



Association of
Title IX Administrators

Investigation Foundations for Higher Education

Training and Certification Course

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WELCOME!

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- Links for any applicable training evaluations and learning assessments are also provided in the ATIXA Event Lobby.
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Strategic Risk
Management Solutions

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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 sexual harassment, sex discrimination, violence, and associated sensitive topics that can evoke strong emotional responses.

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

Introduction



The course focuses on the fundamental skills necessary to conduct sex- and gender-based violence, harassment, and discrimination investigations.



Practitioners will learn how to adapt the investigation process to other civil rights grievance processes including Title VI, Title VII, the ADA, and Section 504 of the Rehabilitation Act.



Our goal is to provide you with an in-depth exploration of each phase of an investigation and how to practically apply the concepts to your role within the Title IX Resolution Process.

Review: Equity and Title IX Regulations

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 Cont.

- 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

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 sex- and gender-based harassment, discrimination, and violence create

2024 Title IX Final Rule

- Issued **April 19, 2024**
- Effective and enforceable **August 1, 2024**
- Applies exclusively to incidents occurring **on or after August 1, 2024**
- 2024 is a blend of the 2011 Dear Colleague Letter, 2020 Regulations, and new approaches
- 1561 pages total (1504 Preamble and 57 Regulations)
- More flexibility for institutions in how to structure and staff resolution processes

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 regulations in place at the time the alleged behavior occurred will apply
- Recipients will need to maintain/update policies, procedures, and training that are compliant with the **2020** regulations and **2024** regulations

Review: Applicability

- Education program or activity in the United States
- Downstream effects of external misconduct
- Disciplinary authority over the context of the behavior
- Identity of the Complainant
- Applies to students and employees



Review: Sex Discrimination Definitions

- 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
- **Disparate Treatment:** occurs when an institutional policy, practice, or procedure (or an agent thereof) **intentionally** discriminates
- **Disparate Impact:** occurs when an institutional policy, practice, or procedure (or an agent thereof) **unintentionally** discriminates
 - A policy may be intended to be neutral as written but it may be applied in a discriminatory manner

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
 - Develop or adopt one for the institution



Review: Sex-Based Harassment Definitions

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



ATIXA Definitions

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



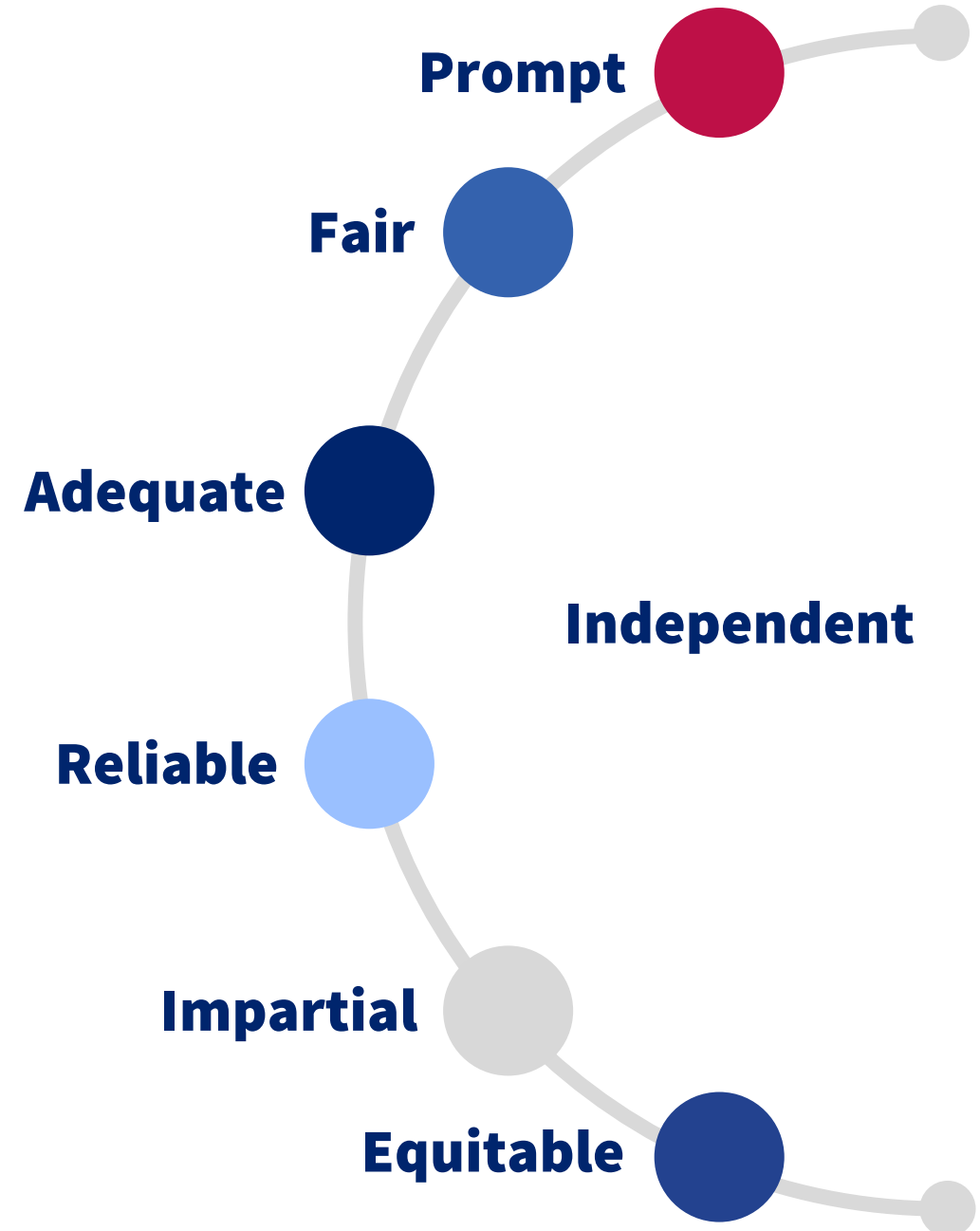
Consent

- **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 Model 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

Civil Rights Investigations Overview

Civil Rights Investigations

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



Bias and Conflicts of Interest

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



Required Investigator Training

- Definition of **Sex Discrimination**
- **Scope** of the institution's education program or activity
- Conducting a **fair and adequate investigation** and **Title IX Resolution Process**
- **Serving impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- The **meaning and application of the term “relevant”** in relation to questions and evidence
- The **types of evidence that are impermissible** regardless of relevance
- Must not rely on sex stereotypes

ATIXA'S Recommended Resolution Process

Two-Track Resolution Process

- The applicable resolution process depends on the parties’ affiliations and type of allegation
 - § 106.45 provides a civil rights resolution process
 - § 106.46 incorporates § 106.45 and adds some due process protections
 - Retains many, but not all, features of 2020 regulatory requirements
- Two separate processes are permitted but **not** required
 - If only using one, it must be § 106.46 (ATIXA’s recommended practice)

§ 106.45	§ 106.46
<ul style="list-style-type: none"> ▪ Retaliation and Sex discrimination complaints that are not sex-based harassment ▪ Sex-based harassment complaints without a student Complainant or Respondent (employees/third parties) 	All sex-based harassment complaints involving a student Complainant and/or student Respondent

Title IX Grievance Process Overview

INCIDENT

- Formal Complaint/ Notice to Title IX Coordinator (TIXC)

INITIAL ASSESSMENT

- Jurisdiction
- Dismissal
- Supportive Measures
- Emergency Removal
- Referral to Another Process
- Informal/ Formal Resolution

FORMAL INVESTIGATION

- Notice of Investigation and Allegations
- Interviews
- Evidence Collection
- Draft Report
- Party Review/ Comment
- Follow Up
- Final Report

HEARING

- Questioning
- Credibility Assessment
- Determination and Rationale
- Sanctions
- Remedies

