

ATMA

Training and Certification Course

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The primary focus of this course is necessary skill building to successfully serve in a decision making role in the Title IX Formal Grievance Process



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



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

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

All AFA 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



Title IX is a gender equity law

Equity refers to the understanding that not all individuals have access to the same resources and opportunities

Equity focuses on providing support and resources to reduce disparities in access to the education program

Title IX seeks to remedy the inequities, sexual harassment and sex discrimination create



Prompt Resolution

Complete without undue delay

Title IX regulations don't define "prompt"

60-90 business days is a good guide

Grievance process may take longer than expected

Anticipate, mitigate, and document delays

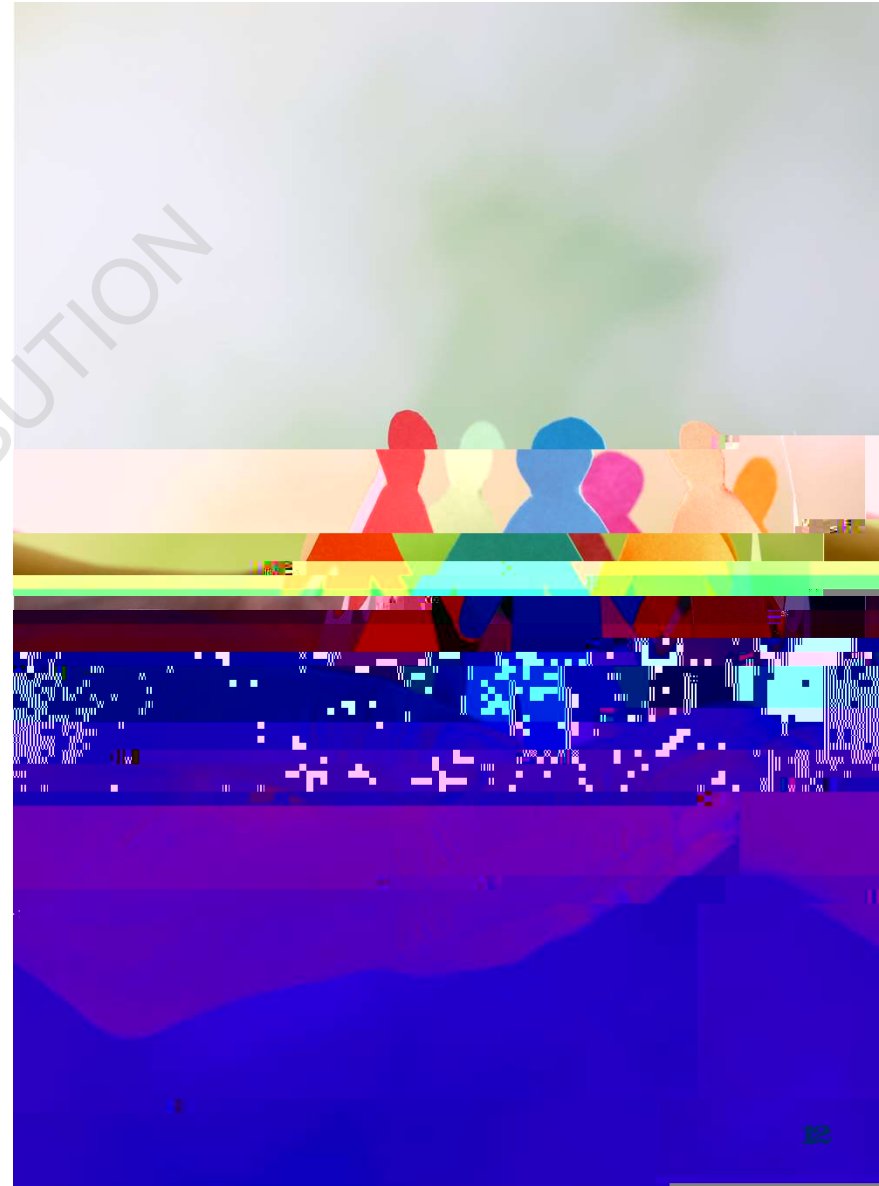
Communicate with parties regarding delays

Equitable Resolution

Treat all parties equitably

Ensure that all parties have opportunity to fully participate in the grievance process

Make certain that all Title IX team members operate without bias and/or conflict of interest



10 Steps of Investigations

- 1 Receive Notice/Complaint**
- 2 Initial Assessment & Jurisdiction Determination**
- 3 Determine Basis for Investigation**
- 4 Notice of Investigation and Allegations (NOIA)**
- 5 Establish Investigation Strategy**
- 6 Formal Comprehensive Investigation**
- 7 Draft Investigation Report**

