



Association of
Title IX Administrators

Title IX Higher Education Decision-Maker

Training and Certification Course

WELCOME!

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- The ATIXA Event Lobby can be accessed by the QR code or visiting www.atixa.org/atixa-event-lobby in your Internet browser.
- Links for any applicable training evaluations and learning assessments are also provided in the ATIXA Event Lobby. You will be asked to enter your registration email to access the Event Lobby.
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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.

Content Advisory

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

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

2024 Title IX Regulations Litigation

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

2024 Title IX Regulations Litigation

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

Retroactivity

- The 2024 Regulations apply **only** to sex discrimination alleged to have occurred **on or after** August 1, 2024
 - For conduct alleged to have occurred prior to August 1, 2024, the 2020 Regulations apply in perpetuity
- Recipients will need to maintain/update policies, procedures, and training that are compliant with the **2020** Regulations and **2024** Regulations



Introduction



The primary focus of this training is to discuss and cultivate the skills necessary to successfully serve in a decision-making role in the Title IX Resolution Process.



Decision-makers must understand their role, apply policy with analytical precision, make determinations based on relevant and reliable evidence, and prevent and recognize bias and conflicts of interest.



Our goal is to help Title IX Decision-makers take on their role with confidence.

Title IX Scope & Definition Review

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 sex-based harassment and sex discrimination
- **Stop, Prevent, and Remedy**

Sex Discrimination

- Discrimination on the basis of sex includes:
 - Sex Stereotypes
 - Sex Characteristics
 - Pregnancy or Related Conditions
 - Sexual Orientation
 - Gender Identity
 - “More than *de minimis* harm”
- Sex-Based Harassment
- Retaliation



Sex-Based Harassment

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



ATIXA Model Policy Definitions

- Common additional offenses with a potential Title IX intersection
 - Sexual Exploitation
 - Harm/Endangerment
 - Intimidation
 - Hazing
 - Bullying



Contextualizing the Decision-Maker Role

Responding to Sex Discrimination

The institution has obligations and tools to respond to sex discrimination:

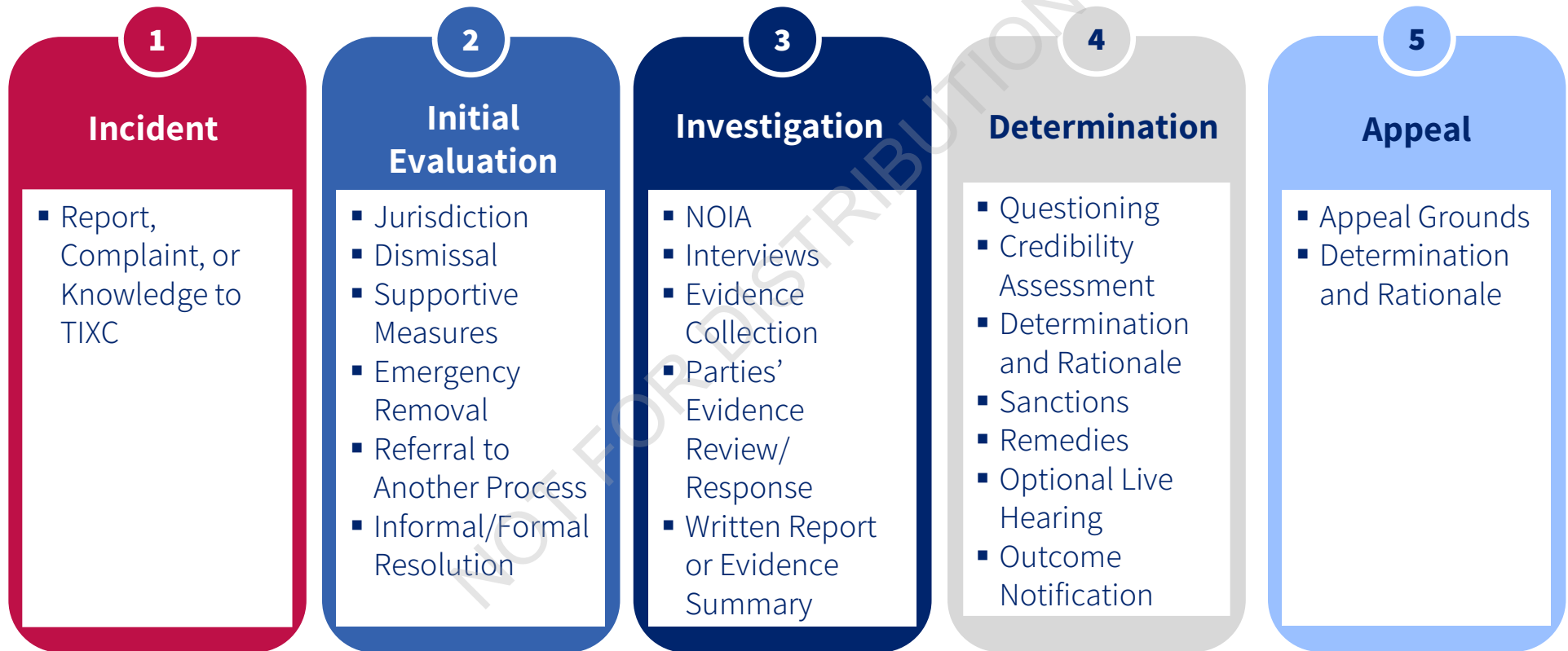
- Monitor and implement solutions for barriers to reporting
- Notification, information-sharing, and reporting requirements
- Supportive measures:
 - Individualized measures
 - Cannot unreasonably burden parties **or** be for punitive/disciplinary reasons
- Emergency Removal:
 - Individualized safety and risk analysis to measure **imminent and serious** threat
- Informal Resolution
- Resolution Process