APPEAL

- Appeal Grounds
- Determination and Rationale

Title IX Resolution Process Overview

- Title IX investigations may examine sex discrimination, sex-based harassment, or retaliation allegations
- ATIXA's recommended investigation process is comprised of 10 steps over three phases:
 - Pre-investigation
 - Investigation
 - Post-investigation
- Not all phases involve the Investigator
- TIXC is responsible for Title IX Investigator oversight and supervision



Investigation Oversight and Supervision

TIXC responsibilities:

- Appoint Investigators and ensure training
- Conduct intake and initial evaluation of reports/complaints
- Consult and strategize with Investigators
- Ensure timeline compliance
- Review investigation evidence and documentation
- Oversee recordkeeping
- Serve as parties' primary point of contact



Title IX Resolution Process Overview

Prompt Resolution

- Reasonably prompt timeframes for “major stages”
 - Title IX regulations do not define “reasonably prompt”
 - 60 business days is a good guide for a moderately complex investigation
- Process may take longer than expected
 - Communicate with parties about delays
 - Reasonable extensions permitted
- Provide anticipated timelines for each proceeding



Title IX Resolution Process Overview

Equitable Resolution

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



Parties' Rights in the Resolution Process

- Receive detailed, written Notice of Allegations (NOIA), including information about the Resolution Process
 - Provide with sufficient time to prepare for any initial interview
 - Must include information about the Resolution Process
- Be informed of and receive appropriate and available supportive measures
- Be accompanied by Advisor of their choice
- Gather and present relevant evidence and witnesses
 - ATIXA recommends permitting expert witnesses
- Written notice of the date, time, location, participants, and purpose of all meetings or proceedings with sufficient time to prepare
- Respondent presumed not responsible until a determination is made

Parties' Rights in the Resolution Process

Cont.

- Inspect, review, and respond to relevant evidence and investigation report
- Equal opportunity to be accompanied by persons other than an Advisor, if any
- Reasonable extension of timeframes for good cause
- Reasonable expectation of privacy
- Opportunity to propose questions for other parties and witnesses
 - To Investigator(s) and/or Decision-maker(s)
 - Access to recording or transcript and opportunity for follow-up questions
 - Through Advisor or DM during a live hearing, if applicable
- Written outcome notification
- Opportunity to appeal the determination

Investigation Process

10 Steps of Investigations:

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

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Pre-Investigation

Pre-Investigation Steps

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1

Notice/Complaint

2

**Initial Evaluation
& Jurisdiction
Determination**

3

**Determine Basis
For Investigation**

Step 1: Notice/Complaint

- Institution receives a report, knowledge, or complaint of alleged discrimination, harassment, or retaliation
- TIXC is point person to receive reports and complaints, including referrals from mandated reporters
- **Report:** Any information that indicates a potential policy violation
- **Complaint:** A verbal or written request to institution that objectively can be understood as a request for the institution to investigate and make a determination about alleged discrimination under Title IX
 - Initiated by the Complainant (or parents/guardians, or other authorized legal representative)
 - Initiated by the TIXC

Step 2: Initial Evaluation and Jurisdiction Determination

TIXC or designee will perform several steps including:

- Outreach and intake for potential Complainant
- Jurisdictional Assessment
- Initiate a Complaint (if applicable)
 - Pattern, Predation, Threat, Violence, Weapons, Minors, Employee Respondent
- Offer and coordinate supportive measures
- Initiate Emergency Removal or Administrative Leave procedures (if applicable)
- Enact Dismissal procedures (if applicable)
- If requested/appropriate, coordinate Informal Resolution process (if applicable)

Informal Resolution

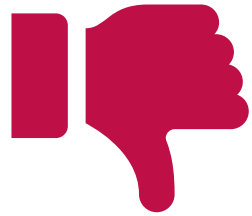
- Title IX permits **voluntary** Informal Resolution (IR)
- Not available for allegations against the institution
- IR is not defined by regulations
- Available at TIXC's discretion, at any time prior to a final determination
- Investigators should consult with TIXC to determine whether an investigation will proceed while IR is pursued
- IR Facilitators must receive training, be free of bias or conflicts of interest
 - IR Facilitator cannot be Investigator or Decision-maker for the same complaint

Step 3: Determine a Basis for Investigation

Determined by TIXC; there are three bases for civil rights investigations:

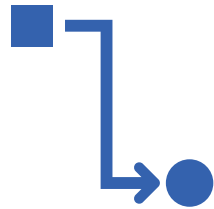
- **Incident:** a specific incident or period
 - May involve one or multiple alleged violations
 - Sex-Based Harassment or Retaliation
 - Disparate Treatment on the basis of sex
- **Pattern:** repetitive or similar behaviors or targets by the same Respondent over a period
 - Tend to involve multiple Complainants
- **Climate/Culture:** discriminatory policies, processes, and environments
 - May have no identifiable Respondent

Types of Discrimination



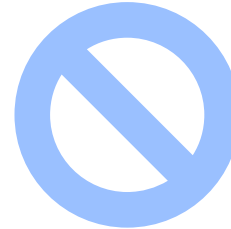
Disparate Treatment

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



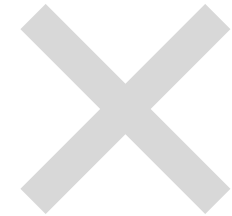
Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain people/groups



Harassment

- Quid Pro Quo
- Hostile Environment



Retaliation

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

Investigation Scope

- TIXC determines the scope of the investigation
- **Scope** refers to the allegations, timeframes, and parties subject to the investigation
- Considerations:
 - Collateral misconduct allegations
 - Individual vs. Group
 - Multiple Complainants or Respondents
 - Counter-complaints
 - Patterns
- If scope needs to be adjusted during the process, Investigator should consult with TIXC



Who Should Investigate?

- Investigator(s) may be Decision-maker for the same complaint (not recommended)
- Title IX Coordinator may serve as TIXC, DM, and Investigator in the same complaint, unless conflicted or biased (not recommended)
- Tasks:
 - Conduct adequate, reliable, 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**

Notice of Investigation and Allegations

Investigation Overview

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Notice to TIXC

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Step 4: Notice of Investigation and Allegations (NOIA)

- TIXC is responsible for ensuring the parties receive the NOIA prior to the investigation
- May temporarily delay sending notice to address reasonable safety concerns related to providing the notice
 - Based on individualized risk and safety analysis



Step 4: Notice of Investigation and Allegations-Includes

- **The NOIA includes:**
 - Resolution Process procedures and Informal Resolution Process, if any
 - Notice of the allegations and known details, such as identities of the parties
 - A description of the alleged conduct
 - The date and location of the alleged conduct
 - Parties have an equal opportunity to access relevant evidence or investigation report
 - Presumption that the Respondent is not responsible for alleged misconduct until a determination is made

Step 4: Notice of Investigation and Allegations-Includes 2

- **The NOIA includes:**
 - A statement that retaliation is not permitted
 - Reference to any code of conduct provisions (student or employee) regarding consequences for knowingly providing false statements
- NOIA must be updated if additional allegations arise, or allegations change, during the investigation

Updating the NOIA

- NOIA may need to be updated for any of the following reasons:
 - Original NOIA was deficient
 - Did not include all potential policy violations
 - Did not identify specific policy provisions alleged to have been violated
 - Did not accurately charge overlapping policy provisions
 - TIXC receives additional allegations
 - Allegations are withdrawn
 - Policy provision no longer applies, based on details of incident
 - Counter-complaint is initiated
- Investigator should discuss any proposed NOIA changes with TIXC, including rationale

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Case Study

Gia and Johnny: Introduction

- Gia and Johnny were both first-year students at Poe College
- One night they attended an on-campus party in a residence hall
- While pre-gaming, Gia drank two to three cups of wine, two to three shots of tequila, and a mixed drink of Sprite and three shots of vodka
- Gia and Johnny arrived at the party an hour after it began
- After leaving the party, Gia and Johnny decided to walk back to Gia's residence hall where they engaged in vaginal penetrative sex
- Midway through the sexual encounter, the condom broke, and Johnny ceased penetration

