

# Title IX Coordinator & Deputy Annual Training

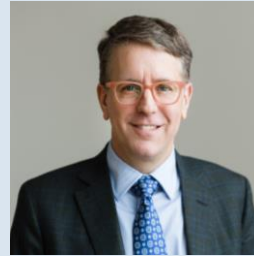
August 2, 2023



# Meet Our Team



**Sean Somermeyer**  
Partner



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**Mary Dunnewold**  
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**Nina Harris**  
Director



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# Ballast Offerings

1

## Drafting & Updating

Policy and process development and review

2

## Training

Legally compliant Title IX and non-discrimination trainings tailored to individuals' roles and knowledge base

3

## Investigators, Alternative Resolution Facilitators, & Decision-makers

Trained, skilled, experienced, and practical

4

## Interim Roles

Interim services to fill gaps in various Title IX positions

5

## Advice & Coaching

Legal and non-legal advising

# Ballast Philosophy & Approach



Collaborative partnerships that honor institutional knowledge and values



Practical solutions that are compliant and make sense for your specific institution and community



Reasonable and fair pricing that acknowledges the financial constraints institutions are facing



First-hand experience and understanding from individuals who have previously worked within higher education institutions

# Agenda

- Title IX Overview
- When does Title IX apply?
- Creating and implementing your policies and procedures
- Title IX personnel roles and responsibilities
- Oversight of reports and Grievance Procedures
- General Title IX Oversight
- Q&A
- Discussion



# Title IX Overview

- Essential compliance elements
- Training mandates
- OCR's role & guidance
- The Clery Act & VAWA
- Relationship between laws
- What about FERPA?
- MN State Law

“

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.

”

20 U.S.C. § 1681

# Title IX Basics

Prohibits gender discrimination in education programs and activities

Applies to students, employees, volunteers, etc.

Includes sexual harassment



# Sexual harassment = conduct on the basis of sex

## Quid Pro Quo

- Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

## Hostile Environment

- Unwelcome conduct that is so severe, pervasive, and objectively offensive that it denies a person equal access to a program or activity

## VAWA Crimes

- Sexual assault
- Dating Violence
- Domestic Violence
- Stalking

# Essential Compliance Elements

## Institutions must:

- Respond promptly in a manner that is not “deliberately indifferent”
- Investigate formal complaints
- Follow and publish the grievance process outlined in the regulations
- Take action to *stop the harassment, prevent the recurrence, and remedy the effects*
- Designate a Title IX Coordinator
- Publish a Notice of Nondiscrimination
- Disseminate a policy prohibiting sex discrimination
- Offer supportive measures
- Conduct training for Title IX personnel and those with heightened responsibilities
- Train students and employees



A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not *deliberately indifferent*. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.

2020 Regulations

# Training Mandates

## Definitions

- Sexual harassment
- Education program or activity

## Other

- Institutional policies and procedures
- Any technology for live hearings
- Training materials must be posted on institution's website and maintained for seven years
- Training cannot rely on sex stereotypes

## Concepts

- Conducting an impartial investigation and hearing process
  - ... While protecting the safety of complainants and promoting accountability
- Serving impartially, without bias, and without conflicts of interest
- Relevance regarding questions, evidence, and the investigation report
- Dynamics of sexual assault, dating violence, dating violence, and stalking



# Office for Civil Rights (OCR)

## Role

- Establishes compliance standards and guidance
- Enforces Title IX through investigations and compliance reviews

## Guidance

- Regulatory and sub-regulatory guidance
- Dear Colleague Letters, Amendments to Title IX Regulations, Q&As, Notices of Interpretation



# The Clery Act and the Violence Against Women Act (VAWA)

## Clery

- Consumer protection law
- Institutions must provide accurate, timely, and complete information on specific types of crimes that occur on or adjacent to campus, including sexual assault
- Clery Act violations come with significant fines
- Policy, procedure, prevention, and training requirements for
  - Dating violence
  - Domestic violence
  - Stalking
  - Sexual assault
- Requires Annual Security Report including institution's policies and crime statistics

