



Association of
Title IX Administrators

2020 Title IX Regulations Refresher for Higher Education

Training and Certification Course

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Strategic Risk
Management Solutions



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

Content Advisory

The content and discussion in this course will necessarily engage with 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 primary focus of this course is to fortify participants' understanding of compliance obligations under the 2020 Regulations.



Title IX practitioners must understand the requirements facing their institutions and review their policies, procedures, and practices.



Our goal is to provide examples, best practices, and in-depth discussion to help navigate the evolving Title IX regulatory environment.

Title IX Updates

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2024 Title IX Regulations Vacated

- **All federal funding recipients are now subject to the 2020 Title IX Regulations**
 - **January 9, 2025:** a federal district court in Kentucky vacated the 2024 Title IX Regulations in their entirety; other federal courts have followed suit
 - The 2024 Title IX Regulations are now vacated (null and void) and **not** in effect for **any** state, institution, or school/district
 - Institutions must revert to **2020-compliant** policies and procedures for Title IX cases
 - Ensure compliance with all 1975 and 2020 regulatory requirements
 - Revisit any complaints decided under 2024 regulations to ensure compliance

Department of Education Updates

- Department changes include:
 - Significant staffing reductions, but increased enforcement in some areas
 - Closure of 7 of 12 OCR regional offices
 - Federal funding and oversight shifts
- Executive Order (EO): *Improving Education Outcomes by Empowering Parents, States, and Communities* (3/20/25)
 - Directed the Secretary of Education to “facilitate closure of the Department” and “return authority to the States and local communities”
- Civil Rights enforcement remains in Department of Education’s Office for Civil Rights (OCR), but other agencies (e.g., Health and Human Services (HHS) and Department of Justice (DOJ)) appear to be ramping up enforcement in certain areas
- Increased focus on Title VI

Dear Colleague Letter 02/04/25

ED released a Title IX-focused Dear Colleague Letter (DCL) on 02/04/25

- OCR will enforce the 2020 Regulations, not 2024
- Institutions must immediately shift open investigations to use 2020 Regulations
- OCR will enforce *Defending Women from Gender Ideology* EO
 - Quoting the EO, OCR will:
 - “‘enforce all sex-protective laws to promote [the] reality’ that there are ‘two sexes, male and female,’ and that ‘[t]hese sexes are not changeable and are grounded in fundamental and incontrovertible reality.’”

Executive Order re: Sex and Gender

Defending Women from Gender Ideology Extremism and restoring Biological Truth to the Federal Government (01/20/25)

- Defines sex as a binary concept – man or woman
- All agencies must ensure that intimate spaces are designated by sex, not gender identity
- Limited *Bostock v. Clayton County*'s holding, says it only applies to Title VII
 - Dept of Justice issued guidance on 02/12/25 that *Bostock* does not apply to Title IX
- Prohibits federal funds and grants from promoting gender ideology
- Revokes all Biden administration EOs addressing gender identity
- Directs OCR to prioritize investigations/litigation to enforce rights and freedoms based on the binary nature of sex
- Does not address sexual orientation

Executive Order re: Gender and Athletics

Keeping Men Out of Women's Sports (02/05/25)

- Prohibits transgender women from playing women's sports
 - Cited as necessary for “safety, fairness, dignity, and truth”
- Applies definitions from *Defending Women from Gender Ideology* EO
- Threatens withdrawal of federal funds
- Will use Title IX to enforce on a prioritized basis
- Seeks to eliminate Olympic competition based on gender identity or testosterone reduction
- Does not prohibit transgender men from participation
- Subject of active and rapid enforcement by Federal government

Rescinded Prior Guidance

Rescinds all guidance documents inconsistent with the EO or subsequent guidance including:

- White House Toolkit on Transgender Equality
- 2024 Title IX Regulations: Pointers for Implementation
- ED Toolkit: Creating Inclusive & Nondiscriminatory School Environments for LGBTQ Students
- Supporting Intersex Students
- Supporting Transgender Youth in School
- Letter of Educators on Title IX's 49th Anniversary
- Confronting LGBTQ Harassment in Schools
- Enforcement of Title IX - Based on Sexual Orientation and Gender Identity in light of *Bostock v. Clayton County*
- AG's memorandum "Application of *Bostock v. Clayton County* to Title IX"
- EEOC's "Enforcement Guidance on Harassment in the Workplace"