Two-Track Resolution Process

- Which grievance process applies depends on the identities of the parties
 - Section 106.45 provides a civil rights resolution process for resolving complaints
 - Section 106.46 incorporates § 106.45 and adds some due process protections
 - Retains many, but not all, features of the formal process from the 2020 Regulations
- Two separate processes are permitted but **not** required
 - If using only one, it must be § 106.46 (ATIXA’s recommendation)

§ 106.45	§ 106.46
<ul style="list-style-type: none">▪ All sex discrimination complaints that are not sex-based harassment▪ All sex-based harassment complaints that do not involve a post-secondary student	<ul style="list-style-type: none">▪ All sex-based harassment complaints involving a post-secondary student Complainant and/or student Respondent

Title IX Resolution Process Overview



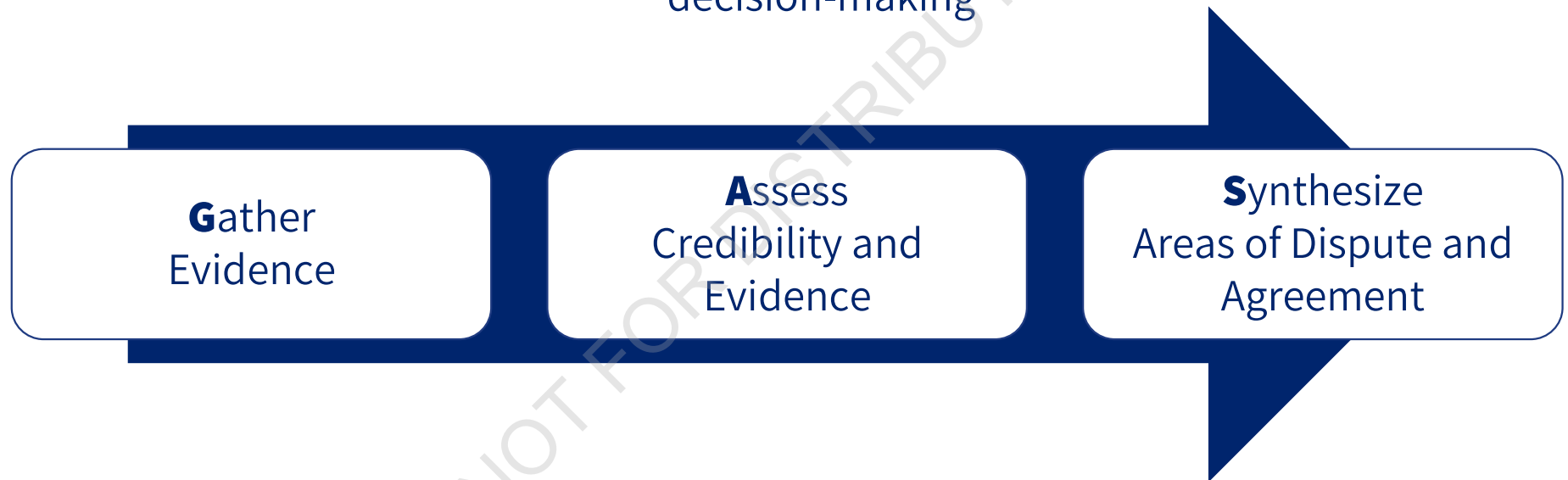
Common Steps in TIX Investigations

Investigation Steps:

1. Receive Notice/Complaint
2. Initial Evaluation and Jurisdiction Determination
3. Determine Basis for Investigation
4. Notice of Investigation and Allegations (NOIA)
5. Establish Investigation Strategy
6. Adequate, Reliable, Impartial Investigation
7. Relevant Evidence Summary/Investigation Report
8. TIXC Reviews Evidence
9. Parties Review and Respond to Summary/Investigation Report or Relevant Evidence
10. Final Investigation Report/updated summary provided to Decision-maker (DM)

Investigation

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



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

Decision-Maker

- Institutions may choose from multiple decision-making models; it is important to know institutional policy to understand the Decision-maker (DM) role
- DM determines whether a Respondent violated policy:
 - May be the Title IX Coordinator, Investigator, or another person/panel
 - ATIXA recommends that, where possible, institutions should use different people for each of these roles
 - Conflicts of interest and bias are still prohibited
 - May be a single person or a panel
 - May be internal or external individuals
- In the event of an appeal, a separate Appeal Decision-maker (Appeal DM) must be identified
 - Appeal DM must not have been previously involved in the complaint or Resolution Process

Decision-Making Requirements: § 106.45

- Section 106.45 requires institutions to provide a process enabling the DM to question parties and witnesses to assess credibility
 - Process must be outlined in policy and procedures
 - Regulations do not provide much guidance
 - Investigator can be the DM
 - TIXC can be the Investigator and/or the DM
 - No Advisors required
 - Questioning by parties not required
 - Recipient must notify parties in writing of the determination, rationale, and appeal procedures (if offered)
 - Appeal not required

DM Model: § 106.45

Not outlined in the regulations, but **ATIXA recommends:**

- Investigators make non-binding recommended findings and recommended final determinations
- A separate Decision-maker
 - Meets with parties in individual meetings to ask questions and assess credibility
 - May meet with Investigators or witnesses as needed
 - Makes findings and policy violation determinations
 - Determines sanctions and remedies
- Offer a robust appeal opportunity

Decision-Making Requirements: § 106.46

- Section 106.46 requires institutions to provide a process enabling the DM to question parties and for parties to propose and ask relevant questions
 - DM makes relevance determinations for all questions prior to a party or witness answering
 - May not permit unclear or harassing questions, may rephrase
 - A DM may place **less or no weight** on statements by a party or witness who refuses to respond to relevant questions
 - A DM may not draw an inference about whether sex-based harassment occurred **solely** on a party or witness's refusal to respond to relevant questions