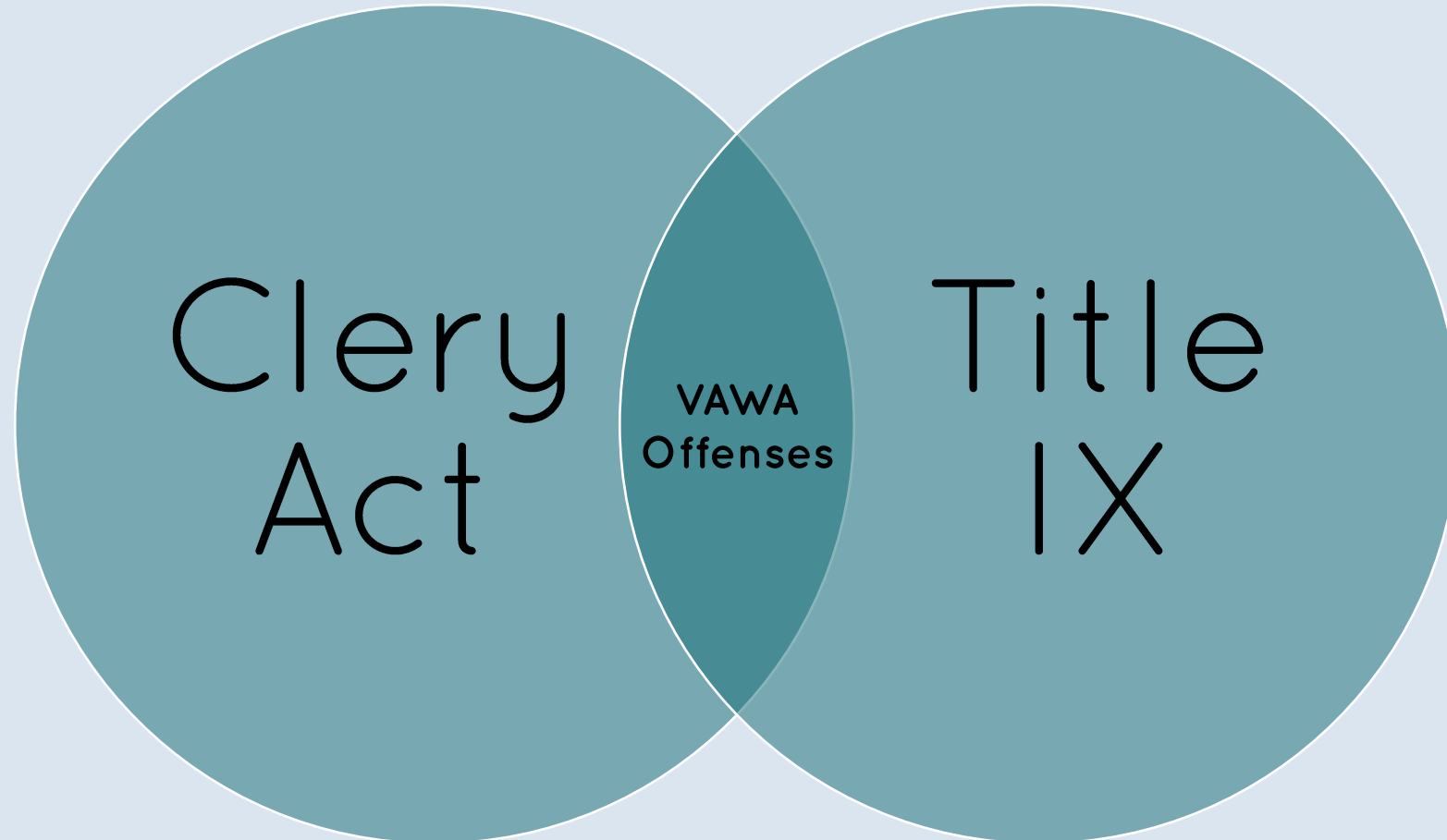
## VAWA

Institutions must:

- Prohibit sexual assault, dating violence, domestic violence, and stalking
- Provide clear definitions for the above misconduct and for consent
- Incorporate training and prevention programs for administrators, students, and employees



# Relationship between Laws



# What about FERPA?

- Right to know what records exist
- Right to dispute accuracy
- Right to control access
  - Legitimate educational interest
  - Reporting Party can know determination
  - Disciplinary sanctions when found responsible for sexual misconduct
- VAWA trumps FERPA



# MN State Statute 135A.15

## Institutions must:

- Incorporate sexual harassment policy requirements
- Inform victims of their rights
- Include reporting procedures and disciplinary processes in their policy
- Incorporate an amnesty policy
- Coordinate with law enforcement
- Health services must be confidential and screen for sexual violence and harassment
- Provide an online reporting system that permits anonymous reports
- Report annual statistics on sexual assault
- Data privacy stipulations
- Training requirements for administrators, campus security, and students
- [Full Statute Link](#)



# When does Title IX apply?

- Defining sexual harassment
- Defining education program or activity
- Parties' relationships with the institution
- When Title IX does not apply



# Sexual harassment =

conduct on the basis of sex that satisfies at least one of the following:

## Quid Pro Quo

- Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

## Hostile Environment

- Unwelcome conduct that is so severe, pervasive, and objectively offensive that it denies a person equal access to a program or activity

## VAWA Crimes

- Sexual assault
- Dating Violence
- Domestic Violence
- Stalking

# Hostile Environment Considerations

- Perspective of a “reasonable person” (consider age, abilities, positions of authority, etc.)
- Is it “severe, pervasive, *and* objectively offensive”?
- Does the conduct deny “equal access”? Does not need to be a total or complete loss of access, but *equal*?
- Consider the type of misconduct, how often it happened, where it took place, etc.



# Examples of Sexual Harassment

- Unwelcome sexual flirtations, advances, touches, or propositions
- Verbal abuse of a sexual nature
- Requests for sexual favors
- Recording video or photographs of a sexual nature without consent
- Cyber harassment
- Punishing or threatening to take adverse action against a subordinate or student for refusing to comply with sexual demands

# Sexual Assault

*Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.*

**Rape:** Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.

**Fondling:** The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

**Incest:** sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law



# Sexual Assault contd.

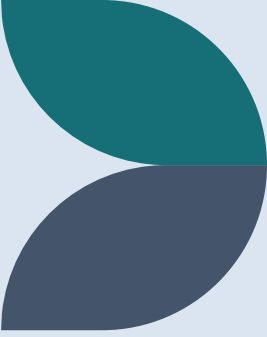
*Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.*

**Statutory Rape:** Nonforcible sexual intercourse with a person who is under the statutory age of consent

**Sexual assault with an object:** The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

**Sodomy:** Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity





# Consent

*Institutions are not required to maintain a particular definition of consent; however, they should include a definition in their policy.*

Consent is words or overt actions by a person clearly and affirmatively communicating a freely-given, present agreement to engage in a particular form of sexual contact.



# Incapacitation

- An individual's physical and/or mental inability to make informed, rational judgments
- Incapacitated individuals cannot give consent to sexual contact
- Intoxication vs. Incapacitation
- Examples include: sleep, unconsciousness, or intermittent consciousness
- Signs include: slurred speech, difficulty walking, vomiting
- May also exist due to mental or developmental disability
- **Frequent decision point for adjudicators:** *1) Was the complainant incapacitated; and 2) did or should the respondent (or a reasonable person) know/have known?*

# Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

# Domestic Violence

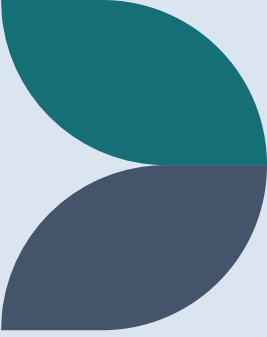
A felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the Complainant;
- By a person with whom the Complainant shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
- By a person similarly situated to a spouse of the Complainant under domestic or family violence laws;
- By any other person against an adult or youth Complainant who is protected from that person's acts under domestic or family violence laws.

# Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

Course of conduct means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.



# Sexual exploitation

A form of sexual harassment that involves one or more of the following behaviors committed for any purpose, including sexual arousal or gratification, financial gain, or other personal benefit:

- taking sexual advantage of another person without consent;
- taking advantage of another's sexuality; or
- extending the bounds of consensual sexual contact without the knowledge of the other individual.

*What are some examples of sexual exploitation?*

# Retaliation

Any intimidation, threats, coercion, or discrimination against any individual because the individual has made a report, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

# Education Program or Activity under Title IX

## What does it mean?

- Locations, events, or circumstances...
- On or off campus...
- Over which the institution exercises substantial control over the context in which the harassment took place.