Gia and Johnny: Facts

- Johnny informed Gia that the condom broke, told her that he would purchase the morning after pill for her the next morning, and then he left
- Gia was later found on the residence hall bathroom floor by a student and the Resident Assistant (RA)
- After helping Gia back to her room, the RA observed a used condom in Gia's trashcan in her residence hall room
- The RA noted her observation in her incident report, which the Hall Director forwarded to the TIXC

Gia and Johnny: Complaint

- Gia initiated a Title IX complaint for rape based on her recollection that Johnny refused to use a condom
- Gia told the TIXC that she had been drinking heavily and couldn't remember parts of the night
- The TIXC was also in receipt of the RA's incident report
- However, the TIXC wrote the NOIA by framing the rape allegations around consent related to condom use and did not include an incapacitation-based rape allegation

Gia and Johnny: Discussion

Questions:

- What is your evaluation of the relevance of the evidence related to alcohol consumption?
- As the Investigator, how would you handle the possible deficiency in the scope of the NOIA?

Recordkeeping

Investigation File Contents

- Investigator is responsible for developing and maintaining an **investigation file** throughout the duration of the investigation
 - Copies of the complaint (if any), policies, and procedures in place at the time of the incident(s) and at the time of the investigation
 - Original NOIA and any subsequent NOIA updates
 - For each party and witness include:
 - Verified interview transcripts
 - Associated evidence (e.g., screenshots, written statements)
 - Correspondence with the Investigator(s)
 - Collected evidence and evidence log

Investigation File Contents Cont.

- Background information (education, employment, etc.)
 - Witness flowcharts
 - Contact Log
 - Investigator notes
 - Timelines for incident and investigation
 - Investigation Report
- Investigation file becomes part of the **comprehensive complaint file**
 - Title IX-related records must be maintained for a minimum of **seven years**

Contact Log

- All forms of contact with any party, witness, or third party regarding the complaint or associated needs
- Date, time, method of contact, topics discussed, determinations, and any agreed upon action steps for each interaction related to the Complaint

Date	Time	Contact	Type	Notes	Follow-up/ Resolution
1/25/24	1:00 PM	Sam Smith	Phone	Discussed getting emails from IT	Received emails from IT on 1/26/24
1/27/24	2:00 PM	Sally Harris	Email	Interview Scheduling Request	Interview scheduled for 1/29/24
1/29/24	3:00 PM	Sally Harris	In Person	Investigation Interview	Send transcript for verification

Evidence Log

- All evidence gathered with:
 - Description
 - Date of receipt
 - Source
 - Method of receipt
- Any evidence verification/authentication information



Evidence Log Example

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Date	Source	Method of Receipt	Type	Description	Authentication
1/25/24	Sam Smith	Email	Security video footage; USB drive	Elevator video footage from 9:10 – 10:10 PM on 12/10/23	Closed circuit from Public Safety
1/27/24	Sally Harris	Social Media Screenshot	Social Media Screenshot	Post made by Respondent at 9:22 PM on 12/10/23	
1/29/24	Sally Harris	In Person	Call Record	Phone call log from Complainant's cell phone carrier	Email with attachment from carrier to Complainant

Investigation Timeline

- Investigators begin documenting an investigation timeline upon assignment of the complaint
- The comprehensive timeline should include:
 - Dates of all significant investigation steps
 - Dates of all meetings and interviews
 - Evidence collection and review periods
 - Report writing and review periods
- Often included in investigation report

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Investigation Strategy

Step 5: Investigation Strategy

- Investigation begins with a strategy meeting
 - Investigator(s) and Title IX Coordinator or investigations supervisor
- Review complaint, NOIA, and intake documentation
- TIXC reviews scope with Investigator
 - Identify potential biases or conflicts of interest
 - Clarify roles and responsibilities
 - Interview scheduling
 - Primary contact for Advisors
 - Discuss information sharing



Strategy Considerations

Sex-Based Harassment

- Common understanding vs. Title IX definition
- First Amendment
- Consent Construct
- Credibility
- Limited eyewitnesses
- Bandwagon effect
- Evidentiary limitations

Sex Discrimination

- Pattern and practice
- Climate and culture
- Respondent vs. No Respondent
- Similarly situated comparator
- Non-discriminatory justification
- Statistical and numerical data

Retaliation

- Common understanding vs. Title IX definition
- Back-and-forth interview process
- Protected activity
- Adverse action
- Non-retaliatory purpose
- Evidence of pretext

Strategy Meeting

- Review elements of the specific policy provision(s) alleged to have been violated
 - Investigators are looking for evidence that speaks to each element
- Develop initial witnesses and tentative interview order
- Discuss challenges with the type of complaint and the parties involved
 - Anticipate allegiances
 - Disrupt possible collusion
 - Predict obstacles and obstructions
- Assess relevant pattern considerations
- Identify preliminary undisputed and disputed facts and their significance
- Other types of possible evidence and the plan to acquire such evidence

Strategy Meeting Cont.

- Establish preliminary investigation timeline
- Consider whether Informal Resolution is available
- Discuss supportive measures, accommodations, and language assistance needs as applicable
- Determine whether Emergency Removal or Administrative Leave is applicable
- Other considerations:
 - Coordination with law enforcement
 - Counter-complaints



Counter-Complaints

- Respondents may file a **counter-complaint** of sex discrimination, sex-based harassment, or retaliation against the Complainant if there is Complainant misconduct that they wish to report
- 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 party 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, clarify or have the TIXC contact them to clarify
 - Be wary of the use of counter-complaints for retaliatory purposes

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Investigation

Step 6: Comprehensive Investigation



ADEQUATE



RELIABLE



IMPARTIAL



PROMPT



FAIR



EQUITABLE

Pre-Interview Planning

- Before scheduling interviews, consider:
 - Location
 - Virtual vs. in-person
 - Accessibility
 - Scheduling constraints
 - Participants
 - Preparation
- Must provide written notification to parties with sufficient time to prepare
 - Date, time, location, participants, and purpose
- Cannot mandate interview participation for any student who is a party or witness. Institution can require employee witnesses to cooperate or impose sanctions if they do not.

Interview Scheduling and Sequencing

- Conduct interviews as promptly as possible to capture fresh recollections (but not before NOIA)
- Schedule ample time to complete the interview, review notes, and document necessary next steps
 - Consider Investigator mental capacity attention span (e.g.: “Zoom fatigue”)
 - Allow time for breaks and meals or snacks
- Solicit additional witness suggestions from parties and other witnesses
- Investigator retains discretion to determine whether a suggested witness has relevant information
 - When unsure, err on the side of conducting the interview

Interview Preparation Considerations

- Review all available documentation and evidence
- Use policy elements to determine types of evidence that would help a Decision-maker determine whether that policy was violated
 - Example: “without consent”
 - Evidence that Complainant gave consent or could not give consent
- Identify clear goals and a set of initial questions
 - Investigator should not passively accept what an interviewee wants to share, but actively gather evidence that will prove or disprove the allegations of the complaint

Interview Preparation

- Identify initial questions for each party and witness based on their role and evidence to which they may have access
 - Relationships prior to and after the reported incident(s)
 - Direct observation vs. receiving information after the fact
 - Communication with whom, when, and content