Title IX Scope and Definitions

Title IX Scope

Title IX

Sex Discrimination

- Disparate Treatment
- Disparate Impact

Retaliation

Sexual Harassment

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

Quid Pro Quo

- An **employee** of the Recipient
- Conditions, implicitly or explicitly, the provision of an aid, benefit, or service of the Recipient
- On an individual's participation in unwelcome sexual conduct



Hostile Environment Sexual Harassment

- Unwelcome sex-based conduct
- determined by a reasonable person
- to be so **severe, pervasive, and objectively offensive (SPOO)**
- that it effectively denies a person equal access to the Recipient's education program or activity



Sexual Assault: Rape

ATIXA Model Definition*:

- Penetration, no matter how slight,
- of the vagina or anus of a person,
- with any body part or object, OR
- Oral penetration
 - of a sex organ of the Complainant, or
 - by the Respondent's sex organ...
- Without the consent of the Complainant,
- Including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental or physical incapacity

*Note: This definition differs slightly in wording and construction than the 2020 Regulations version, but not in substance. Also covers attempted violations.

Sexual Assault: Fondling

ATIXA Model Definition*:

- The touching of the private body parts (breasts, groin, buttocks) of the Complainant by the Respondent, or
- The Respondent's private body parts touching the Complainant, or
- The Respondent causing the Complainant to touch the Respondent's or their own private body parts,
 - For the purpose of sexual gratification,
 - Without the consent of the Complainant,
 - Including instances where the Complainant is incapable of giving consent because of their age or because of temporary or permanent mental incapacity

*Note: This definition differs slightly in wording and construction than the 2020 Regulations version by providing additional clarification. Also includes attempts.

Fondling: Sexual Gratification

- Contact with private body parts is considered to be done for the purpose of sexual gratification unless the contact:
 - Can be proven inadvertent
 - Is for a legitimate medical (or other privileged) purpose and thus is conduct for which consent should have been sought and obtained by the provider
 - Involves a Respondent who is pre-sexual, based on maturity/age (thus their intent is not sexual)
 - Involves a Respondent who cannot developmentally understand sexual contact or that their contact is sexual, or
 - Is something like butt-slapping on a team and is both minimal and unlikely to have sexual motivation or purpose, as shown by the context of the act(s)*

*ATIXA recommended definition

Sexual Assault: Incest and Statutory Rape

- **Incest**

- Sexual intercourse between persons related to each other within the degrees wherein marriage is prohibited by state law

- **Statutory Rape**

- Sexual intercourse with a person who is under the statutory age of consent

Dating Violence

- Violence, on the basis of sex,
- Committed by a person
 - Who is in 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 interactions between the persons in the relationship
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse
 - Does not include acts covered under the domestic violence definition

Domestic Violence

- Violence, on the basis of sex,
- 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, or
 - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
 - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of the state, or
 - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of the state

Definition of Violence

- Violence includes situations where the Respondent intentionally or recklessly causes the Complainant serious physical, emotional, or psychological harm
- Intent is evidenced when a Reasonable Person would be more likely to act with the purpose of causing serious harm rather than for any other reason
- Recklessness is evidenced by a disregard of obvious risk to the safety of the Complainant
- Violence in self-defense is not chargeable under the Policy if the purpose is safety, not harm
- Consensual use of violence, such as in kink relationships, would also not meet this definition
- Threats to seriously harm the Complainant or people they care about may be chargeable under this definition if doing so causes serious emotional or psychological harm
- Threats to harm oneself, even if made to cause emotional or psychological harm, are not considered violence under this definition (but may be addressable under a threat policy)

Stalking

- A Respondent engaging in a course of conduct,
- On the basis of sex,
- Directed at the Complainant, that
 - would cause a reasonable person to fear for that person's safety, or the safety of others, or
 - suffer substantial emotional distress