## Additional requirements:

- Must have occurred within the United States.
- Includes conduct that occurred in any building owned or controlled by an officially recognized student organization.
- Institution must also have exercised substantial control over the responding party.



# Parties' relationship with the institution

## Reporting Party

Must be participating or attempting to participate in the institution's education program or activity at the time of filing a Formal Complaint.

*\*Broad interpretation of "participating or attempting to participate in"*

## Responding Party

An institution's ability to take disciplinary action under Title IX is limited when the Responding Party is not affiliated with the institution.

*\*But... should still consider appropriate action steps to facilitate reporting party's participation in education programs and activities.*

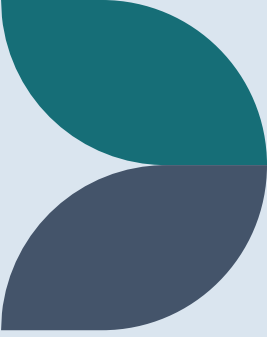
**What about a reporting party from outside the institution who reports against a current student or employee?**





# A Note about Sex-Based Discrimination

Discrimination based on sex or gender (i.e., adverse or preferential treatment based on someone's sex, gender identity, sexual orientation, etc.) is still prohibited under Title IX; however, institutions are not obligated to implement all the same Grievance Process requirements as stated in the regulations in order to address and/or investigate those types of concerns.



# When Title IX does not apply

- Conduct that occurs outside the US; however, VAWA might still apply in these instances
- Sexual harassment that is not sufficiently severe, pervasive, and objectively offensive
- Sexual harassment that occurs outside an institution's education program or activity

# Which process should we use?

Does the allegation fit under Title IX?  
If not Title IX, what about VAWA?



## Consider:

The severity of the allegation  
(severe, pervasive, AND  
objectively offensive?)

Where it occurred (on/off campus,  
US or abroad, etc.)

The roles of the involved parties  
(students, visitors, employees,  
alumni, etc.)

# How might this change with the new regulations?



- **Scope:** covers all forms of gender discrimination impacting educational environment regardless of location of incidents
  - Distinction between sex-based harassment and sex-based discrimination
- **Training:** more flexibility

# Creating and implementing your policies and procedures

- General recommendations
- Options for structuring your policy/procedures
- Required policy definitions & elements
- Additional best practice recommendations



# General recommendations

- Be intentional about who helps craft/revise your policies and procedures (Title IX Coordinator should be central!)
- Gather input from key stakeholders whenever possible – helps with buy-in down the road
- Internally maintain previous policies
- Ensure your Title IX policy doesn't conflict with or contradict any other existing institutional policies
- Plan for community-wide education about any updated policies
- Policies should be published, easily accessible, and posted widely. Be diligent about removing old policies from websites, resources, materials, etc.
  - Include updated policies on the website and all handbooks/catalogs provided to applicants for admission and employment
- Use easily understandable language



# Structuring your policy and procedures

## Title IX vs. Non-Title IX sexual harassment

Different processes, or keep as similar as possible?

What about allegations of VAWA crimes?

## Considerations:

- Barriers to reporting
- Clarity / minimizing confusion
- Equity
- Institutional mission
- Cost
- FERPA interaction
- Consistency with other campus processes



# Required Policy Definitions & Elements

## Sexual harassment

- Quid Pro Quo
- Hostile environment
- Sexual assault
- Domestic violence
- Dating violence
- Stalking

## Others

- Sexual exploitation
- Consent
  - Force
  - Incapacitation
- Retaliation
- Program or activity
- Formal complaint
- Reporting/Responding Party/Complainant/Respondent

## Elements

- Scope of policy
- Notice of non-discrimination
- Supportive measures
- Reporting process
- Grievance process
- Rights of parties
- Potential sanctions and remedies





# Best Practice Recommendations

Templates

Conversation  
checklists

Case tracking  
system

Amnesty  
policy\*

Informal  
resolution

Consensual  
relationships

Student &  
community  
reviewers



# Title IX personnel roles and responsibilities

- Title IX Coordinator role and responsibilities
- Role of the investigator
- Role of decision-makers
- Role of advisors



# Title IX Coordinator: Role and Responsibilities

Must designate at least one Title IX Coordinator

Should have significant autonomy and seniority

Consider how the Coordinator best fits into the institution's organizational chart

- Creates and implements legally compliant policy and procedures
- Oversees response to reports and formal complaints as well as informal and grievance procedures
- Implements supportive measures and facilitates connection to resources
- Ensures sanction and remedy compliance
- Training oversight
- Recordkeeping

# Investigator: Role and Responsibilities

- Can be internal or external
- Burden to collect sufficient evidence
- Conducts fair, prompt, and impartial investigations
  - Identifies witnesses and evidence
  - Provides parties opportunity to submit evidence
  - Identifies factual issues
  - Maintains records, recordings, etc.
  - Creates an investigation report
- Works in coordination with the Title IX Coordinator, particularly around evidence and report review
- Maintains impartiality and avoids bias
- Receives annual training



# Decision-makers: Role and Responsibilities

## Hearing Panel Members & Adjudicator(s)

- Attends and conducts a live hearing
- Determines whether the institution's policy has been violated under the appropriate standard of evidence
- Determines sanctions, if necessary
- Writes a Notice of Decision that includes a rationale for the finding
- Avoids bias and conflicts of interest
- Receives annual training

## Appeal Officer(s)

- Determines a ruling on a party's appeal by reviewing appropriate investigation/hearing materials
  - Not a "re-do" of the investigation
- May meet with parties
- Writes a Notice of Decision that includes a rationale for the outcome
- Avoids bias and conflicts of interest
- Receives annual training



# Conflicts of Interest



Biases *for* or *against* reporting or responding parties individually or generally



A material connection to the parties, witnesses, or issues that would cause a reasonable person to question partiality



Immediately disclose any potential conflicts of interest to the Title IX Coordinator



Conflicts of interest may be raised on appeal



Incorporate an avenue for parties to raise potential conflicts of interest early in the process

# Avoiding Bias

Bias = tendency to like or dislike; may involve stereotypes

Might be implicit

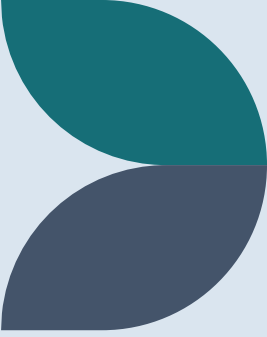
Avoid prejudgment of the facts

# Frequent implicit biases

- Race
- Gender
- Gender identity
- Gender expression
- Sexual orientation
- Religion
- National origin
- Ethnicity
- Age
- Disability
- Marital status
- Veteran status







# Conflict, or not?

- Complainant is a star athlete and her coach is a member of the panel pool.
- Respondent worked with one of the decision-makers on a potential conduct violation.
- Susan, the investigator, majored in Women and Gender Studies as an undergrad.
- Complainant is an Econ major, and one of the decision-makers is an Econ professor.