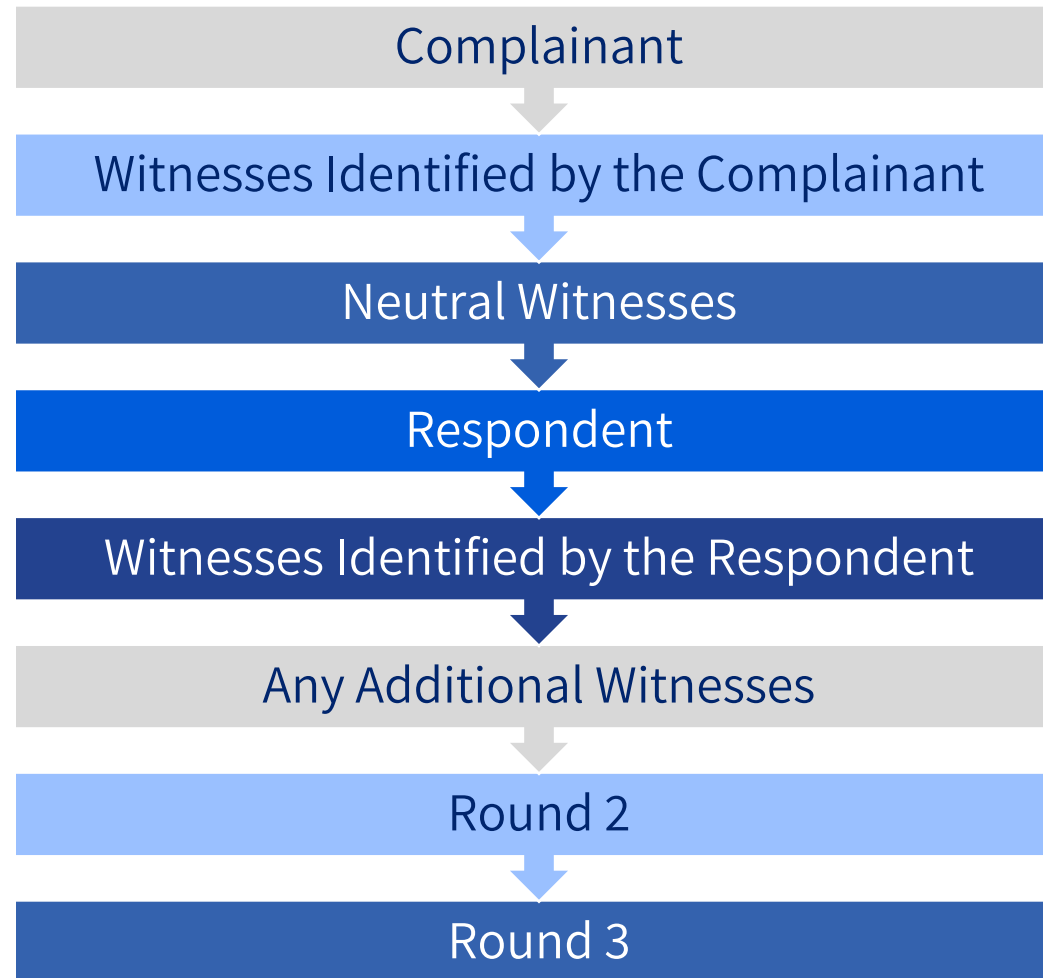
Sample Interview Sequences: A

Sequence A



Sample Interview Sequences: B

Sequence B



Sample Interview Sequences: C

Sequence C

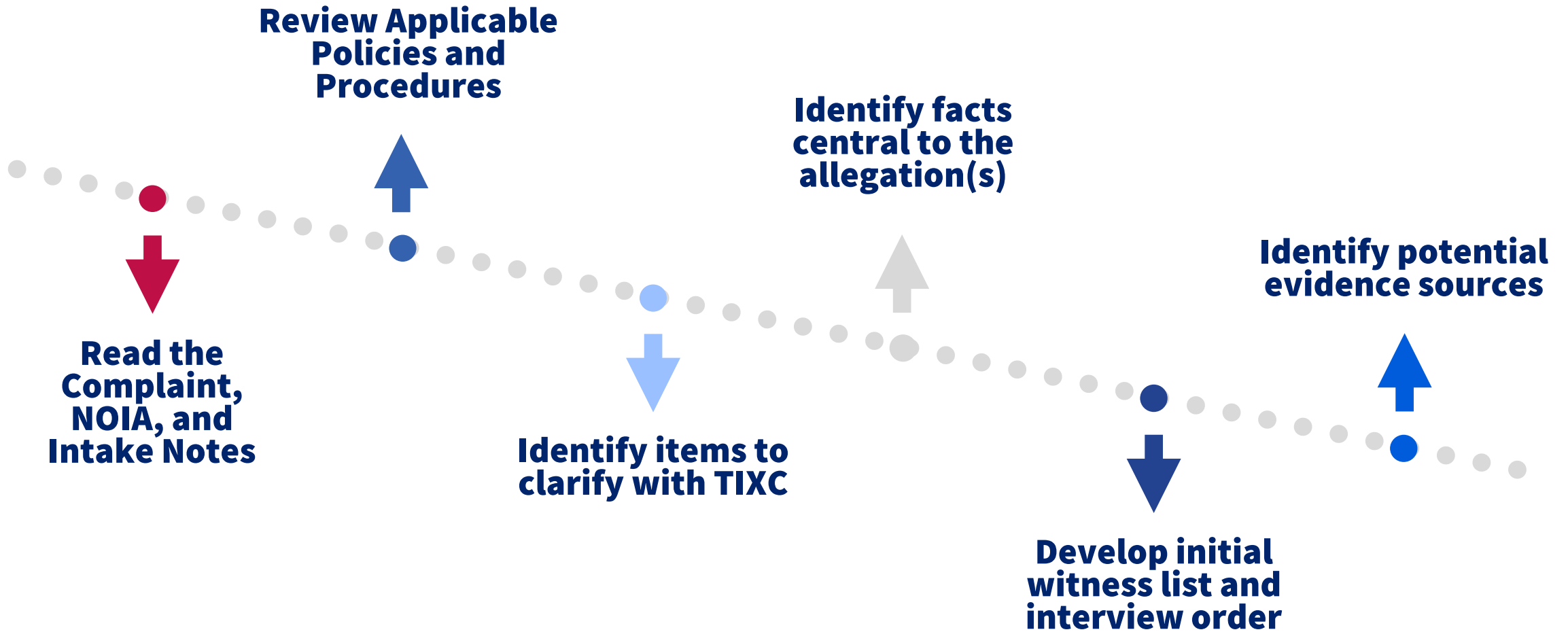


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Activity: Investigation Strategy

Activity: Investigation Strategy

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Activity: Investigation Strategy

Read the Strategy Exercise document in the course lobby

- Are there additional policies that may apply?
- Who are the initial witnesses?
- Who do you want to interview and in what order?
- What other sources of evidence may exist?

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

What are the most common types of evidence in your investigations?



Information Sharing

- Information sharing practices must balance transparency, privacy, and strategy, as well as the parties' rights
 - Often sharing more information during the investigation garners more information
 - Investigators may have to give to get, but be judicious in what is shared
- The parties will have access to all relevant evidence at the conclusion of the investigation
- Witnesses:
 - May have limited or no knowledge about the complaint itself
 - May or may not know the parties or other witnesses
 - Some information sharing will be necessary, but be circumspect and don't make assumptions that witnesses already know certain facts

Party and Witness Privacy Concerns

Privacy vs. Confidentiality vs. Privilege

1

PRIVACY

Statutory protection (FERPA) only allows disclosing records to those who need to know, but cannot guarantee confidentiality

2

CONFIDENTIALITY

Information protected by those who need not report to the TIXC because they are designated confidential or have ethical/statutory confidentiality duties (subject to exceptions)

3

PRIVILEGE

The highest legal protection (attorney giving advice to a client or clergy providing pastoral advice); client/patient/parishioner controls the privilege

New Confidentiality Rule:

“A Recipient must take reasonable steps to prevent and address the parties’ and their Advisors’ unauthorized disclosure of information and evidence obtained solely through the grievance procedures.”