Individual Meetings Model: § 106.46

- If an institution does **not** conduct a live hearing, it may use individual meetings
 - Investigator or DM asks relevant and follow-up questions during individual meetings
 - Each party may propose questions to be asked of any party or witness, **AND**
 - Has the right to have those relevant questions asked by the Investigator or DM during individual meetings, **AND**
 - Each party has the right to a recording or transcript of the meetings with a reasonable opportunity to propose follow-up questions
 - DM must have the ability to ask more questions, if needed

Live Hearings Model: § 106.46

Questioning

- DM asks questions directly of the Parties and witnesses
- Questioning by Parties can be through DM **or** through Advisors
 - **DM-Facilitated Questioning:** The institution may permit each party to propose questions to the DM to be asked of another party and witnesses; **OR**
 - **Advisor-Led Questioning:** Advisors ask questions directly of another party and witnesses on behalf of their advisee, subject to rulings by the DM on relevance and permissibility
 - Institutions must choose one or the other

Live Hearings Model: § 106.46

- If an institution uses Advisor-led Questioning, the institution must provide an Advisor for the purpose of questioning if a party does not have an Advisor and wishes to conduct questioning
 - Institution-appointed Advisor may **not** be a confidential employee
- Hearings via technology (e.g., Zoom or Teams) are permitted
 - DM and parties **must** be able to simultaneously see and hear the party or witness while they are speaking
- Institution must create recording or transcript of hearing
- **Note:** Some public colleges and universities may need to use some sort of hearing based on:
 - Case law
 - State law
 - Governing body policy

Appeals

- **Under § 106.45**, offer an appeal process mirroring those in **comparable proceedings**:
 - If there is no appeal in comparable proceedings, none is required
 - Institutions may exceed this requirement
 - Comparable proceedings may include those used to resolve other discrimination complaints
 - Any appeal opportunity must be provided equally to the parties
- **Under § 106.46**, Recipients **must** offer an appeal
 - Written determination required
 - ATIXA recommends written determinations for all appeals (§§ 106.45 and 106.46)
- ATIXA recommends permitting only one level of appeal

Appeal Grounds

1

Procedural irregularity that would **change the outcome**

2

New evidence that would **change the outcome** and that was not reasonably available when the determination of whether sex-based harassment occurred, or dismissal, was made

3

TIXC, Investigator, Decision-Maker had a conflict of interest or bias for or against complainants or respondents generally or the individual Complainant or Respondent that would **change the outcome**

Institutions have the discretion to add additional appeal grounds

Appeal Determinations

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)

Decision-Maker Mission and Role

Activity: Ranking Priorities

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-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
 - Types of complaints and findings necessary for each: incident(s), pattern(s), culture/climate
 - Best practices for asking good, relevant questions
 - Decision-making procedures and management
 - Evidence: how to weigh it and apply it to institutional policy by the standard of proof
 - How to analyze credibility
 - How to make findings, determine sanctions/remedies, and write a rationale

Due Process

NOT FOR DISTRIBUTION

Due Process



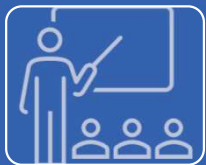
Title IX Regulatory Requirements

- Flexible procedures for Title IX Resolution Process
- Can have different procedures for students and employees



Fundamental Fairness for Students in Disciplinary Procedures

- Fundamental fairness concepts (private institutions)
- Constitutional due process protections (public institutions)



Procedural Protections for Employees

- State law requirements may exist for some or all positions
- May be enhanced by collective bargaining agreements/union contracts

Due Process in Procedure

A Resolution Process must be:

- Consistent, thorough, and procedurally sound review of all allegations
- Substantially compliant with written policies and procedures

A Final Determination must:

- Be appropriately impartial and fair, both in finding and sanction(s)
- Be neither arbitrary nor capricious
- Be based on a fundamentally fair rule or policy and made in good faith
- Have a rational relationship to the evidence

Decision-makers must be aware of due process protections owed to the parties and raise any due process concerns to the Title IX Coordinator, if necessary

Due Process Rights of the Parties

- Receive sufficient information, available at the time, about the allegations
- Discuss allegations with witnesses, family members, confidential resources, and/or Advisors
- Identify witnesses
- Obtain and present relevant and not otherwise impermissible evidence without restriction
- Equal opportunity to access the relevant evidence or an accurate evidence description
 - If the institution provides an evidence description, it must provide access to the relevant evidence upon request
- Prepare for and participate in the Resolution Process
- Opportunity to appeal any dismissed complaint, if applicable
- Written determination and rationale stating whether sex discrimination occurred

Notice of Investigation and Allegations

The Notice of Investigation and Allegations (NOIA) is critical to fundamental fairness and due process:

- §106.45: Verbal or written
- §106.46: Written
- ATIXA recommends a **written** NOIA prior to all Title IX investigations
- NOIA should include the parties' rights in the **Resolution Process**, in addition to:
 - Known details of allegations, such as date and location; identities of the parties; a description of the alleged conduct; and relevant policy provisions
 - Information about the **Resolution Process**, including opportunity to access the relevant evidence or an accurate description of the relevant evidence
 - Presumption of non-responsibility
 - Prohibition on retaliation, false statements

Conflicts of Interest and Bias

Conflicts of Interest and Bias

- Decision-makers must **not have a conflict of interest or bias** for or against the following:
 - Complainants, generally
 - Respondents, generally
 - The parties involved in a complaint
 - Subject matter or details of the complaint itself
- Consider a perception of a conflict or bias, even if none in fact exists
 - Not required, but TIXC may choose to substitute a DM based on perception alone

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
 - 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 unless it influences the DM's findings
- DM must bring potential conflicts to the TIXC's attention
- Parties may also alert TIXC
- TIXC will determine whether to recuse the DM
 - DM may also recuse themselves