Draft report and directly related evidence must:

Be sent to each party and Advisor in an electronic format or hard copy

Include evidence upon which the Recipient does not intend to rely

Include exculpatory and inculpatory evidence

Investigator must:

Allow 10 days for written response

Consider parties' feedback and incorporate where appropriate

Investigator sends the final investigation report to the parties and Advisors for review at least 10 days prior to the decision making phase/hearing



**Decision maker (DM) could be a single person or a panel (typically three)
Institutional community member (typically faculty or staff) or external
contractor**

Currently, all institutions must hold a live hearing

DM can ask relevant questions

Advisors can ask relevant questions on behalf of parties

TXC and Investigator may not serve as Decision maker

NPRM could affect decision making structure in the future

Hearings may be optional, depending on jurisdiction

TXC or Investigator may serve as DM

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Title IX Coordinator (TIX) responsibilities:

Appointing Decision makers (DMs)

Properly training DMs g C^a i ni D r^a D H fi inc “ R

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Many Title IX training requirements are covered in this course:

Decision makers have no side, other than the integrity of the process

DM must have a thorough understanding of:

Institutional policy and procedures, including the investigation process

Whether you are addressing an alleged incident(s), a pattern, or a culture/climate complaint, and what findings are necessary based on that footing

Best practices for asking good questions

Decision making procedures and management

Evidence and how to weigh it and apply it to institutional policy by the standard of evidence

How to analyze credibility

How to make determinations, decide sanctions/remedies, and write a rationale

Decision makers need to be an organized manager and multi-tasker with
Effective questioning skills
Strong writing skills
Subject matter expertise
Analytical skills



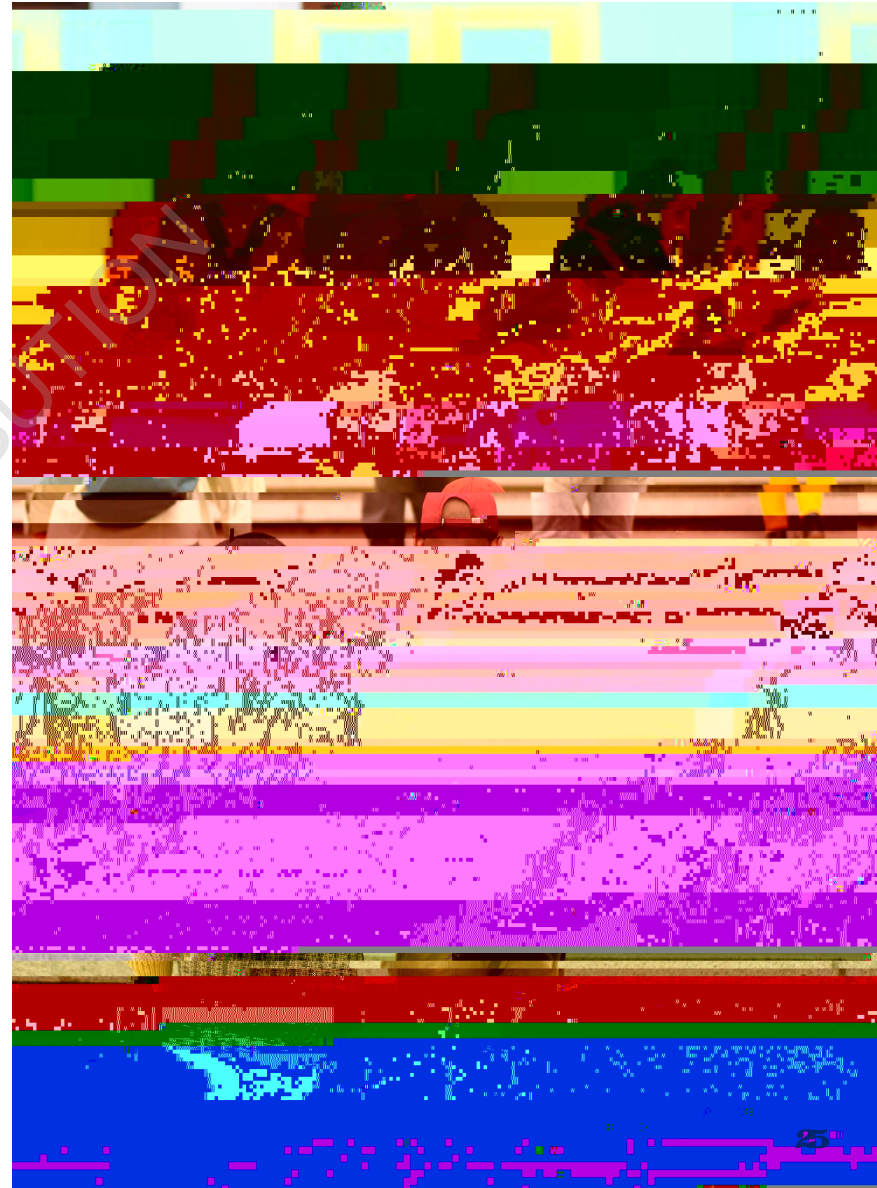
Education program or activity in the United States