Working with Advisors

- Parties have the right to be accompanied by an Advisor of their choice
- “Of choice” truly means anyone
- Investigators may establish participation ground rules, if applied equitably
- Advisor availability may not unreasonably delay the process



Building Rapport

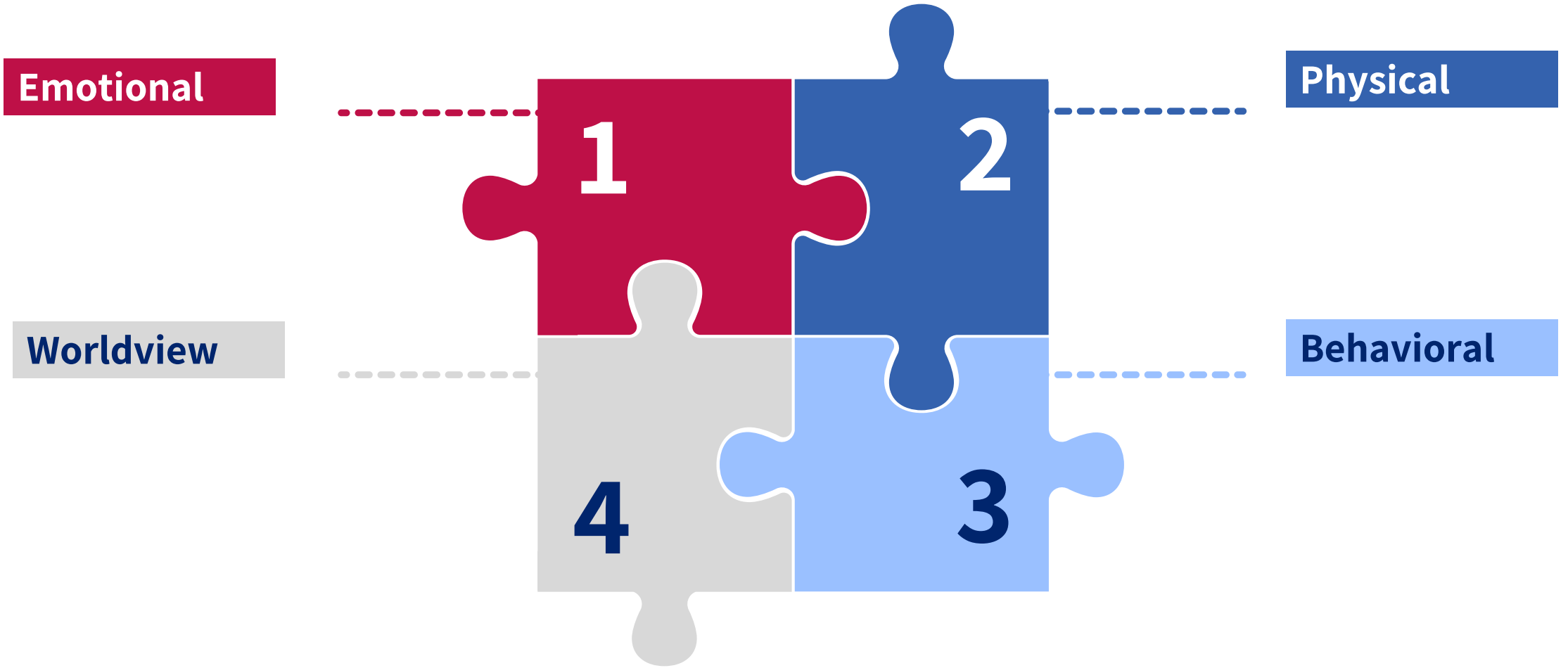
- **GOAL:** Interviewee trusts that you are neutral and impartial
- Investigators help set the tone for a productive interview
- Maintain professionalism
- Provide transparency about expectations and the process
- Balance neutrality with a human approach
- Ask questions in a straightforward, non-judgmental manner
- Follow up in a timely manner, if necessary
- Use a trauma-informed approach to working with all parties and witnesses

Trauma-Informed Practices

- **Trauma** is exposure to an event or events that create a real or perceived threat to life, safety, sense of well-being and bodily integrity
 - Acute, chronic, or complex
 - Neurological, biological, psychological, social, and emotional impacts
 - Developmental, intergenerational, historical, secondary, vicarious, or collective
 - Responses to trauma can vary, depending on a variety of factors
- Provide all persons with support that makes TIX services and processes accessible, including those who may have experienced trauma

Impacts of Trauma

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Trauma-Informed Practice Principles

- **Key principles of trauma-informed practice:**
 - Safety
 - Trustworthiness and transparency
 - Collaboration and mutuality
 - Empowerment, voice, and choice
 - Cultural, historical, and gender issues
- **ATIXA Position Statement:** Application of trauma-informed practices in our field has gotten ahead of the actual science
 - **ATIXA Recommendation:** Incorporate trauma-informed investigation and interviewing methods without compromising gathering credible, relevant evidence
 - Trauma-informed practices should not significantly influence evidence evaluation

“The Spiel”: The Process and Investigator Role

- Establishing rapport creates a conducive interview environment
- “The Spiel” helps an interviewee to understand the Investigator’s role and the process

- Investigator introduction and role
- Purpose of investigation
- Role of the Advisor
- Interview questions
- Recording/Notetaking practices
- Commitment to privacy
- Witness-specific information
- Post-interview steps
- Interview expectations
- Relevant policies
- Acknowledge difficulty
- Retaliation reminder

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Activity: Practicing Your Spiel

Interviewing

Interviewing Skills

Investigators build and improve skills over time and with practice:

- Appropriate questioning
- Active listening
- Seeking clarification
- Identifying gaps
- Body language and non-verbal communication (use caution)



Interviewing Considerations

- Prepare questions in advance
 - Open-ended questions designed to elicit narrative responses
 - Listen to answers before asking additional questions
 - Note discrepancies or areas for follow-up
- Use active listening skills
 - Eye contact
 - Head nodding
 - Summarization/Restating
- Avoid tangents or distractions
- Insert logical additional questions flowing from interviewee's answers

Questioning Considerations

- An interview is a conversation designed to elicit relevant information in a non-accusatory manner
- Start with broad questions, but focus on timelines and details as well
- Explore all gaps in information; answer all questions
- Ask purposeful questions:
 - What do I need to know?
 - Why do I need to know it?
- Use policy definitions to inform questions
- Avoid unnecessary repetition or traumatic re-triggering
- Choose or blend effective questioning strategies/methodologies

Questioning Tips

- Listen carefully
- Seek to clarify terms that have multiple meanings
 - “We hooked up” or “She was acting weird”
- Avoid:
 - Accusatory or argumentative questions/tone
 - Confusing questions
 - Blaming questions
 - “Double-barreled” questions
 - Evaluative responses
 - Sanitizing language (use the terms used by the interviewee)



Questioning Techniques

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Following
vs.
Leading



Explaining
vs.
Defending



Clarifying
vs.
Challenging



Curiosity
vs.
Suspicion

Interview Challenges: Resistance, Reluctance, and Lying

- Offer a reminder of Investigator’s role as a neutral fact-gatherer
- Maintain rapport and avoid accusation
 - “Help me understand...”
 - “I think I’m missing something...”
 - “Can you tell me more about that?”
- Use language mirroring
- Allow opportunity for interviewee to restate
- Review retaliation, amnesty policies, expectation of truthfulness
- Avoid statements reflecting moral judgment

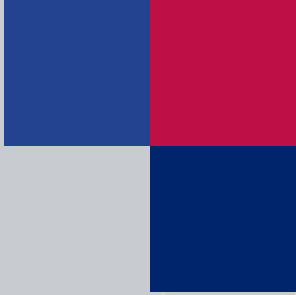
Final Interview Questions

- “Is there anyone else that you think we should talk to?”
- “Are there any questions you expected, but that we didn’t ask?”
- “Is there anything else you think we need to know?”
- What questions should I pose to other witnesses/parties?
- **FOR THE PARTIES:** “Are there any questions that you would like us to ask any witness or other party?”
- Document questions and answers provided
- Keep a running list of the questions suggested/requested by each party
 - Whether and when the question was asked
 - Rationale for not asking any question(s) based on irrelevance or impermissible evidence