Bias

- Bias can be a significant problem for DMs:
 - Explicit or implicit
 - The often implicit and unconscious nature can lead to unexpected outcomes
- Formed from stereotypes, societal norms, cultural experiences, and expectations of others
- Can affect our perceptions of any party or witness
- Common pre-conceptions about parties and witnesses
- DM role requires recognition and mitigation of bias
- If DM does not feel they can be impartial, they should notify the TIXC

Identifying and Correcting Bias

Strategies to mitigate bias:

- Hearing panels vs. individual DM
- Panel members reviewing each other's questions in advance
- Compliance with institutional policy and procedure
- Identify evidentiary gaps and seek relevant evidence to fill gap
- All panel members review the rationale
- TIXC reviews the rationale
- Be conscious of own biases
 - Counteract them and ensure they do not influence decisions

Decision-Making Phase: Skills and Practical Application

Skills: Working with Advisors

Working with Advisors

- Permitting Advisors is optional in § 106.45 proceedings, but doing so is a best practice
 - If an institution allows Advisors, all parties must have an equal opportunity to have an Advisor in the process
 - Advisors must be permitted for alleged employee-on-employee VAWA offenses
- Advisors are **permitted** in § 106.46 proceedings
 - Institution must provide an Advisor for any party who does not have one **if** the institution offers Advisor-led Questioning
- Institutions may limit the role (but not the presence) of an Advisor in meetings/interviews
 - E.g., not allowed to provide testimony
- **For unionized employees**, union may be entitled to have a designee/representative participate; that person may serve as an Advisor, or the party may elect to have a separate Advisor

Skills: Materials Review

Initial Materials Review

- DMs should take time to review all available documentation and evidence prior to making a determination
 - Even if the Investigator is serving as a DM and is already familiar with the complaint
- Review should consist of:
 - Complaint, if written
 - NOIA, if written
 - Applicable policies
 - Relevant and not otherwise impermissible evidence
 - Investigation report, if created

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

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

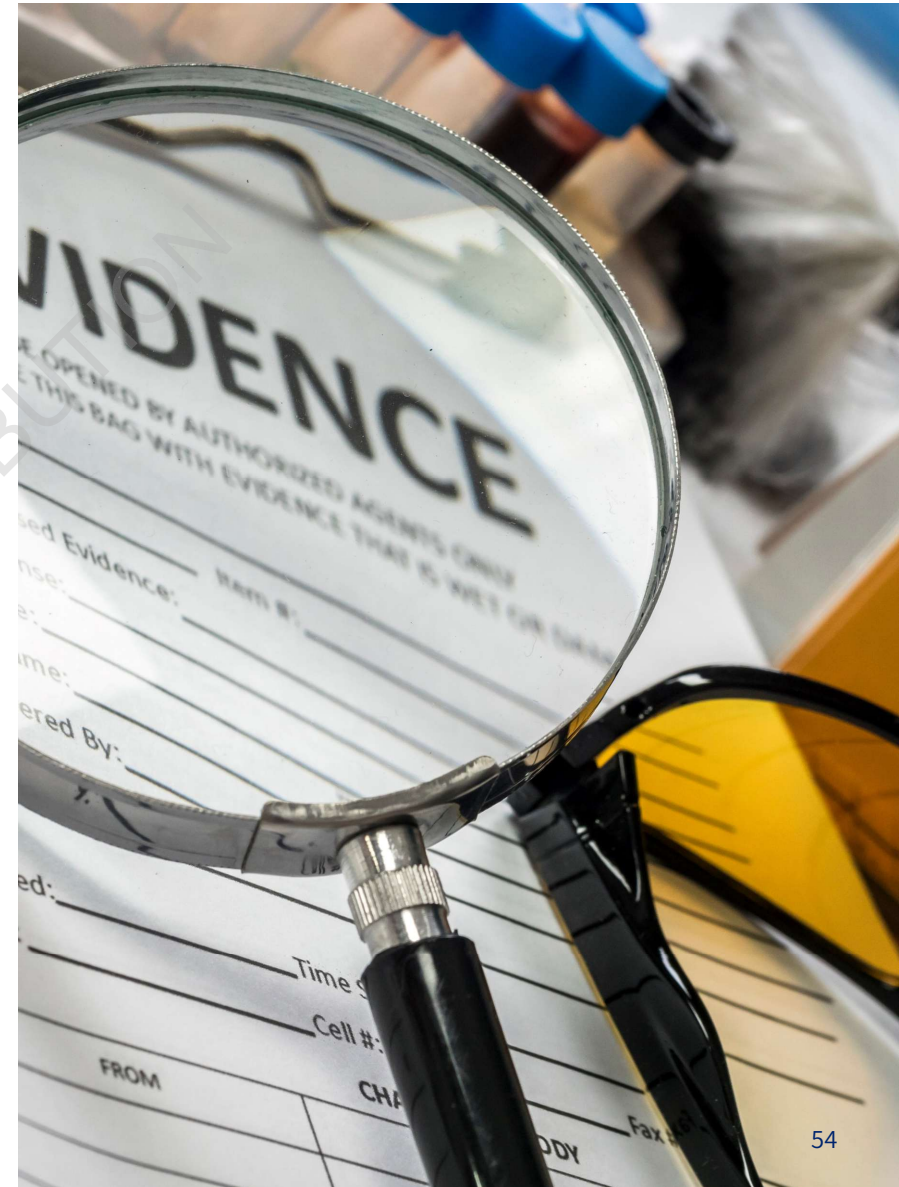
- Review decision-making procedures to refresh previous training
- Note any procedural questions to ask the TIXC/legal counsel

Skills: Understanding Evidence

Understanding Evidence

DM must evaluate all relevant evidence:

- **Evidence** is any information presented to help determine what occurred
- **Relevant evidence** is evidence that may aid in showing whether the alleged sex discrimination occurred **or** contributes to assessing credibility
- **Impermissible evidence** is evidence that must not be accessed or considered, as outlined in the regulations



Types of Evidence

Documentary Evidence	Supportive writings or documents
Electronic Evidence	Photos, text messages, and videos
Real Evidence	Physical objects
Direct or Testimonial Evidence	Personal observation or experience
Circumstantial Evidence	Not eyewitness, but compelling
Hearsay Evidence	Statement from outside the interview presented as truthful
Character Evidence	Evidence of a person's character or character traits

Privilege and Medical Information

A party or witness must provide written, voluntary permission to obtain and/or include:

- Evidence protected under a legally recognized privilege
- Evidence provided to a confidential employee
- Records made or maintained by:
 - Physician
 - Psychiatrist
 - Other recognized professional or paraprofessional in connection with treatment

Other Evidence Considerations

- Institutions may permit expert witnesses, if the opportunity is provided equally to all parties
- Restrict sharing of evidence
 - Institutions must take reasonable measures to prevent the unauthorized disclosure of information obtained solely during the Resolution Process:
 - Parties cannot be restricted from talking to witnesses, family, or confidential employees
 - Other limits on the sharing of information may be appropriate

Primary Questions for Decision-Makers

1

Is this information
relevant?

2

Is this information
reliable?

3

**Will DM rely upon
it as evidence
supporting a
rationale?**

Skills: Determining Relevance

Relevance

- All relevant evidence, unless otherwise impermissible, must be objectively evaluated and considered, including both inculpatory and exculpatory evidence:
 - **Inculpatory:** supports a finding of “responsible”
 - **Exculpatory:** supports a finding of “not responsible”
- **Relevant** means related to the allegations of sex discrimination under investigation:
 - Relevant **questions** seek evidence that may aid in showing whether the alleged sex discrimination occurred
 - Relevant **evidence** aids a decision-maker in determining whether the alleged sex discrimination occurred
 - DM may consider **credibility** when determining whether the alleged sex discrimination occurred

Impermissible Evidence

- Evidence of the **Complainant's sexual interests** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct; or
 - If offered to prove consent with respect to prior consent with the Respondent
 - Any prior consensual sexual conduct between the parties does not by itself demonstrate or imply the Complainant's consent
- Even if admitted/introduced by the Complainant
- Does **not** apply to Respondent's prior sexual behavior or sexual interests

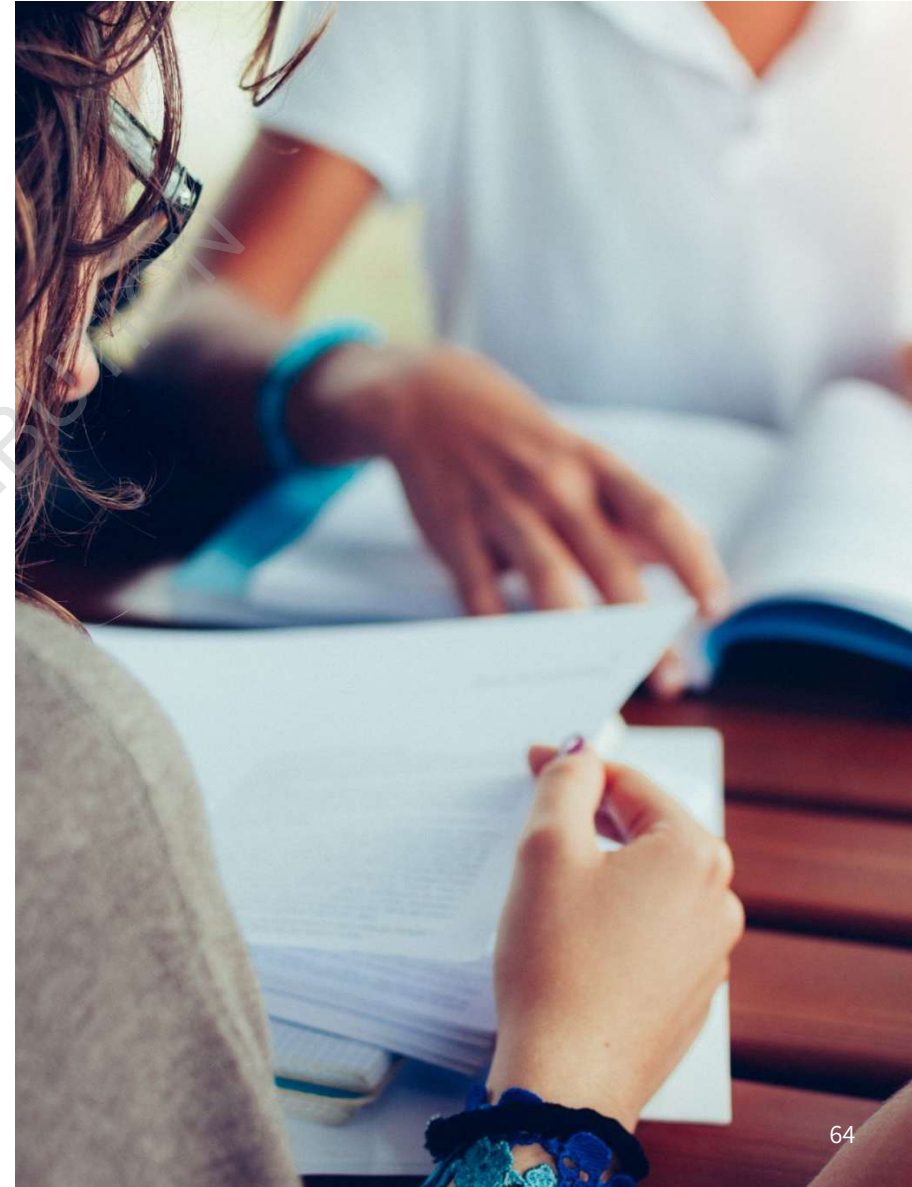
Skills: Credibility Assessment

Credibility Considerations

- Assessing and determining credibility is an important DM role
- Credibility is often a function of **corroboration and consistency**
- Credibility does **not** necessarily equate to honesty or truthfulness:
 - Believability does not equal truthfulness
 - Not judging character
 - Not calling people liars
- 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

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 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?