Control over the Respondent

Control over the context of the alleged behavior

Applies to both student and employee complaints

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QidProQid

Retaliation

Common additional offenses

Sexual Exploitation

Harm/Endangerment

Discrimination

Intimidation

Hazing

Bullying

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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)

ATIX's Definition o " i ds ot nil btb

Physical Violence:

Hitting restraint, pushing kicking etc

Threats

Objective and subjective analysis of the viability of the threat (true threat if public)

Intimidation

Implied threat that menaces and/or causes reasonable fear

Coercion

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

What was the reason for incapacity?

Alcohol or other drugs (prescription or non prescription)

Mental/cognitive impairment

Injury

Asleep or unconscious

Blackouts are frequent issues

Blackout incapacitation (automatically)

- Partial blackout must be assessed as well

Memory absent, but verbal and motor skills may still function

Slurred speech



If the Complainant was not incapacitated, move to the Consent Analysis

If the Complainant was incapacitated, but:

The Respondent did not know AND

The Respondent would not have reasonably known of the Complainant's incapacity = no policy violation, move to Consent Analysis

If the Complainant was incapacitated, and

The Respondent knew it or caused it = policy violation

The Respondent should have known it (reasonable person) = policy violation

The Respondent's own intoxication cannot be used as a defense

Did the Respondent previously know the Complainant?

If so, was the Complainant acting differently than previous similar situations?

Evaluate what, if anything the Respondent observed the Complainant consuming

Use a timeline analysis

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Evaluated on a case by case basis

Simply knowing a student or employee is not enough to generate a conflict of interest, as long as objectivity is not compromised

Previously disciplining a student is likewise not enough

DM must bring potential conflicts to the TIXCs attention

Parties may also do so

TIXC will make a recusal determination

Policy may have a recusal provision

Are these conflicts of interest?

An academic advisor deciding a complaint in which the Respondent is a current advisee, but they have not met in two years

A faculty member deciding a complaint for a colleague in a different department who has kids that play on the same soccer team as the faculty member's kids

A finance division senior supervisor deciding a complaint involving a Respondent who is three levels below the supervisor in the finance division

A faculty member serving on the same 30- person committee as the Complainant

The President recommends that the institution's general counsel serve as decision maker based on their legal training and subject matter expertise

Bias can be a significant problem for DMs

Explicit or implicit

The often implicit and unconscious nature can lead to unexpected outcomes

Formed from stereotypes, societal norms, cultural experiences, expectations of the people around you

Can affect our perceptions of Complainants and Respondents

Common pre-conceptions about Complainants and Respondents

Can affect our perceptions of others within the process or associated with the process

DM role requires us to recognize it and mitigate its effects

Could the following qualify as bias if these people serve as DMS?

A faculty member from Gender Studies wrote their dissertation on campus sexual violence at religiously affiliated institutions

A student activities staff member who says, "When I think of the Respondent, I just think of my oldest child being in this situation and how I would hit want their

**Pre
determined
outcome**

Political bias

**Intervention
from senior
level admin**

Groupthink

**Improper
application of
policies**

**Confirmation
bias**

Implicit bias

Animus

Attribution Bias

**Appearance
Bias**

Affinity Bias

**Halo/Horn
Effect**

Strategies to mitigate bias

Hearing panels vs individual DM

Panel members review each other's questions

Compliance with institutional policy and procedure

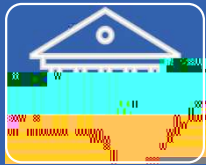
Evidence mapping to prevent evidentiary gap filling

All panel members review the rationale

Be conscious of your bias

- Counteract them and ensure they don't influence your decision





Title IX regulatory requirements



**Fundamental fairness concepts (private institutions)
Constitutional Due Process concepts (public institutions)**



Institutional policies and procedures

A decision must:

Be appropriately impartial and fair (both finding and sanction)

Be neither arbitrary nor capricious

Be based on a fundamentally fair rule or policy

Be made in good faith (i.e., without malice, ill-will, conflict, or bias)

Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence

Rights of the parties during the Title IX grievance process
Present witnesses, including expert witnesses