Interview Documentation and Review

- Maintain interview transcripts or written summaries
 - **Transcript:** word-for-word documentation of a recorded interview
 - **Summary:** Investigator's summation of all information gathered during entire interview (may be several paragraphs or pages, depending on interview length)
- Recording is an increasingly common practice
- Parties and witnesses should be invited to review their interview transcript/summary
 - Verify accuracy, clarify where needed, and provide additional information

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Activity: Developing Questions

Activity: Developing Questions

- Refer back to the **Strategy Exercise** in the course lobby
- Begin developing interview questions based on the complaint, intake notes, and policy language provided

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Evidence

Understanding Evidence

- Duty to collect and objectively evaluate all relevant evidence
- **Evidence** is any kind of information presented to help determine what occurred
- **Relevant** means related to the allegations of sex discrimination under investigation:
 - Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred
 - Evidence is relevant when it may aid a Decision-maker in determining whether the alleged sex discrimination occurred or in assessing credibility
- All relevant evidence, unless otherwise impermissible, must be objectively evaluated and considered, including both inculpatory and exculpatory
 - **Inculpatory:** supports a finding of responsible for a policy violation
 - **Exculpatory:** supports a finding of not responsible for a policy violation

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

Privileged and Medical Information

The party must provide written permission to obtain and/or include:

- Evidence protected under a legally recognized privilege, including evidence relevant to determining capacity to consent for students with disabilities
- Records made or maintained by:
 - Physician
 - Psychiatrist
 - Psychologist
 - Recognized professional or paraprofessional in reference to party or witness treatment



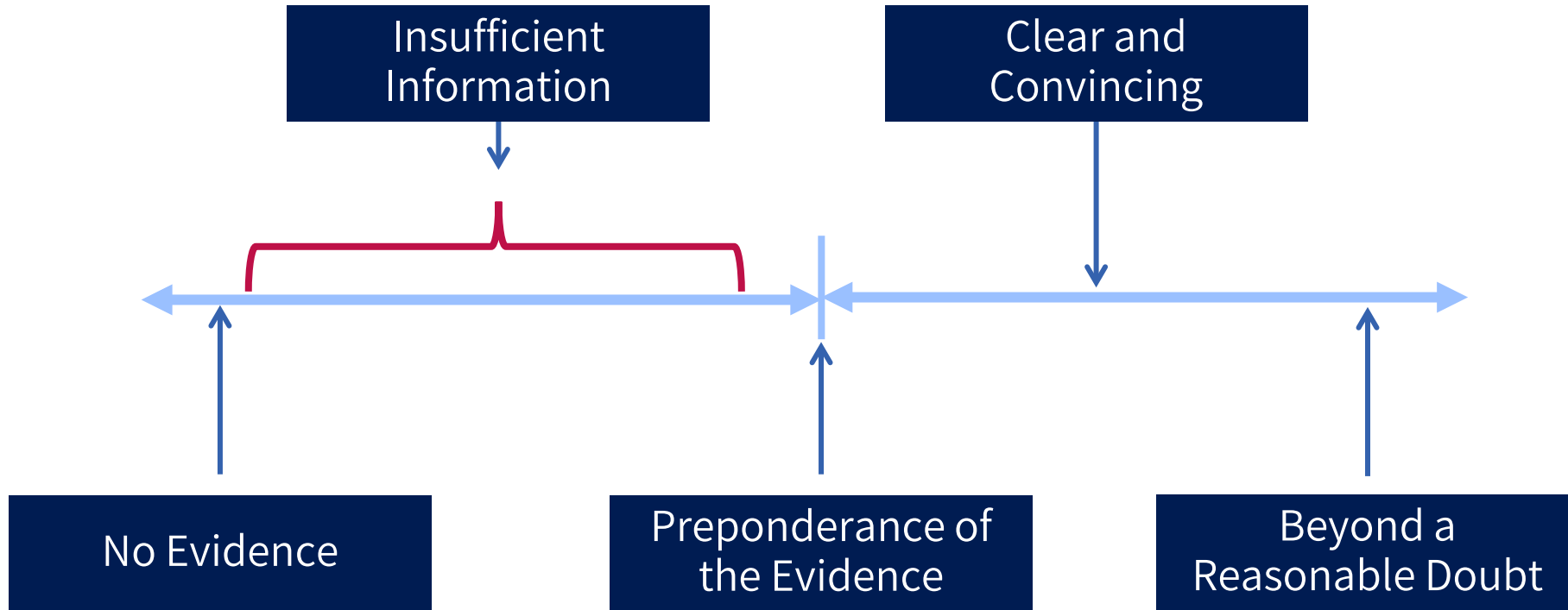
Impermissible Evidence

- Evidence of the **Complainant's sexual interests** is never relevant
- Evidence of the **Complainant's prior sexual conduct** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct, or
 - Prior sexual conduct with Respondent, if offered to prove consent to the alleged sex-based harassment
 - 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

Standard of Proof

- Institutions must use **preponderance of the evidence** standard
 - Unless clear and convincing is used for all “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
- Investigator must be familiar with the standard in institutional policy

Standard of Proof Diagram



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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**
- **Past Record***
- **Demeanor***

*Less probative

Evidence Authentication

- Not all evidence has the same degree of credibility
 - Less credible evidence may be less reliable evidence
- Investigator should seek the **highest quality evidence** available
- Investigators should try to **authenticate all evidence** provided
 - Check for possible evidence fabrication or alteration
 - Corroborate information between witnesses
 - Try to obtain complete, rather than partial, records when possible
 - Test assertions to verify accuracy when possible
 - Example: “I don’t remember if I wore a condom, but the condom in my wallet is no longer there”

Additional Considerations

Coordinating with Law Enforcement

- Law enforcement may also be investigating one or more of the allegations in the Title IX investigation
- Law enforcement may request that the institution pause or stop its investigation; however, the Title IX investigation cannot be unreasonably delayed
 - Pausing for a reasonable time to permit law enforcement to gather evidence is permissible, but offer supportive measures in the meantime
- Criminal investigation cannot substitute for the Title IX investigation



Complaint Analysis Tools

Correct Charging Rubric

- Any time a Respondent is charged with one of the “Big Six” offenses, they should also have an overlapping Sex-Based Harassment (SBH) charge
- For example, when charging with Sexual Assault, SBH will also be charged as an overlapping offense
 - If the parties are in a relationship, the SA allegation will also form the basis of an overlapping Dating Violence charge
- If using the ATIXA model policy language, Title IX, Title VII, and FHA offenses are all included in the same SBH definition, but if not using the ATIXA model, pay careful attention to how many different sexual harassment charges/policies should be charged

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?