Skills: Analyzing Consent Evidence using the Consent Construct

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?

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

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

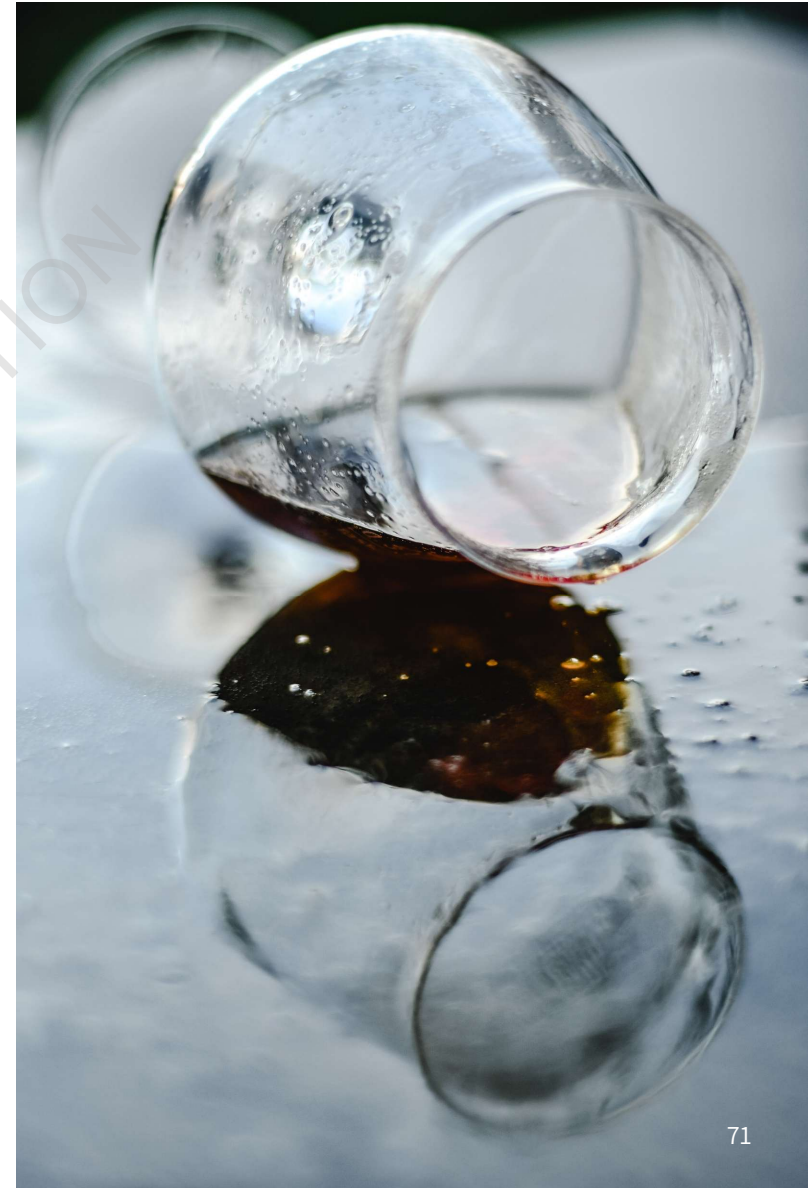
Was the Complainant incapacitated?

- **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 or 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
- The Respondent's own intoxication does not excuse a policy violation

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

Consent Analysis

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

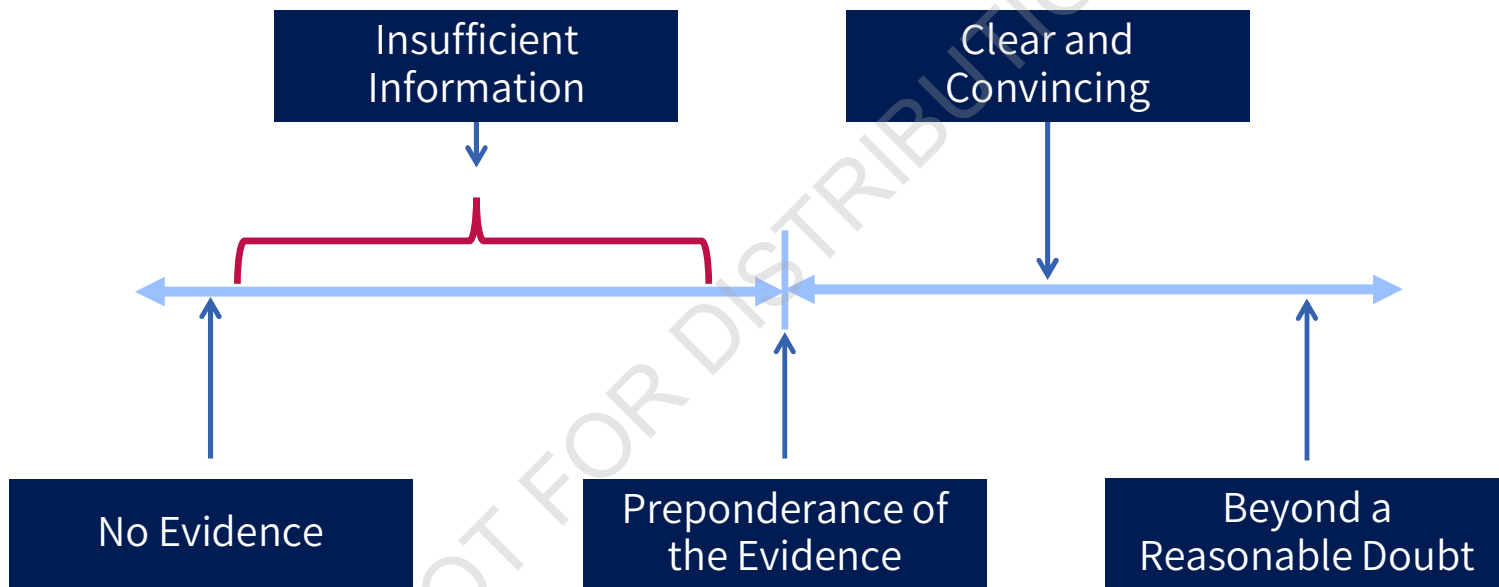
- Evaluate relevant sexual or intimate pattern or history between the parties
- Consider whether verbal and/or non-verbal cues were present during any acts or portion of the encounter that the parties agree were consensual
 - Contemporaneous communication
- Critical to gather evidence regarding detailed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