# Advisors

- Advisors assist parties throughout the process; can be attorneys, advocates, friends, family members, mentors, etc.
- Parties have the right to an advisor of their choice
- Advisors may attend meetings and interviews with the party
- If a party does not have an advisor, the institution must provide an advisor to conduct cross-examination on the party's behalf during the hearing. These advisors are not required to be trained
- Consider Advisor Guidelines for both the general process as well as the hearing
- What if an advisor is being overtly disruptive or not adhering to your Advisor Guidelines?

# Oversight of reports and Grievance Procedures

- Employee reporting requirements
- Responding to a report
- Starting the Grievance Process
- Dismissal
- Rights of the parties
- Emergency removal and administrative leave
- Notice of Allegations
- Informal process
- The investigation
- Directly related evidence review
- Investigation report and review
- The hearing
- Making a determination
- Sanctions
- Notice of Decision
- The Appeal process
- Steps once the Process is over



# Reporting Methods

Direct communication from the reporting party to the Title IX Coordinator

Third-party reports from faculty, concerned friends, RAs, etc.

Online reports

Anonymous reports

# Employee Reporting Requirements

## Confidential Resources

- Not required to report disclosures to the Title IX Coordinator
- Legally privileged
- Includes licensed counselors; individuals associated with a religious order/denomination; licensed healthcare providers; victim advocates

*\*While working within the above capacity*

## Officials with authority to institute corrective measures

- Required to report instances or disclosures of sexual harassment to the Title IX Coordinator
- Who this applies to will depend on your institution
- Deans? Directors? RAs?

## Other employees

- Institutions have discretion re: reporting requirements
- Consider requiring all non-confidential employees to report disclosures or instances of sexual harassment to the Title IX Coordinator
- What about student employees?



# Confidential Resources

When an individual discloses any form of sexual harassment to a confidential resource, the resource should discuss the following with the individual:

- Reporting options and rights (with an offer to assist with reporting)
- Campus resources and supportive measures
- The institution's retaliation policy
- The importance of preserving evidence

*\*Proposed regs include more prescriptive requirements for Confidential Resources training*

# Responding to a Report

After receiving a report:

- Title IX Coordinator should reach out to the affected individual **quickly**
- Offer the affected individual an initial conversation
- Email resources the individual might need/want to take advantage of right away
- Acknowledge that if the individual does not choose to engage right now, that you will always be available going forward
- However, delaying complaints or law enforcement reports can make investigating more difficult



# What about anonymous reports?

- If the report names the individual who experienced the misconduct, reach out to that individual ASAP
- If the report only names the individual who perpetrated the misconduct, consider next steps (meeting? Available evidence?)
- If possible, consider reaching out to the reporter for additional information
- Consider potential patterns (i.e., multiple reports from the same location? About the same person?)
- Duty to attempt remedies



# Initial Conversation with a Reporting Party

## Process Options:

- Law enforcement report
- Grievance Process
  - Informal Process
- Taking time to decide what to do next, if anything
- Potential for TIXC Formal Complaint
- Preservation of evidence
- Other options permitted by your policy, if not Title IX?

## Supportive Measures:

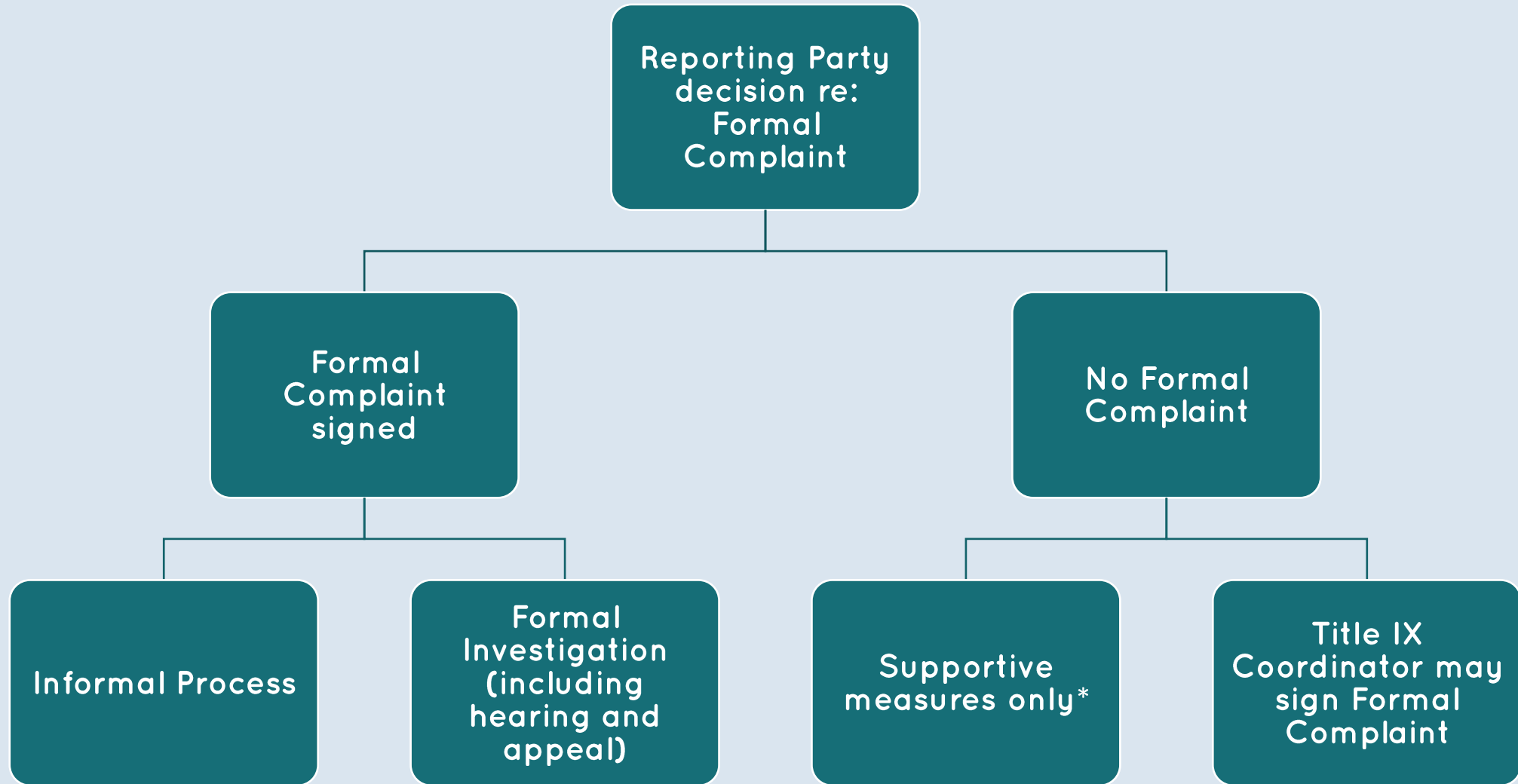
- Cannot be punitive
- No-contact directives
- Accommodations for housing, classes, etc.
- Confidential resources
- Community resources
- Campus security escorts
- Etc.