Evaluating Sex-Based Harassment Rubric per the Regulations

- The 2020 Regulations consider unwelcomeness from a subjective lens
 - If a Complainant says the conduct is unwelcome, it is
- The 2024 Regulations consider unwelcomeness from both an objective and a subjective lens
 - Most people do not welcome objectively offensive conduct
 - Someone who welcomes objectively offensive conduct is unlikely to initiate a complaint about such conduct

Evaluating Sex-Based Harassment Rubric

- Investigators should consider reported conduct to be unwelcome unless a preponderance of the evidence shows otherwise
 - Complainants may act as if something is welcome, even if it is not
- For SBH, Investigators should primarily be focused on evidence that supports or detracts from the “limits or denies” language
 - If there is limitation or denial, then evaluate whether the conduct was severe or pervasive enough to cause that effect

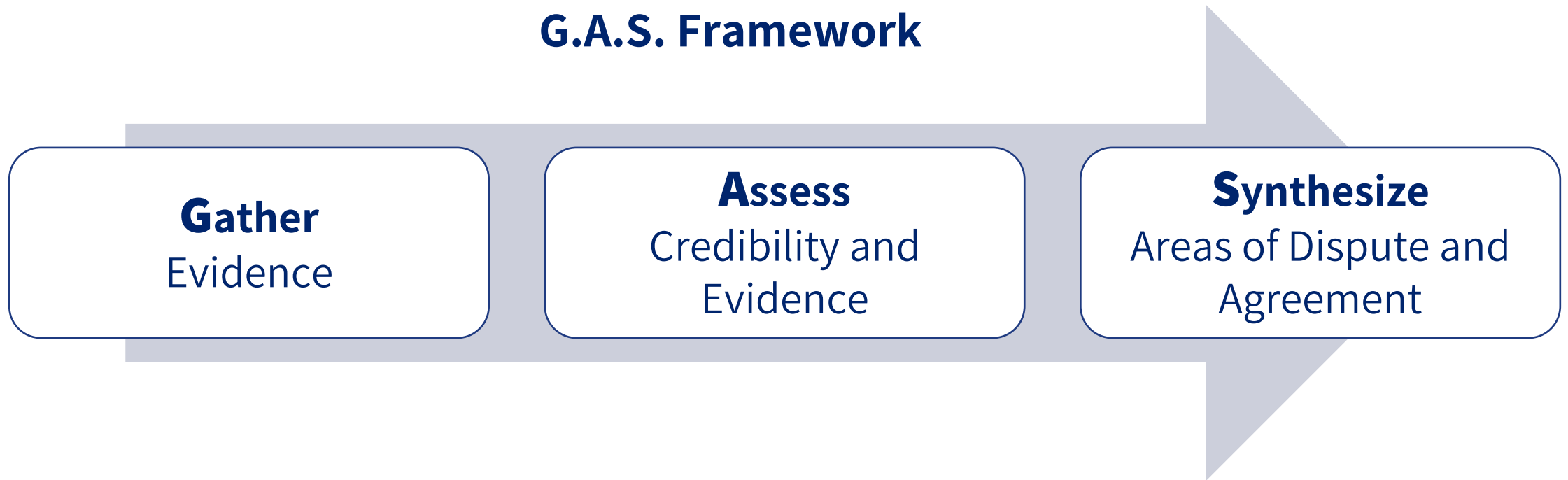
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Investigation Report

Formal Investigation

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G.A.S. Framework



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

Investigation Report Elements

Comprehensive investigation report typically includes:

- Complaint and party information
- Jurisdiction
- Scope
- Applicable policies and definitions
- Investigation timeline
- Evidence summary
- Analysis
 - Credibility Assessment
 - Disputed and non-disputed facts
- Conclusion
- Appendices

Drafting, Reviewing, and Finalizing the Investigation Report

Draft Investigation Report

TIXC/Legal Counsel Review Draft Report and Evidence

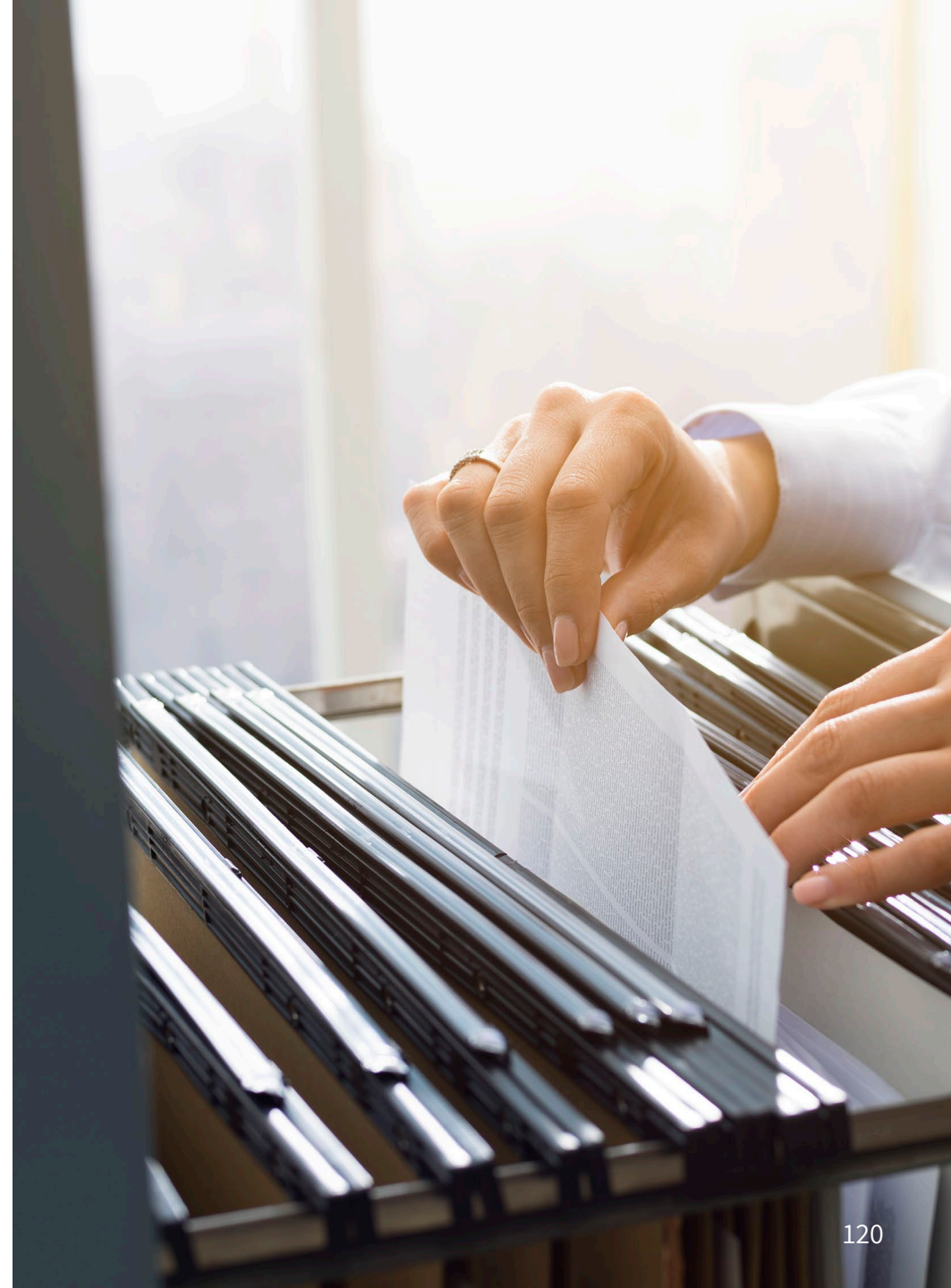
Parties and Advisors Review Draft Report and Evidence

Final Investigation Report

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Step 8: Internal Report Review

- TIXC and/or legal counsel reviews draft investigation report
 - Can occur prior to providing it to the parties, after, or both
 - ATIXA recommends after, and offering a tracked changes version of the final report
- Reviewer(s) identifies gaps, logic leaps, typographical errors, missed witnesses, and substantive issues
- Reviewer(s) should not rewrite any section of the report but can ask questions and provide suggestions
- Investigator should review and incorporate helpful edits and suggestions



Decision-Making Models

- Institutions may choose from multiple decision-making models
 - May use different models for resolving allegations under § 106.45 and § 106.46 (not recommended)
 - Know which model(s) the institution uses
 - Will impact how the remaining process requirements are fulfilled
- Decision-making models situate the Investigator role in three ways:
 - Investigator as evidence gatherer
 - Investigator as evidence synthesizer
 - Investigator as determination recommender
- ATIXA recommends separating the investigation and decision-making roles

Decision-Making Requirements

- Must provide a process that enables the Decision-maker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination or sex-based harassment
- **Section 106.46:** If no live hearing, must:
 - Allow the Investigator or Decision-maker to ask questions during individual meetings with a party or witness
 - Allow each party to propose questions for another party or witness and have those questions asked by the Investigator or Decision-maker during one or more individual meetings
 - Provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions
- Can be accomplished during the review and response phase