Consent: ATIXA Model Definition

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

Collateral Misconduct

- The Regulations permit resolving alleged **collateral misconduct** within the Title IX process
 - Collateral misconduct refers to allegations of misconduct arising out of the same facts or circumstances as the Title IX allegations
 - For practical purposes, resolving all allegations of misconduct in the same process may make sense
 - This is discretionary, but if using another process to resolve collateral misconduct, ensure it is not retaliatory or chilling
 - Eliminates the need to have witnesses and parties go through two or more resolution processes

Retaliation

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Retaliation: ATIXA Model Definition

- Recipient, or any member of Recipient's community,
 - Taking or attempting take materially adverse action,
 - By intimidating, threatening, coercing, harassing, or discriminating against any individual,
- For the purpose of interfering with any right or privilege secured by law or Policy, or
- Because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this Policy and Procedure

Retaliation Investigations

- Retaliation allegations often arise during an ongoing grievance process
- May address in a consolidated investigation with the original allegations
 - Always update Notice of Investigation and Allegations (NOIA)
- May address separately at the end of the original grievance process
 - Not required to use Title IX process
- Consider approach on case-by-case basis:
 - Timing
 - Complexity
 - Necessary supportive measures



Reports, Complaints and Notice

When is the Institution “On Notice?”

The institution is “**on notice**” of sexual harassment when a report is made to:

- **Title IX Coordinator** (TIXC), or
- An **Official with Authority (OWA)**: any official who has authority to institute corrective measures on behalf of the Recipient
 - ATIXA recommends including OWAs by role in policy

Being “on notice” creates an institutional obligation to respond

Mandatory Reporting

- ATIXA recommends that institutions, by policy, designate **all employees** as **mandated reporters** (except for **confidential resources**) under Title IX
 - Ensures information gets to those trained to respond
 - Enables institution to best support individuals
 - Supports tracking patterns
 - Provides for simpler, uniform, and universal training and reporting
- Many employees will also have reporting responsibilities under other state and federal laws or institutional policy

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

Report vs. Complaint

A **report** is different than a **formal complaint**:

- **Report**

- Notifies the TIXC of an incident and
- Obligates the TIXC to offer supportive measures and explain the process

- **Formal Complaint**

- Written request to initiate an investigation
- Physical document or electronic submission from Complainant
 - OR signed by TIXC
- Alleging sexual harassment
- Complainant must be **participating or attempting to participate** (P/ATP) at the time of the formal complaint
 - TIXC can make a complaint P/ATP by signing a formal complaint

Signing a Formal Complaint: PPTVWM

In limited circumstances, a TIXC should sign a formal complaint even if the Complainant declines to do so

Factors that likely indicate an ongoing risk of harm include:

- **P**attern
- **P**redation
- **T**hreat
- **V**iolence
- **W**eapons
- **M**inors

Other Considerations for TIXC Signing a Formal Complaint

- Employee Respondent
- Complainant who is not P/ATP

Formal Grievance Process Overview

Due Process in the Grievance Process

Rights of the parties during the Title IX grievance process:

- Present witnesses, including expert witnesses
- Present all inculpatory and exculpatory evidence
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction, including expert sources
- Be accompanied by and confer with Advisor of choice
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare

Due Process in the Grievance Process, Cont.

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

- Inspect and review all relevant and directly related evidence and investigation report
- Conduct cross-examination, if desired, through the Advisor
- Right to explanation of any ruling that a question is not relevant
- See/hear all evidence the DM may rely upon in their decision
 - Right to review and comment on that evidence to the DM
- Access to recording of any hearing
- Receive a written rationale explaining the basis for the DM's decision
- Appeal

ATIXA Model Policy (1P2P)

ATIXA recommends addressing all forms of discrimination in similar ways

- One Policy, Two Procedures Model
 - “Process A”
 - Title IX Grievance Process for Sexual Harassment
 - “Process B”
 - Non-Title IX Resolution Process for other complaints of discrimination, harassment, or retaliation
 - Including non-Title IX sex discrimination or sexual harassment allegations
 - Retains most due process protections from Title IX Process; less formal

Initial Assessment

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Jurisdiction

TIXC is responsible for conducting an initial assessment to determine Title IX jurisdiction:

- Does the alleged conduct, if proven, meet one of the definitions of Title IX Sexual Harassment?
- Who is the Complainant?
 - P/ATP
- Who is the Respondent?
- Does the institution have control over the context of the alleged harassment?
- Did the behavior occur in the United States?