*\*Explain that access to these resources is not contingent upon moving forward with a formal complaint*

## Next steps for TIXC:

- Does the reported incident fall within the scope of your policy? If so, which process would apply?
- Notify others at the institution who need to know?
- Timely warning?
- Emergency removal?
- TIXC Formal Complaint if reporting party declines Grievance Process?





# Starting the Grievance Process

## Formal Complaint initiated by Reporting Party

- Can initiate at any time
- Requests an investigation
- Must be signed and in writing, but can be on paper or electronic (i.e., via email)

## Formal Complaint initiated by TIXC

Consider:

- Egregiousness of allegations?
- Use of weapon?
- Risk? Threat?
- Availability of evidence?
- Discuss with Deputies or Title IX Team
- If proceeding, notify reporting party



# Dismissal

## Mandatory Dismissal

TIXC required to dismiss a formal complaint if:

- at the time of the complaint, the reporting party is not participating/attempting to participate in the institution's program/activity
- the alleged conduct, even if proved, would not meet the sexual harassment definition
- the alleged conduct did not occur in the institution's program or activity
- the alleged conduct happened outside the U.S.

## Permissive Dismissal

TIXC may dismiss a formal complaint prior to a final decision if:

- Reporting party withdraws from the process (needs to be in writing)
- Responding party is no longer a student/employee at the institution
- Circumstances prevent the institution from collecting sufficient evidence



# If dismissing for any reason...

- ❑ Must notify the parties in writing and include rationale for dismissal
- ❑ Appeals of dismissals are permitted
- ❑ Consider initiating a different disciplinary process under a separate policy (Code of Conduct? Was the allegation a VAWA offense?)

# Rights of the Parties

Notice of policies,  
meetings,  
investigation,  
outcome, etc.

Supportive measures  
*(cannot penalize  
responding party in  
any way unless and  
until they are found  
responsible)*

Impartial Title IX  
personnel

Ability to discuss  
allegations

Advisor of choice

Opportunity to  
identify witnesses  
and provide  
evidence

Ability to review  
evidence and  
investigation report

Ability to appeal

# What does “prompt” mean?



Regs require reasonably prompt timeframes



Temporary delays for “good cause” are ok, as long as they’re accompanied with written notice of the delay to the parties



Incorporate grievance process timeframes into your policy, but build in opportunity for discretion (case complexity, law enforcement investigation, breaks, etc.)



Consider incorporating weekly updates to the parties

# Emergency removal & administrative leave

## Institution may remove a student responding party IF:

- Institution goes through an individualized safety/risk assessment
- Institution decides that an immediate threat to the physical health or safety arising from the allegations exists
- Institution provides the responding party an opportunity to challenge the removal decision

## Institution may place non-student employees on leave:

- while a Grievance Process is pending





# Notice of Allegations

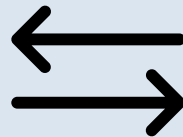
- Notice of grievance process and the informal process
- Information about the allegations known at the time (names, conduct constituting sexual harassment, date and location of incident)
- Responding party presumed not responsible, and that the determination of responsibility occurs at conclusion of the process
- Rights of parties to an advisor, to review evidence, etc.
- Any code of conduct provision prohibiting knowingly making false statements/submitting false information
- Provide with sufficient time for parties to prepare a response
- *\*If additional allegations arise during the process, provide an amended or additional notice to both parties*

# Consolidation of Complaints

“An institution may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, *where the allegations of sexual harassment arise out of the same facts or circumstances.*”

# Cross-Complaints

How does your institution handle situations where both parties have complaints against the other?



# Informal Process

## Requirements

- Must be voluntary; parties must provide written consent to participate
- Formal complaint required
- Allowed at any time prior to final decision being made
- Title IX Coordinator has discretion
- Unavailable when responding party is an employee and reporting party is a student

## Various approaches

- Alternative resolution (i.e., restorative justice, dialogue facilitation, etc.)
- Shuttle diplomacy or negotiation
- Responding party does not need to accept responsibility to access informal process, but that can be written into your policy if desired



# Informal Process Considerations

- Does completing an informal process mean that the reporting party can no longer resume/initiate the investigation process?
- What records will be maintained, and with whom could they be shared?
- What outcome is necessary to stop, prevent, and address effects of the harassment?
- What types of allegations are more/less appropriate for informal resolution?
- Consider the parties and whether this type of resolution could truly be successful.
- What if the allegation is especially egregious – is informal resolution still an option?

