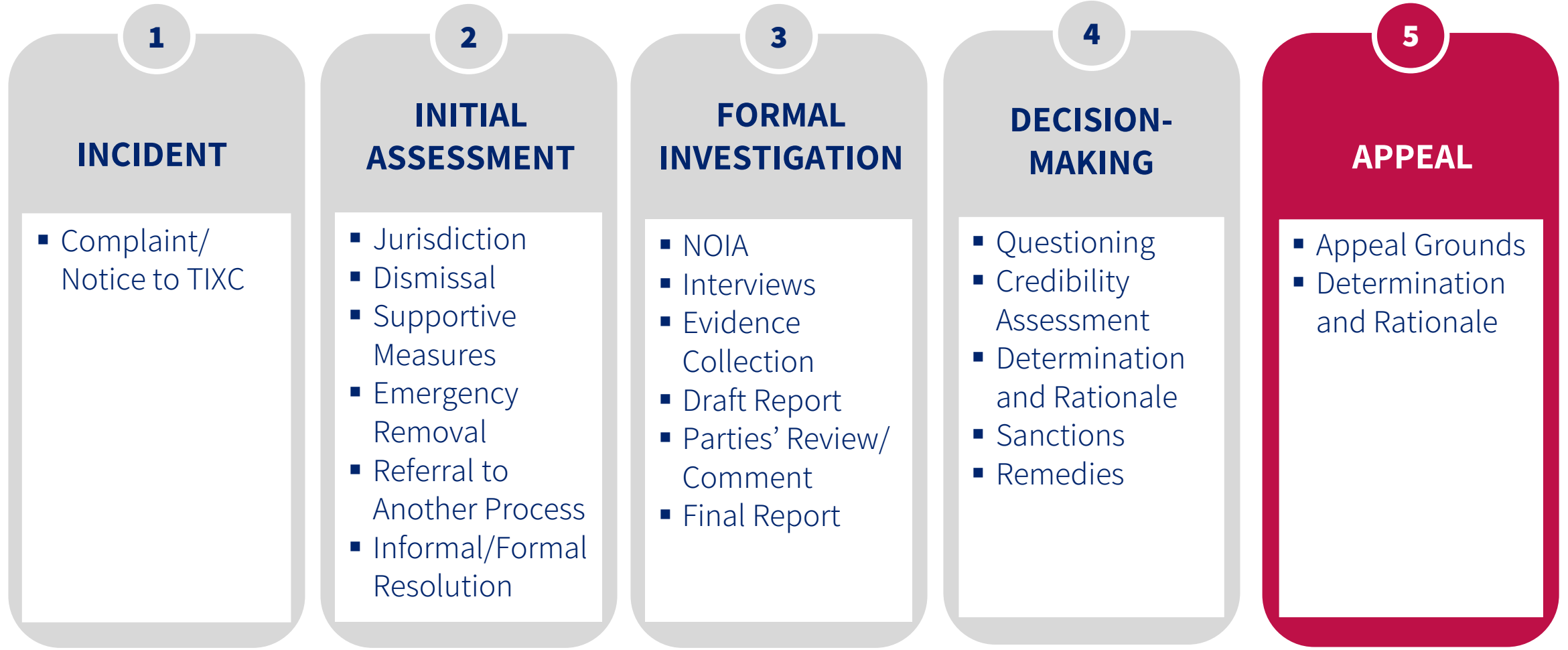
- Engaging in a course of conduct

Facts:

- Complainant asserts Respondent followed Complainant to an off-campus party on October 1
- Respondent came to Complainant's residence hall room three times between October 5 and October 12
- Respondent denies following Complainant on October 1
- Witness corroborates Respondent knocked on Complainant's door several times in one week

Appeals

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
- 4 Excessive or inappropriate sanction

Institutions have the discretion to add additional appeal grounds

Appeal Decision-Maker and Outcomes

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

Appeal Outcome Notification: Key Points

- Hearing date
- Standard of evidence for original decision
- Decisionmaker(s) finding w/ full text of policy violation(s) if found in violation
- Sanctions if applicable
- Party's appeal grounds
- Standard of evidence for the appeal decision (likely the same as at hearing)
- Outcome of appeal
- Rationale for determination
- Notation regarding any further action, if applicable (new hearing, reopen investigation, remand to reconsider evidence, etc.)

Recordkeeping and Documentation

Recordkeeping

- DM must compile all documentation related to the decision-making process, typically with the TIXC, including:
 - **Timeline** of decision-making process
 - **Interactions** and pre-hearing meetings with parties, other DMs, TIXC, etc.
 - **Determination** with any associated sanctions and/or remedies
 - **Rationales** for all determinations
 - **All work product** from the DM process
- TIXC is responsible for maintaining complaint files for a minimum of seven years



Decision-Maker Notes and Drafts

- Decision-making creates opportunities to generate paperwork and paper trails
- Be judicious with notetaking, annotating, draft writing, and communication
- Anticipate that the parties could see DM work product:
 - Student FERPA inspection and review rights
 - Employee rights to personnel records
 - Litigation
- TIXC should provide guidance and clear expectations about saving work product, including personal notes

Case File

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

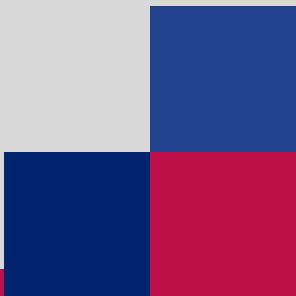
Investigation Case File

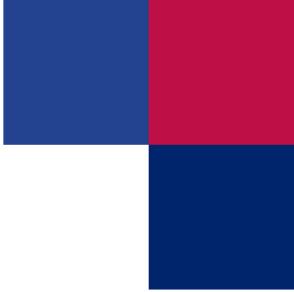
- Formal complaint
- Incident report(s)
- Policies/procedures in place at the time of the incident(s) and the investigation
- Original NOIA and any subsequent NOIA updates
- Verified interview transcripts/statement summary
- Collected evidence
- Background information (education, employment, etc.)
-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

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

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

Questions?





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