Rights of the parties during the Title IX grievance process, continued

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

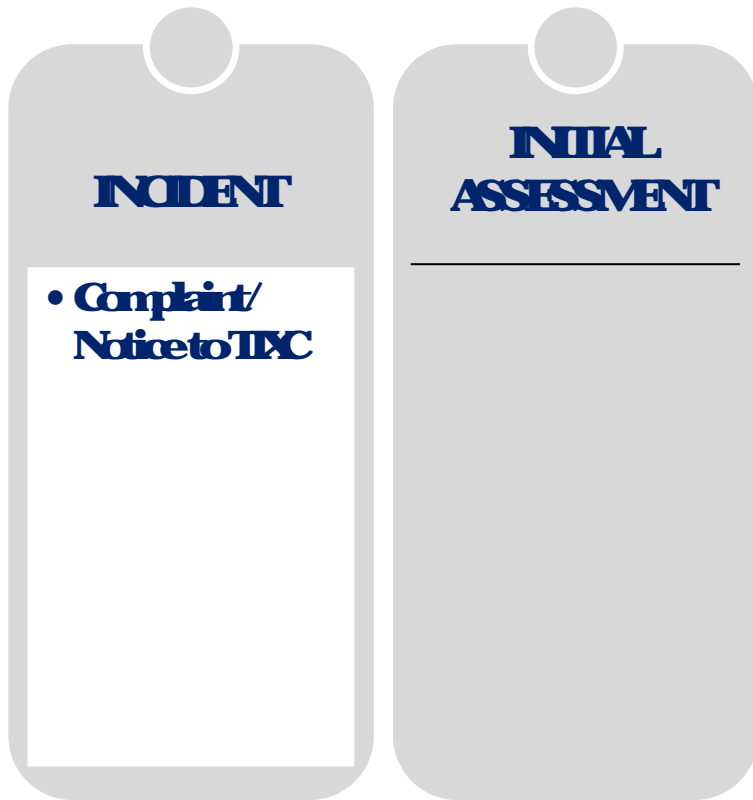
The NOIA lists the rights of the parties in the grievance process, in addition to

Known details of allegations, such as identities of the parties

A description of the alleged conduct and relevant policy provisions

The date and location of the alleged conduct

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Review the complaint file, including

Complaint

**Written Notice of Investigation and
Allegations (NOIA)**

Applicable policies

Investigation report and appendix

Review carefully and thoroughly

May require multiple reads



Policy

What policies are alleged to have been violated?

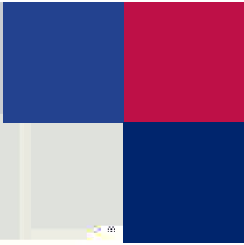
What are the elements of those policies?

DMs will weigh and apply relevant evidence to determine whether a policy violation occurred

Procedures

Review decision making procedures to refresh your training

Note any procedural questions to ask the TIX/legal counsel



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Identify the elements of each policy provision
Unwelcome conduct

Identify the elements of each policy provision

Stalking defined as engaging in a course of conduct on the basis of sex directed at the Complainant that would cause a reasonable person to fear for the person's safety or the safety of others or suffers substantial emotional distress

Identify the elements of each policy provision

Stalking defined as engaging in a course of conduct on the basis of sex directed at the Complainant that would cause a reasonable person to fear for the person's safety or the safety of others or suffers substantial emotional distress

Parties have the right to be accompanied by an Advisor of their choice

Could be an attorney, but need not be

Parties may request that the institution provide an Advisor for hearing

Institution may choose to appoint earlier in process

DM may establish participation equitable ground rules, as long as they do not interfere with any party rights

Set and communicate reasonable expectations for Advisor participation





Supportive writings or documents

**Is this information
relevant?**

**Is this information
reliable?**

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

1. Is this information relevant?

Evidence is generally considered relevant when it helps determine:
Whether the Respondent violated policy, and/or
The credibility of any evidence, including a party or witness statement
The Investigator initially evaluates relevance, but the DM ultimately decides
All relevant evidence must be objectively evaluated and considered
Inculpatory: tending to suggest a finding of responsible
Exculpatory: tending to suggest a finding of not responsible
In the decision making phase parties may dispute the Investigator's initial
relevance determinations

Evidence of the Complainant's sexual predisposition is never relevant

Evidence of the Complainant's prior sexual behavior is not relevant except:

If offered to prove that someone other than the Respondent committed the alleged conduct; or

Specific incidents of the Complainant's prior sexual behavior with respect to the Respondent offered to prove consent