Step 9: Evidence/Draft Report Review

- Provide parties and Advisors with an equal and reasonable opportunity to **review** and **respond** to relevant evidence that is not otherwise impermissible
 - ATIXA recommends using a draft investigation report for this purpose
 - Must also provide an equal opportunity to **access** relevant and not otherwise impermissible evidence upon request
 - For live hearings, review must take place prior to the hearing
 - Response can take place prior to or during the hearing, or both
- ATIXA recommends providing 10 days for review and response, though the regulations do not specify a timeframe
- The report also goes to the DM for review and comment at this time in ATIXA's model

Review and Response

- Review and response may include:
 - Suggested additional witnesses
 - Suggested additional questions for parties or witnesses
 - Additional evidence for review
 - Clarification of earlier statements
 - Correction of misinformation
 - Argument that evidence is relevant or not
- Parties must receive a transcript or recording of follow-up interviews and the opportunity to submit additional follow-up questions, but keep from becoming endless back-and-forth



Investigator-Facilitated Cross-Examination

- ATIXA recommends allowing the parties to propose questions for the parties and witnesses during the review and response period
 - This should also occur throughout the investigation
- DM also reviews relevant evidence and/or report and provides questions for the Investigator to ask parties and witnesses
 - At this stage, DM should have input on whether all proposed questions are relevant/permissible
- Investigator interviews parties and witnesses, records the interviews, and asks questions deemed relevant as posed by the parties and DM(s)
- Parties may review recording or transcript and pose additional questions
- Investigator asks those questions in recorded interviews, then finalizes report

Step 10: Final Investigation Report

- Institutions determine the final investigation report review process
- Once finalized, the investigation report is distributed simultaneously to the parties and their Advisors
- The Title IX office provides the report and all relevant evidence to the Decision-maker(s)

Post-Investigation: Decision-Making and Hearings

Decision-Making Overview

INCIDENT

- Formal Complaint/
Notice to TIXC

INITIAL ASSESSMENT

- Jurisdiction
- Dismissal
- Supportive Measures
- Emergency Removal
- Referral to Another Process
- Informal/
Formal Resolution

FORMAL INVESTIGATION

- Notice of Investigation and Allegations
- Interviews
- Evidence Collection
- Draft Report
- Party Review/
Comment
- Follow Up
- Final Report

HEARING

- Questioning
- Credibility Assessment
- Determination and Rationale
- Sanctions
- Remedies

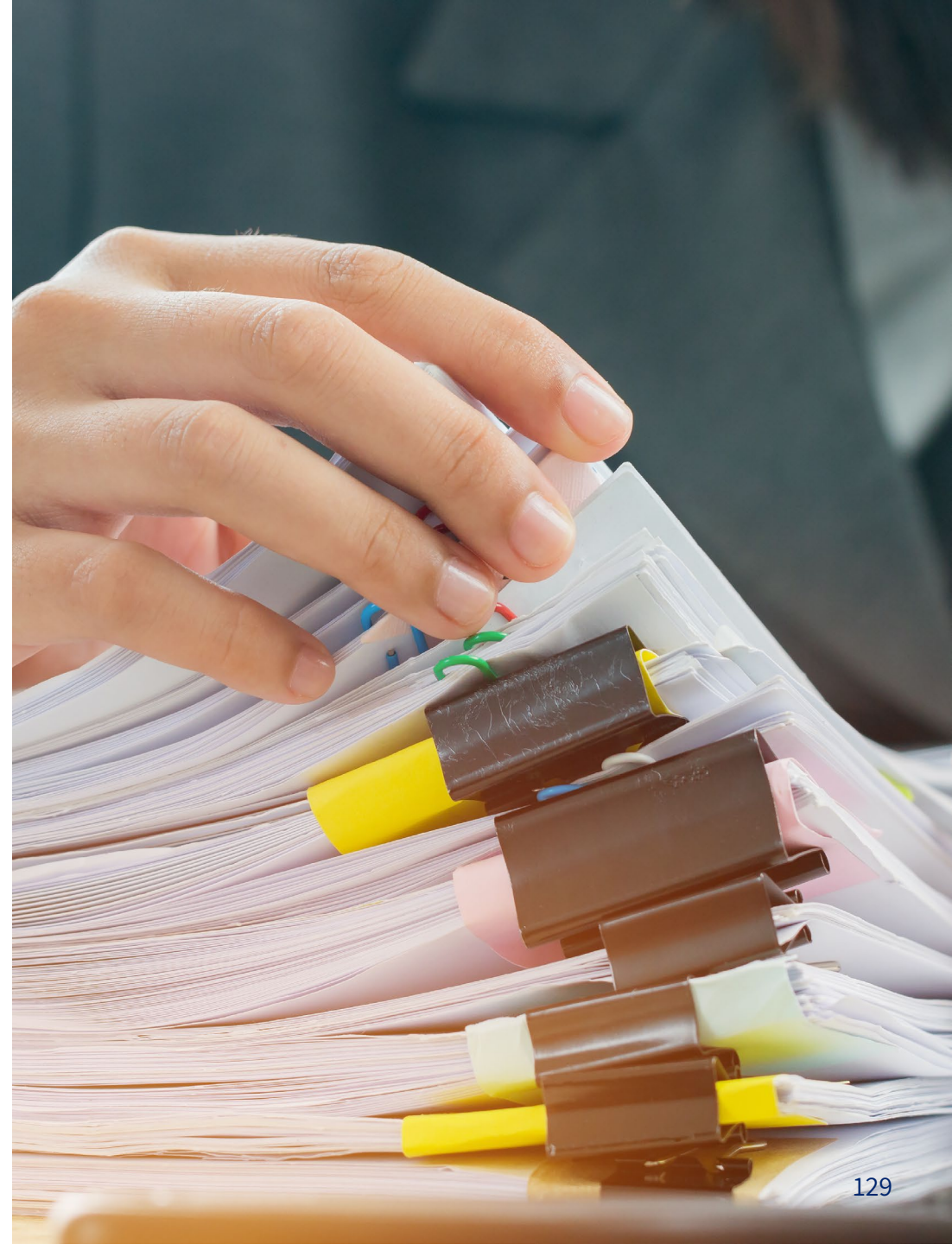
APPEAL

- Appeal Grounds
- Determination and Rationale

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No Live Hearing

- Decision-maker(s) will use the final investigation report and relevant evidence to determine if the Respondent violated policy, and if so, what sanctions or remedies are appropriate and necessary



Live Hearings

- Institutions may use a live hearing model
- Investigator may be asked to participate as a witness in the live hearing and be questioned by the Decision-maker(s) and/or parties through their Advisors
 - Example: Why did you decide some evidence is relevant and other evidence was not?
- Decision-maker manages the hearing and questioning to limit to relevant, permissible evidence only
- Hearing can be held in a physical location or virtually
- Must record hearing or create transcript

Written Determinations

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

Written Determination Elements

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

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Appeals

Appeal Overview

INCIDENT

- Formal Complaint/
Notice to TIXC

INITIAL ASSESSMENT

- Jurisdiction
- Dismissal
- Supportive Measures
- Emergency Removal
- Referral to Another Process
- Informal/
Formal Resolution

FORMAL INVESTIGATION

- Notice of Investigation and Allegations
- Interviews
- Evidence Collection
- Draft Report
- Party Review/
Comment
- Follow Up
- Final Report

HEARING

- Questioning
- Credibility Assessment
- Determination and Rationale
- Sanctions
- Remedies

APPEAL

- Appeal Grounds
- Determination and Rationale

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
- 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

Must offer appeals on 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 by the TIXC, Investigator, DM that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

Appeal Decision-Maker and Outcomes

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



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Questions?

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