Skills: Weighing and Mapping Evidence

Standard of Proof

- The standard of proof is the amount of relevant evidence necessary to find a policy violation
- Use **preponderance of the evidence** standard
 - “More likely than not”
 - Unless clear and convincing is used for other “comparable proceedings”
 - “Comparable proceedings”
 - Proceedings for other discrimination complaints involving the same **category of respondents** (students vs. employees)
 - Similar types of “person-to-person offenses” that are physical in nature but do not pertain to sex

Standard of Proof



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 they wish
 - 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

Parsing the Policy

- The DM determines whether a policy violation occurred by applying relevant facts to the policy provisions in question
 - To understand the different components of a policy provision, parse the policy into its elements

Identify the elements of this policy provision:

Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the institution's educational program or activity

Parsing the Policy: Answers

Identify the elements of the policy provision:

- Sex-based,**
- Unwelcome conduct,**
- That is **subjectively offensive**, and
 - Objectively offensive**, and
 - Is so **severe OR pervasive**
- That it **limits or denies** a person's ability to participate in or benefit from the institution's education program or activity

Applying Facts to Policy

- Next, the DM **analyzes facts against each policy element** to determine whether the Respondent violated policy
 - Assess evidence credibility and evidentiary weight
 - Assess statements as factual, opinion-based, or circumstantial
- Apply the standard of proof to determine if policy has been violated
 - If the **relevant, credible evidence** demonstrates that it is **more likely than not** that **each element** of the alleged policy violation is met, a policy violation occurred

Example: Applying Facts to Policy

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

Example: 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

Example: Applying Facts to Policy

Map relevant and credible facts to the applicable policy element

Policy Element:

- Directed at a specific person:
 - That would cause a reasonable person to **fear for their safety**

Facts:

- Complainant alleged Respondent pounded on his door and yelled until an RA told her to leave
- Complainant alleged Respondent sent texts suggesting she was following him, and he should fear her
- Respondent produced texts that do not support Complainant's characterization
- RA witness asserts "pounded on her door and yelled" is an exaggeration

Skills: Making Findings, the Final Determination, and Sanctioning

Finding vs. Determination

Finding

Whether the conduct occurred, by the standard of proof

Final Determination

Whether the conduct that is 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 Determination Components

- Cogent explanation of facts
- Evidence relied upon/not relied upon and why
- Evidence that was unavailable and why
- Whether the presumption of non-responsibility was overcome
- Credibility assessment and explanation
- Finding(s) based on standard of proof
- Rationale analysis explains how DM got from the allegation to the final determination and offers reasoning for any sanctions implemented
- Any appeal procedures available
- Any sanctions or remedies

Written Determination

Section 106.46 written determinations must also include:

- Description of alleged sex-based harassment
- Relevant policy and procedures
- DM's evaluation of the relevant and not otherwise impermissible evidence and determination of whether sex-based harassment occurred
- Disciplinary sanctions
- Remedies
- Appeal procedures

Sanctions and Remedies

Sanctions

- Only implemented after a determination of responsibility
- Nexus between sanctions and misconduct
- Goal: stop, prevent, and remedy
- 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
 - 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