Even if admitted/introduced by the Complainant

Does not apply to Respondent's prior sexual behavior or predisposition, which are admissible if relevant

No restriction on parties discussing case or gathering evidence, but we can restrict parties from sharing 1° q



Turn to the Complainant transcript in the mock investigation file

You will notice that some portions of the transcript are highlighted in grey

Those grey selections have been marked by the Investigator as relevant

Find three examples of:

Testimony marked as relevant that should be DRE, or

2 Is this information reliable?

Assessing and determining credibility is an important role for DM

Credibility does not necessarily equate to honesty or truthfulness

Believability does not equal truthfulness

Not judging character

Not calling people liars

Authenticating evidence seeks to prove that the evidence is genuine and credible

Investigators should authenticate evidence, but sometimes DM will

Examples of authentication

Verifying text messages by collecting texts from all involved parties

Collecting photographic evidence after it is referenced in an interview

Establishing chain of custody for a piece of physical evidence

Credibility impacts likeliness

Would a reasonable person do the same?

Are there more likely alternatives?

Credibility Assessment involves evaluating whether evidence is believable and reliable

Refrain from focusing on irrelevant inaccuracies and inconsistencies

Note: Memory errors alone do not necessarily diminish witness credibility, nor does some evasion



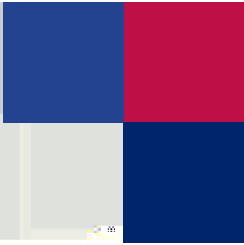
**Inherent
Plausibility**

**Corroboration
and
Consistency**

**Motive to
Falsify**

Past Record

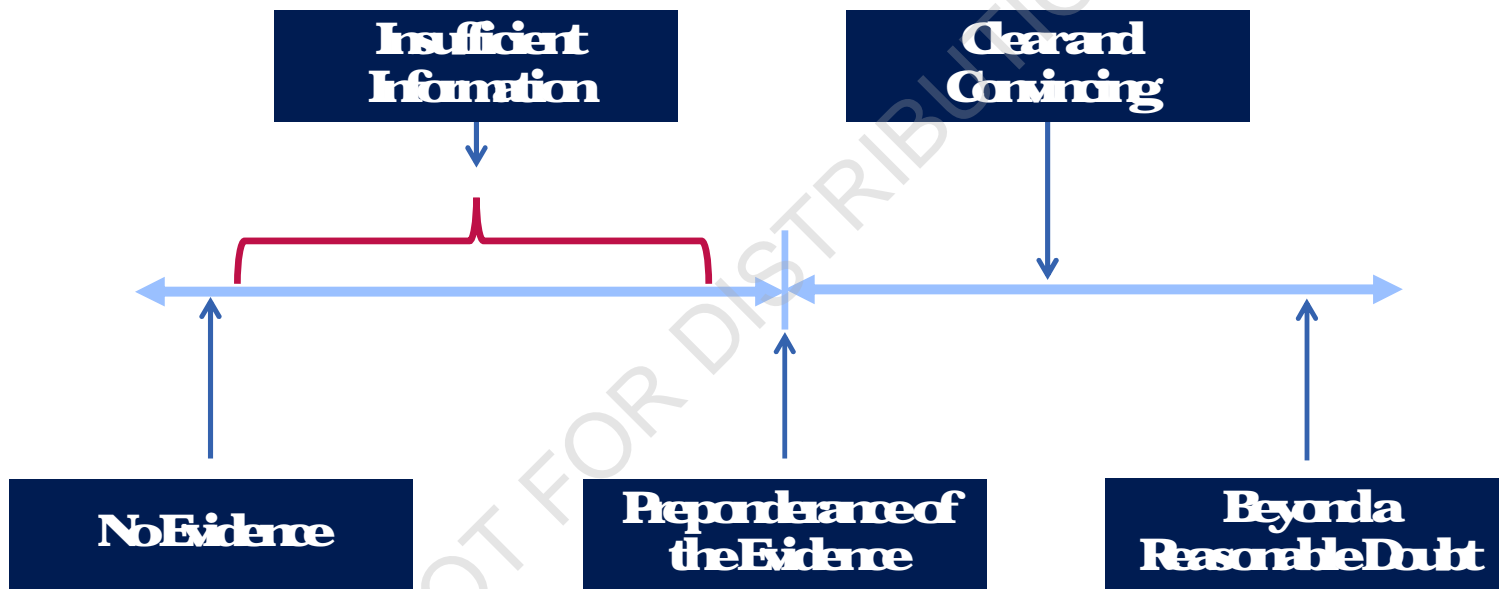
Demeanor



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Use the mock investigation report to identify four to six examples of
Evidence that raises authentication issues or questions and why
Evidence that raises credibility questions or concerns and why
Evidence that supports a party's or witness's credibility or corroborates
another piece of evidence and why