Outreach and Intake

- After receiving a report, TIXC (or designee), should always reach out to the Complainant
 - Best practice and regulatory requirement
- **Outreach** includes:
 - Introduction to Title IX and staff
 - Reason for the outreach
 - Offer to meet/speak over the phone; include right to Advisor
 - Available resources and resolution options, including how to file formal complaint
 - Discuss supportive measures and resources
 - Explain options to report to law enforcement
 - Follow up in writing with resources and information

Mandatory Dismissal

TIXC must dismiss the complaint at any time prior to a determination, if:

1. The conduct alleged in the formal complaint would not constitute Sexual Harassment as defined in the 2020 Title IX Regulations even if proved, and/or
2. The conduct did not occur in the Recipient's education program or activity, or
 - No control over the context
3. The conduct did not occur against a person in the United States, or
4. At the time of filing a formal complaint, the Complainant is not P/ATP
 - **AND** the TIXC determines they do not need to sign a formal complaint

The complaint may be referred to a different process

Discretionary Dismissal

The TIXC may dismiss the complaint (or a portion of it) at any time prior to a determination, if:

- Complainant notifies the TIXC in writing that they would like to withdraw the formal complaint or any portion thereof
- Recipient no longer employs or enrolls Respondent
- Specific circumstances prevent the Recipient from gathering sufficient evidence for a determination

The complaint may be referred to a different process

Dismissals

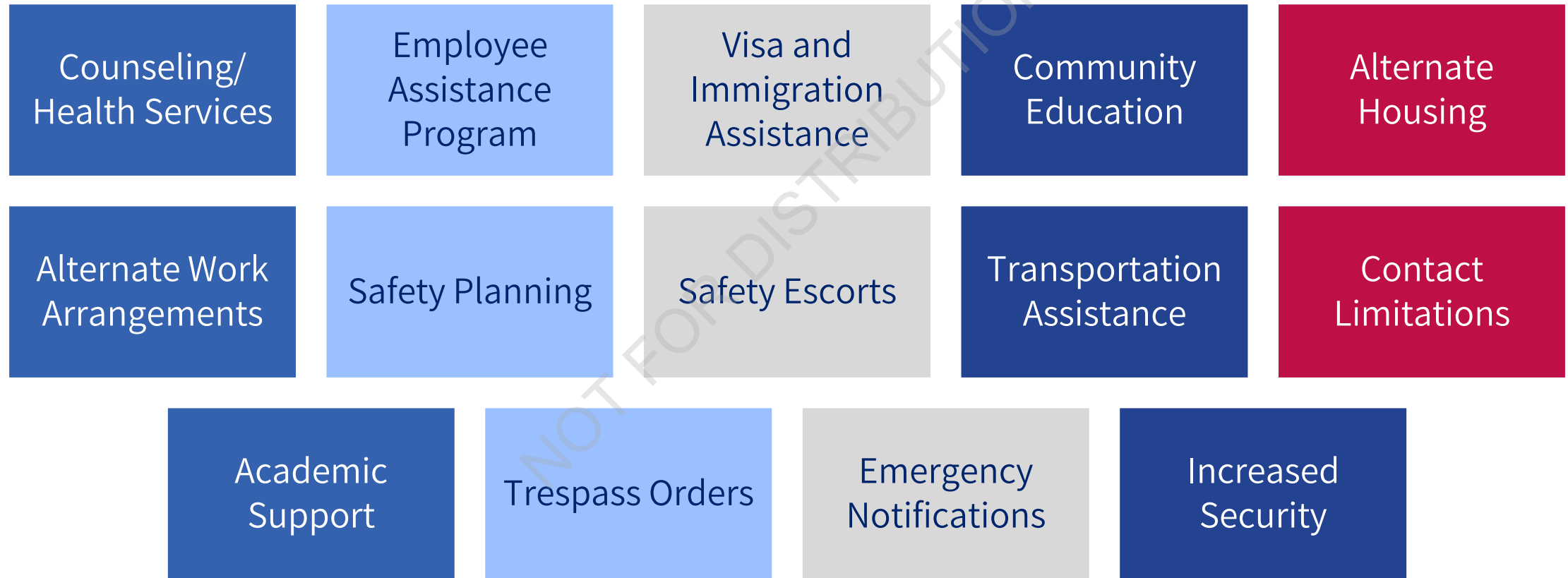
- Must promptly notify parties of the dismissal
- Notify parties that a dismissal may be appealed and include appeal information
 - Appeal Decision-maker(s) must be trained; must not have been involved in the complaint so far
- Institution may, and often will, refer the complaint to address the reported behavior under some other applicable policy