# Pros and Cons

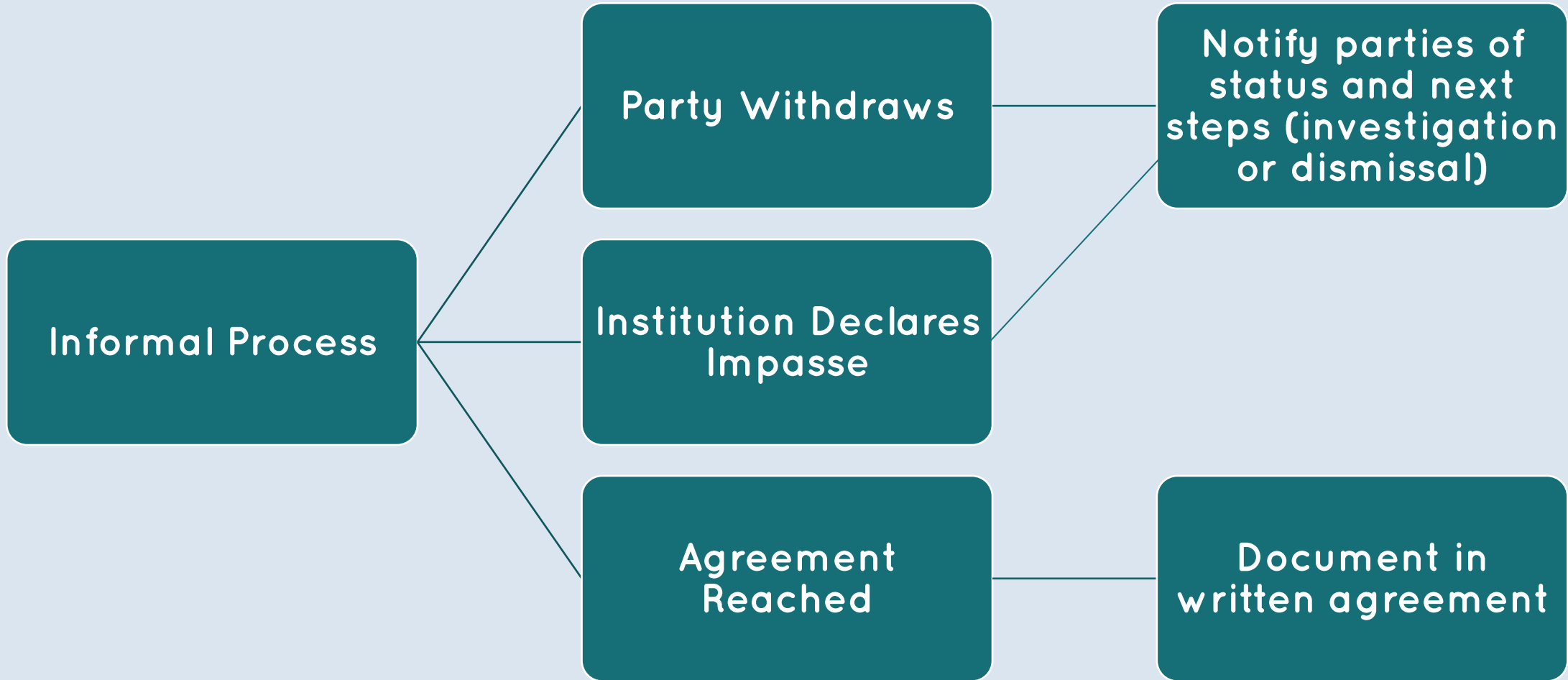
## Pros

- Quick
- Low/No confrontation
- Parties in control
- Parties feel heard
- Focus on resolution; not conflict
- Less resources and risk

## Cons

- Coercive?
- Doesn't hold perpetrators accountable?
- Lack of due process?
- Puts community at risk?
- Party changes mind?





# Potential Terms of Resolution

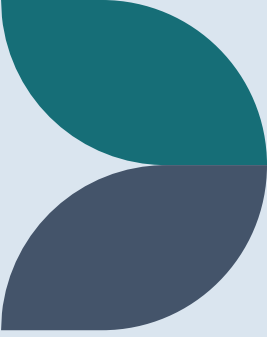
- Suspension
- No contact order
- Nondisparagement
- Change in classes (now and future)
- Change in residence hall (now and future)
- Withdrawal from athletics team or co-curricular activities
- Reimburse expenses
- Boundary counseling and other mental health or addictions services
- No further action or investigation
- No admission of responsibility
- Agreement not to sue
- Impact of not following terms





# Impact of Proposed Regs on Informal Resolution

- Clarification of student/employee status
- More flexibility regarding Facilitator training
- Formal Complaint requirement gone – can access the Informal process more easily



# Discussion

Examples of successful informal resolution processes?

Examples of unsuccessful informal resolution processes?

- What went wrong?
- Lessons learned?

# The Investigation

Who should investigate? How do you decide?

Investigator determines investigation strategy (in coordination with TIXC)

Witness and party interviews

Evidence collection

# Directly Related Evidence Review

## Must:

- Provide review of evidence “directly related” to the allegations for parties and their advisors
- Include inculpatory and exculpatory evidence
- Include evidence upon which the institution does not intend to rely upon in making a decision
- Allow at least 10 days for review and submission of a response
- Provide copies of evidence directly to parties/advisors in electronic or hard copy format
- Evidence must be made available for review at the hearing

## Next steps:

- If responses are submitted, investigator considers them prior to completing the Investigation Report
- Additional evidence collection needed? Other action?
- What if evidence is submitted during or after the review period?



# What about...



- Evidence related to sexual history?
- Privileged information?
  - Cannot require or allow this unless privilege has been waived by the party
- Treatment/health records?
  - Only permissible if party provides voluntary, written consent to include
- Redactions?
- Ensuring parties/advisors don't share the evidence with others?
- Can/should parties see each other's responses to the evidence?
- Close of evidence?