3 What evidence is relied upon in making a determination?



Standard of Evidence must be consistent for all formal complaints of sexual harassment
is the most common industry standard

DM must presume the Respondent is not in violation unless and until the standard of evidence is met

The DM analyzes facts against each policy element to determine whether the Respondent violated policy

Written rationale will have to cite to specific evidence supporting conclusion

Assess credibility of evidence and evidentiary weight

Assess statements as factual, opinion based, or circumstantial

Apply evidentiary standard to determine if policy has been violated

Based only upon evidence in the investigation report or presented at the hearing

Policy Element:

Engaging in a course of conduct

Facts:

Complainant asserts Respondent followed Complainant to an off-campus party on October 1

Respondent came to Complainant's residence hall room three times between October 5 and October 12

Respondent denies following Complainant on October 1

Witness corroborates Respondent knocked on Complainant's door several times in one week

Policy Element:

Would cause a reasonable person to fear for the person's safety

Facts:

Complainant alleged Respondent pounded on her door and yelled until an RA told him to leave

Complainant alleged Respondent sent texts suggesting he was following her; and she should fear him

Respondent produced texts that do not support Complainant's characterization

RA witness asserts "pounded on her door and yelled" is an exaggeration

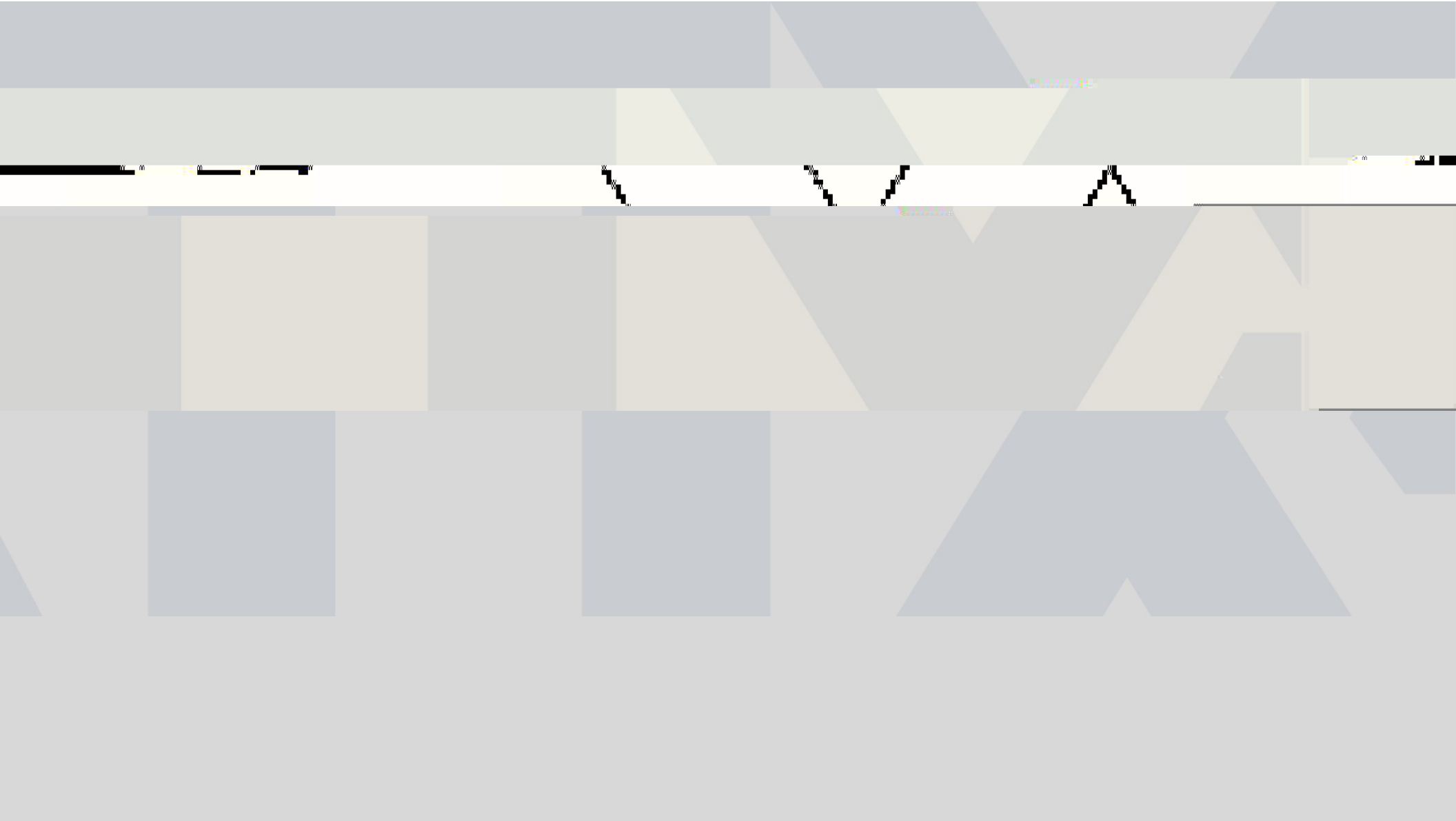
In groups of three to five:

Parse the two policies on the next slide

Use the investigation report to identify facts

Map facts to each policy element that you believe helps prove or disprove an element of the policy OR

Speaks to the credibility of evidence related to the elements of the policy





After making a determination of responsibility, decide sanctions and remedies

Only implemented after a determination of responsibility

Nexus between sanctions and misconduct

Goal: stop, prevent, and remedy

TIXC does not issue sanctions but oversees the process

TIXC assures sanction compliance

Failure to comply could lead to discipline

May be implemented before or after a determination

TIXC determines remedies that are equitable and not clearly unreasonable given the circumstances

Goal: preserve or restore access to education program and activity

TIXC ensures remedies are implemented for both Complainant and community

DM may consider:

Impact statements from the parties

Precedent, prior misconduct, proven pattern (if charged), attitude, collateral violations, or multiple violations

Aggravating or mitigating circumstances

Primary purposes should not be developmental or educational, but equitable and remedial

Each sanction must have a rationale

Warning (preferably written)

Probation

Loss of privileges

Counseling

No contact order

**Residence hall relocation,
suspension, or expulsion**

Limited access to campus

Service hours

Online education

**Alcohol and drug assessment and
counseling**

Discretionary sanctions

Parental notification

College suspension

College expulsion

Warning (preferably written)

Probation

**Performance improvement/
management process**

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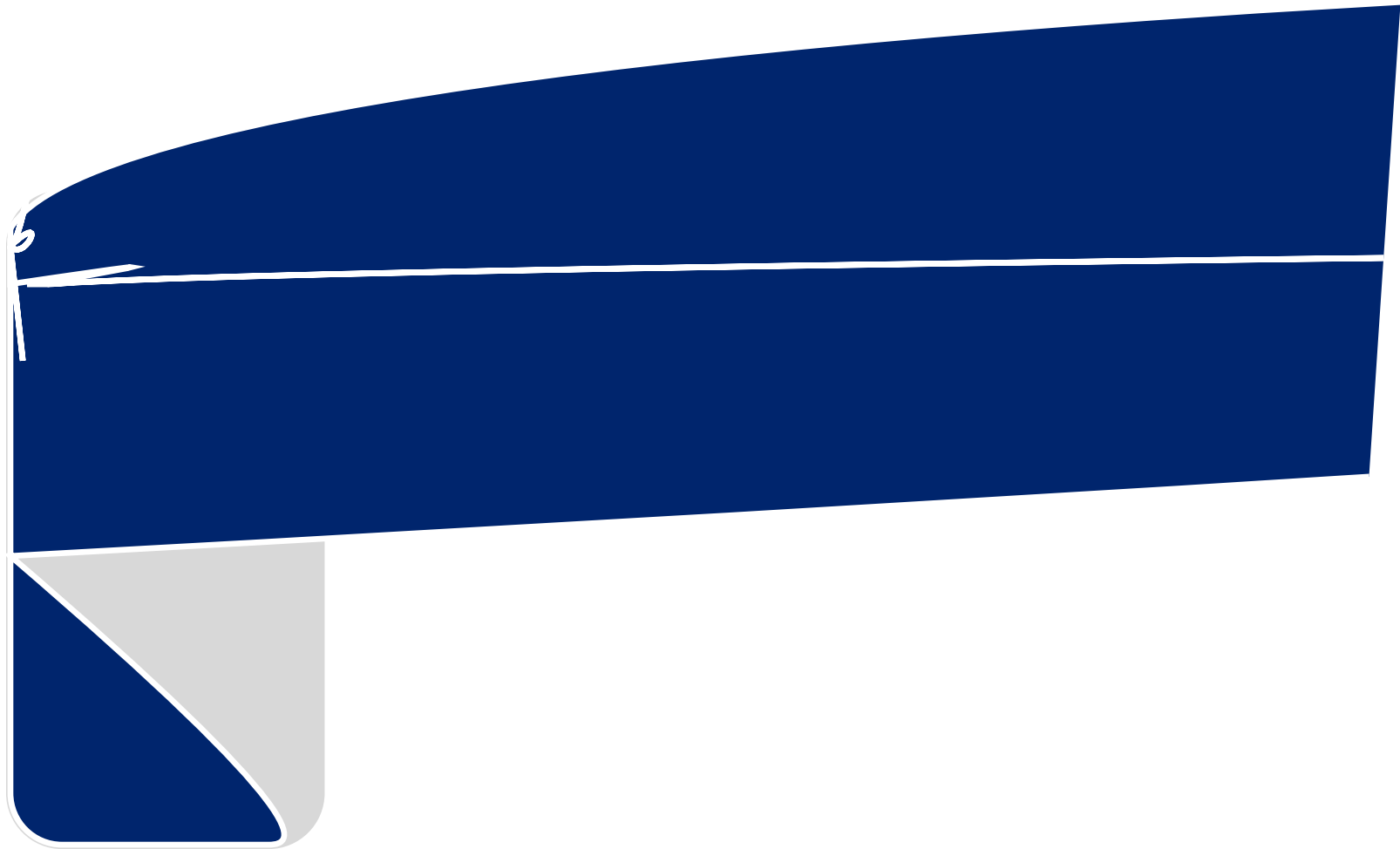
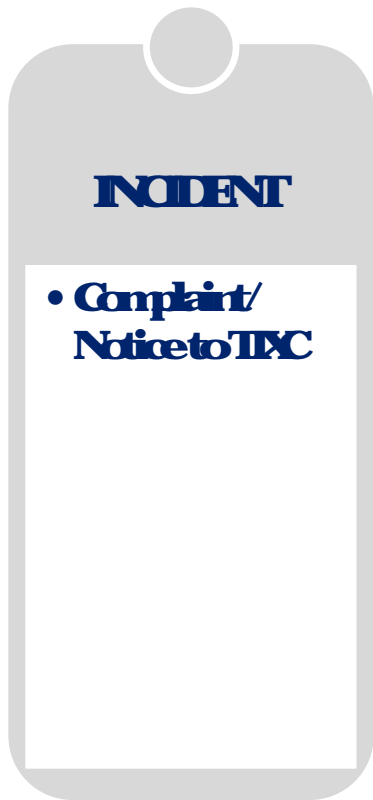
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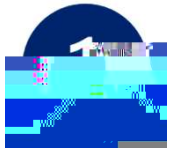
Failure to stop, prevent, and remedy