Supportive Measures

- Provided to parties throughout the process:
 - At no cost to the party
 - Individualized
 - Non-disciplinary, non-punitive
 - Protect safety of parties or environment, or deter sexual harassment
 - Restore or preserve equal access
 - Without unreasonably burdening other party
- Publish the range of supportive measures
- Avoid unnecessary disclosures about supportive measures
- Consult with disability services when appropriate
- If not provided, document the rationale for refusal

Supportive Measure Examples



Emergency Removal

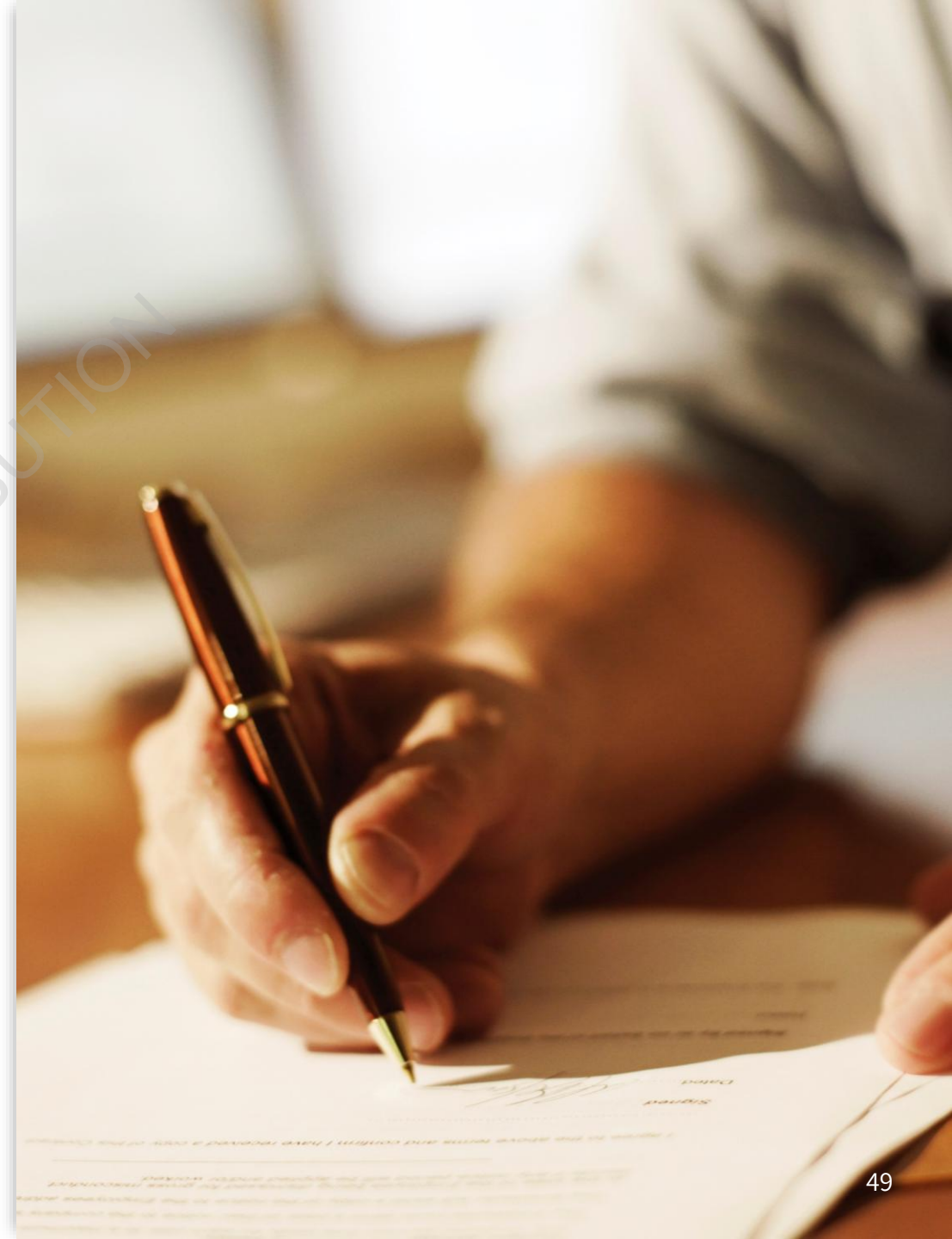
- Imposed upon Respondents on an emergency basis only
- Individualized safety and risk analysis
 - Immediate threat exists to the physical health or safety of any student or other individual
 - The threat arises from the allegations of Sexual Harassment
- Respondent entitled to immediate notice and opportunity to challenge