# Reporting Party's sexual behavior

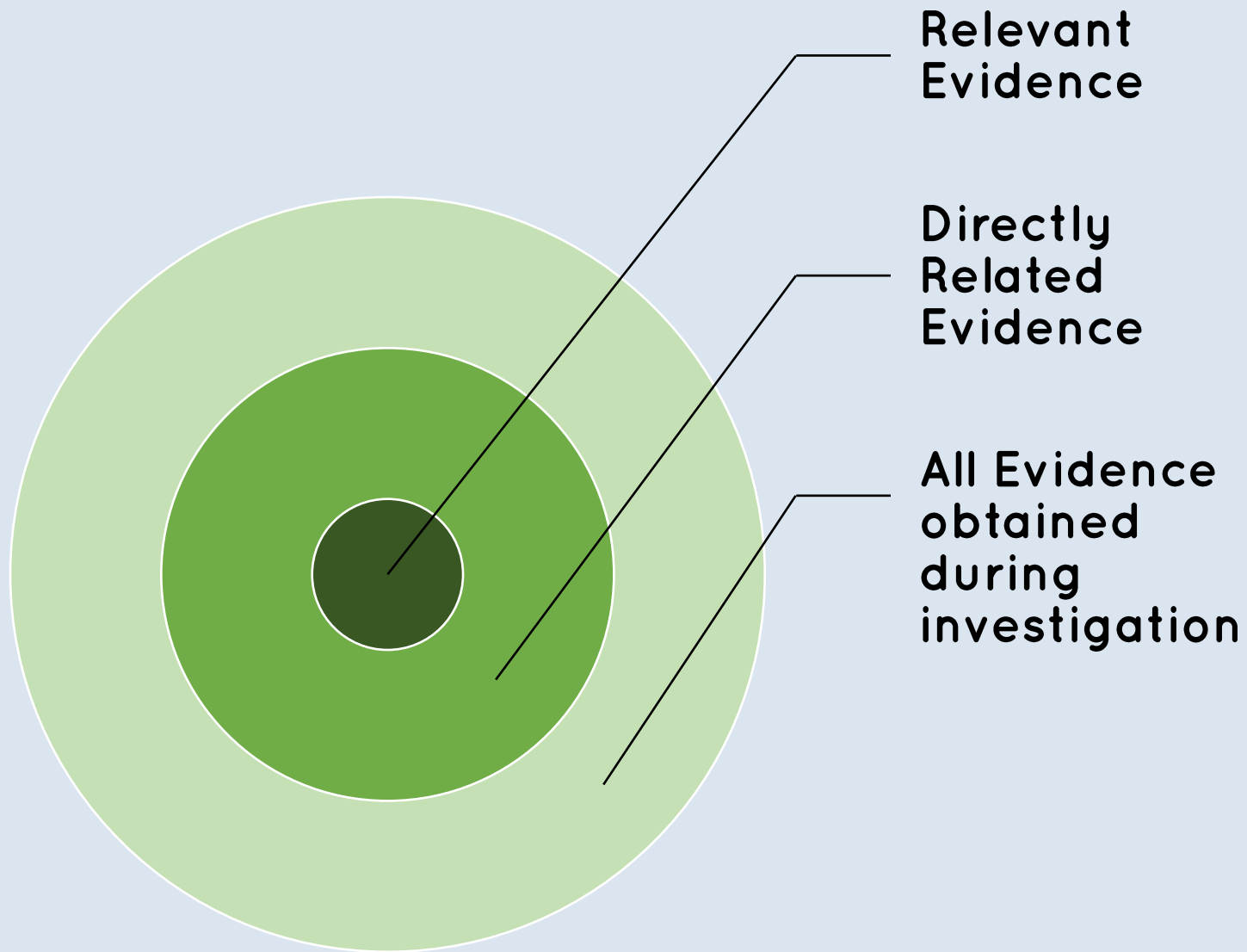
- Information about a reporting party's sexual behavior or predisposition is not permitted in the Investigation Report or during the hearing *unless*:

The information is being used to prove someone other than the responding party committed the misconduct

OR

The information relates to prior sexual behavior between the reporting and responding parties and is submitted *in an effort to prove consent*





# Investigation Report and Review

- Summary of relevant evidence written by the Investigator
- Must be made available for parties and advisors to review (in hard copy or electronic format) 10 days prior to hearing
- Written responses to the report are permitted and provided to the hearing panel
- Consider having the investigator share the report with the TIXC prior to sharing with the parties/advisors to ensure adherence to the institution's policies and procedures





# The Hearing

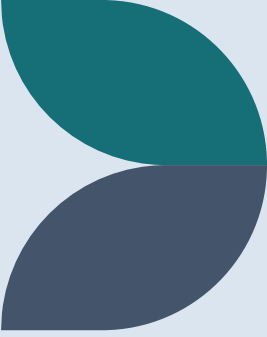
- Needs to be live but can be virtual (must include video)
- Provides opportunity for parties' advisors to ask questions of the other party and witnesses
- Institutions must provide an advisor to parties who do not have an advisor during the hearing specifically for the questioning portion
- Can have a single decision-maker or multiple, but someone must make relevancy determinations during the hearing
- TIXC or another individual may be present to enforce hearing decorum and process
- Must be recorded

# Who attends the hearing?

- Decision-maker(s) / Hearing Panel members
- The parties and their advisors
- Witnesses who the parties or the decision-makers have identified as needing to be present for questioning
- Title IX Coordinator may attend (to help with logistics, decorum issues, hearing process, etc.)
- General counsel may attend (or be on standby for questions)
- Investigator may attend

# Hearing technology

- This will vary depending on the institution.
- Decision-makers need to be trained in how to use their institution's hearing technology.
- Remember that hearings need to be recorded.
- Pros and cons of various hearing tech setups? What has worked well, and what hasn't?



# Hearing Preparation

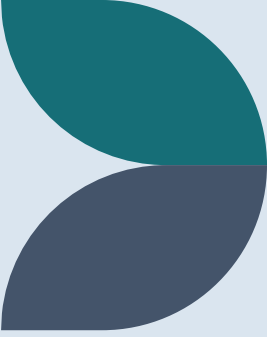
- Hearing format and structure (breaks, length, etc.)? Determine in coordination with TIXC
- Review the Investigation Report and evidence
- What questions do you plan to ask parties/witnesses during the hearing?
- Which witnesses do you want present, if any, during the hearing?
- Which witnesses do the parties want present, if any, during the hearing?
- Who will be the one to make relevance determinations?
- Does either party need a school-appointed advisor?
- Consider conducting pre-hearing meetings with each party and their advisor

# Pre-hearing meetings



- Not required, but could be good practice to meet with each party and their advisor in advance of the hearing to discuss:
  - The hearing process and what to expect
  - Expectations regarding decorum, Advisors' participation, how any technology will be used during the hearing
  - Review the cross-examination phase of the hearing
  - Whether the parties want any witnesses present at the hearing
- Can be facilitated by the Chair, Decision-maker, or the TIXC

# Role of the Hearing Panel Chair (or sole Decision-Maker)



- May facilitate the hearing, with assistance from TIXC.
- Make relevancy determinations for all questions asked during the hearing.
- Make determinations about appropriateness of questions or information provided (cannot be irrelevant, abusive, or overly repetitive).
- Ensure advisors stay in line with hearing decorum guidelines.