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Institutions must offer appeals on the following grounds



Procedural irregularity that affected the outcome of the matter



New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter



Conflict of interest or bias by the TDC, Investigator, Decision Maker that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

Appeal Decision maker

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)

Appeal Decision maker may be an individual or a panel

Cannot be the Title IX Coordinator

Cannot be the Investigator or Decision maker in the original grievance process

Recipient may have a pool of Decision makers who sometimes serve as hearing or appeal Decision makers

Recipient may have dedicated Appeal Decision makers

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DM must compile all documentation related to the decision making process, typically with the TIXC, including

Timeline of decision making process

Interactions and pre hearing meetings with parties, other DMs, TIXC, etc

Determination with any associated sanctions and/or remedies

Rationales for all determinations

All work product from the DM process

TIXC is responsible for maintaining complaint files for a minimum of seven years

Ask the TIXC for guidance and clear expectations about saving your work product, including your personal notes

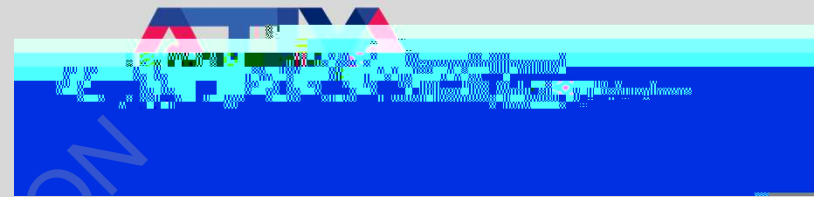
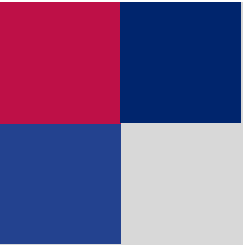
Anticipate that the parties could see your work product

Student FERPA inspect and review rights

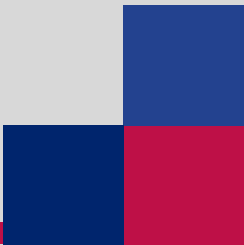
Employee rights to personnel records

Litigation

Be judicious with not taking annotating draft writing and communication



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