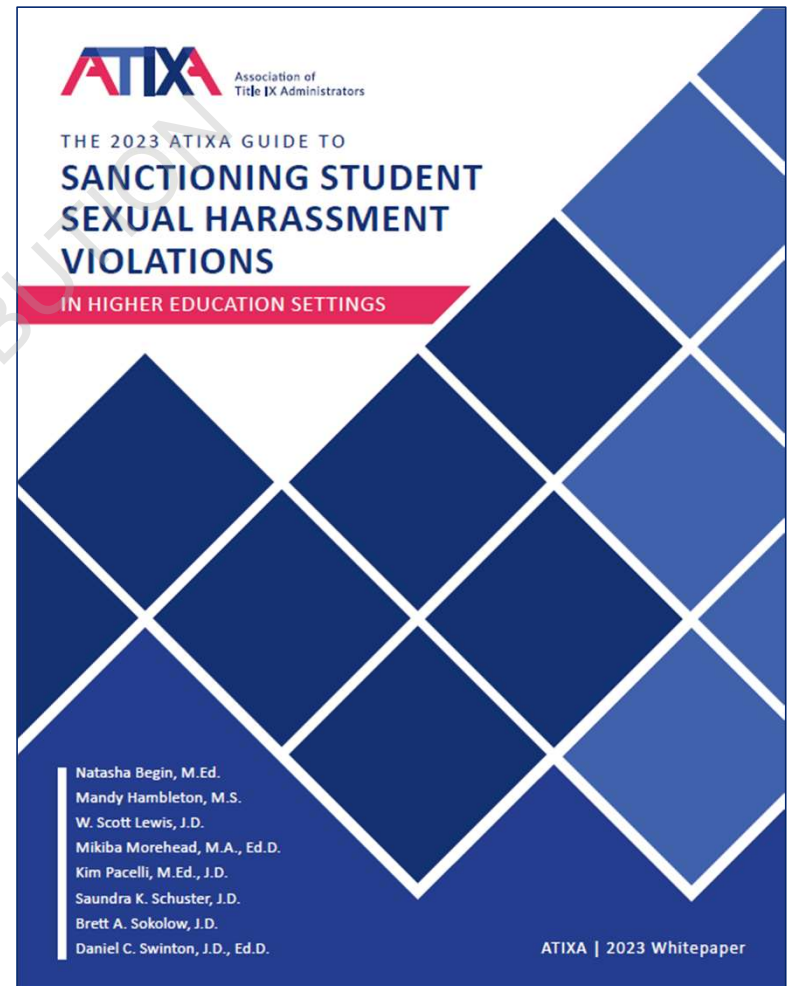
- Warning (preferably written)
- Probation
- Loss of privileges
- Counseling
- No contact order
- Residence hall relocation, suspension, or expulsion
- Limited access to campus
- Service hours
- Online education
- Alcohol and drug assessment and counseling
- Discretionary sanctions
- Parental notification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

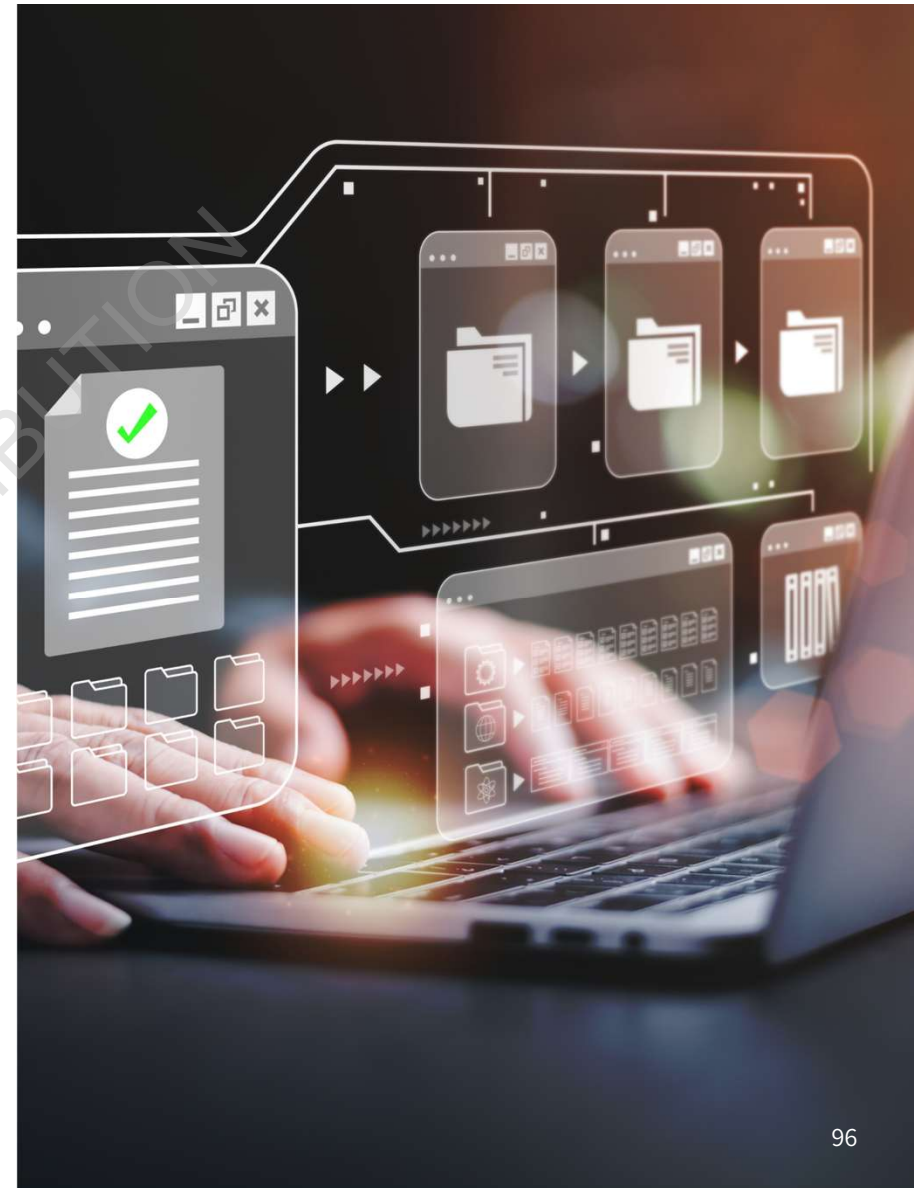
- Failure to stop, prevent, and remedy
- Conflating the finding, the determination, and the sanction
- Unwillingness to suspend, expel, or terminate
- Inconsistent or disparate sanctions for similar behavior
- Failure to consider aggravating or mitigating circumstances
- Lockstep or prescribed sanctioning;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



Recordkeeping and Documentation

Recordkeeping

- Records documenting the resolution process and the resulting outcome must be kept for at least seven (7) years
- DM should compile and send TIXC all documentation related to the decision-making process, including:
 - **Timeline** of decision-making process
 - **Determination** with any associated sanctions and/or remedies
 - **Rationales** for all determinations
 - **All work product** from the DM process



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



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Questions?

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