# Relevancy Determinations

Does the information help me in deciding if there was a policy violation?

Does it “move the dial” in proving or disproving the allegations?

Off limits:

- Medical or treatment records without voluntary, written consent
- Reporting party’s prior sexual history (with two exceptions)
- Legally privileged information unless party waives privilege

- Know where the line is regarding evidence or questioning intended only to harass or embarrass another party
- What about Responding Party’s prior or subsequent misconduct?
- What about evidence or questioning that is duplicative or repetitive?



# Difficult situations

- What if a party doesn't show up to the hearing?
- What if a party refuses to answer a question?
- What if an advisor starts violating one of your hearing guidelines?
- Other difficult situations you've encountered? How did you handle them?



# Making a Determination

## Standard of Evidence

Preponderance of the evidence (“more likely than not” / 50.1% likely) OR the clear and convincing standard

## Process

Hearing panel members need to meet after the hearing to deliberate.

Determine which policy definitions apply to the allegations.

## Decision-Makers

- What are the undisputed facts and what are the disputed facts?
- What does the evidence show regarding the disputed facts? Which evidence is most credible? Why?
- Using the appropriate standard of evidence, did a policy violation occur? Analyze each element of a policy definition under the evidence standard.
- What is the rationale for your decision?



# Standards of Evidence

- **Preponderance of the evidence:** “more likely than not” that the policy was violated (50.1% and above).
- **Clear and convincing standard:** highly and substantially more likely to be true than untrue.

# Sanctions

Need to stop,  
prevent, and remedy!

Consider educational  
and developmental  
sanctions

Engage in a risk  
assessment to help  
determine  
appropriate  
sanctions

Sanctions should  
reflect the severity of  
the behavior  
(consider prior  
misconduct)

Consider any  
loss/injuries to the  
Reporting Party or  
the institution and  
how to rectify those,  
if possible

Can consider past  
cases of similar  
misconduct with  
assistance from Title  
IX Coordinator



# Common Sanctions & Remedies

## Students

- Probation
- Loss of leadership positions
- Loss of privileges
- Housing changes
- Limited access to campus
- Counseling or required education
- Suspension
- Expulsion

## Employees

- Loss of leadership positions
- Loss of privileges
- Required education
- Disciplinary letter
- Unpaid suspension
- Demotion
- Termination



# Notice of Decision

## Needs to include:

- Allegations
- Procedural steps
- Findings of fact
- Decision regarding responsibility
- Rationale for each allegation/decision
- Sanctions, if applicable
- Whether remedies will be provided
- Appeal process information

## Other requirements:

- Deliver notice simultaneously to the parties
- Decision/sanctions become final when parties are notified of the appeal decision OR when the deadline to submit an appeal has passed



# The Appeal Process

Available to both parties for final determination of responsibility and dismissal of formal complaints



## Required reasons for appeal:

Procedural irregularity that affected the outcome

New evidence that was not reasonably available at the time the decision was made that could affect the outcome

Conflicts of interest or bias from an official involved in the case that affected the outcome

*\*Can allow additional grounds for appeal if desired\**

# Appeal Process contd.

## Requirements

- Appeal decision-maker cannot have been previously involved in the process
  - No conflict of interest or bias
  - Required training
- Timeframe for accepting appeals?
- Let parties know if an appeal was received and that the other party has an opportunity to respond
- Must send appeal decision and rationale to parties simultaneously

## Possible Appeal Determinations

- Hearing Panel decision stands
- Hearing Panel decision overturned
- Sanction adjusted
- Remand
  - New investigation
  - New hearing or re-hearing
  - Sanctions-only re-hearing



# Steps once the Process is Over

Notice to parties that the process is over

Sanction and remedy adherence and monitoring; respond to violations

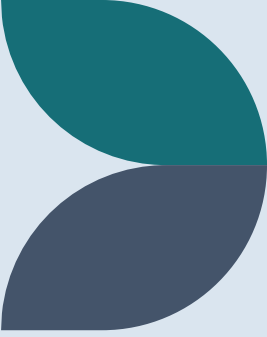
Checking in with parties as appropriate, particularly regarding ongoing supportive measures

Additional prevention measures? School-wide messages, campaigns, training, etc.?

Recordkeeping

Feedback mechanism regarding the Title IX process?





# What about the new regs?

- Supportive measures may burden respondent during grievance process, with restrictions.
- No more formal complaint requirement.
- No more mandatory dismissal, but institutions may dismiss for reasons such as complainant withdraws, respondent not participating in a program or activity, etc.
- Live hearing no longer required; however, must provide opportunity for decision-maker(s) to adequately assess credibility of witnesses.
- Athletics – Institutions cannot categorically ban trans students from participating on the sports team corresponding with their gender identity.
- More explicit and proactive requirements meant to protect pregnant students and employees

# General Title IX Oversight

- Recordkeeping and documentation
- Gender equity
- Managing campus climate
- Assessing compliance



# Recordkeeping

Records must be retained for at least **seven years**.



## Records to maintain:

- Actions taken and responses to reports
- Investigation and adjudication documents, recordings, etc.
- Training materials for decision-makers, investigators, Title IX Coordinators/Deputies, and informal resolution facilitators

# Gender Equity

- Title IX Coordinator is responsible for oversight of gender equity in Athletics
- Consider periodic check-ins with other departments regarding any gender equity gaps or concerns

# Campus Climate Management

- Periodic campus climate surveys are useful in determining experiences or perceptions on campus that you might not be aware of
- Strategies for combatting misperceptions about Title IX?
  - Focus groups or individual meetings
  - Targeted resource development and deployment
  - Bolstering website content
  - Community-wide messages
  - Forums or events
  - Consider engaging campus partners and student leadership
  - What about managing repercussions stemming from individual cases?

# Assessing Compliance



Templates and checklists for all steps of the process



Internal reviews



Feedback mechanisms from parties



Internal case debriefs with team members



Professional development

# Keep in touch!



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