Administrative Leave

- May remove an employee Respondent using existing administrative leave procedures
- A lower bar than emergency removal

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Informal Resolution

- Title IX permits **voluntary** Informal Resolution (IR)
- Not available for employee-on-student harassment
- IR is not defined by the Title IX Regulations
- At discretion of TIXC, at any time prior to a final determination
 - Likelihood of resolution
 - Power dynamics
 - Goals and motivation of the parties to participate
 - Complexity and timing of the complaint
- IR Facilitators must receive training, be free of bias or conflicts
 - ATIXA recommends IR Facilitators not serve in any other process roles

Informal Resolution, Cont.

- Procedural requirements:
 - Formal Complaint
 - Parties must receive written notice of the allegations, IR procedures, records created, and potential consequences
 - Parties' voluntary, written consent
 - Must still stop, prevent, remedy
- May withdraw from IR to start or resume Formal Grievance Process at any time



Investigation

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Notice of Investigation and Allegations

- Notice of Investigation and Allegations (NOIA) letter
 - Sent to all parties, simultaneously
 - Must be sent prior to interviewing any party
- **The NOIA includes:**
 - Notice of the allegations and known details, such as identities of the parties
 - A description of the alleged conduct and relevant policy provisions
 - The date and location of the alleged conduct
 - Information about grievance procedures
 - Any Informal Resolution options

Notice of Investigation and Allegations, Cont.

The NOIA must outline the parties' right to:

- Present witnesses, including expert witnesses
- Present inculpatory and exculpatory evidence
- Freely discuss the allegations
- Be accompanied by an Advisor of their choice
- Receive written notice of all details and purpose, with sufficient time to prepare, of any investigation interview or other meeting they are requested to attend
- Review all relevant and directly related evidence before the investigation report is finalized

Notice of Investigation and Allegations, Cont.

The NOIA must also include:

- Presumption that Respondent is not responsible
- A statement that retaliation is not permitted
- Reference to any code of conduct provisions (student or employee) regarding consequences for knowingly providing false statements
- The NOIA must be updated if additional allegations arise during the course of the investigation
- Include or reference current policy and procedures

Understanding Evidence

- Duty to collect **relevant** evidence
 - Evidence is any kind of information presented to help determine what occurred
 - Relevant evidence is evidence that tends to prove or disprove the underlying allegations
 - Inculpatory and exculpatory evidence
 - Some evidence may only be relevant to assessing credibility
- Collect **all** relevant and reasonably available evidence except if **impermissible**
- Relevant evidence forms the basis of the investigation report

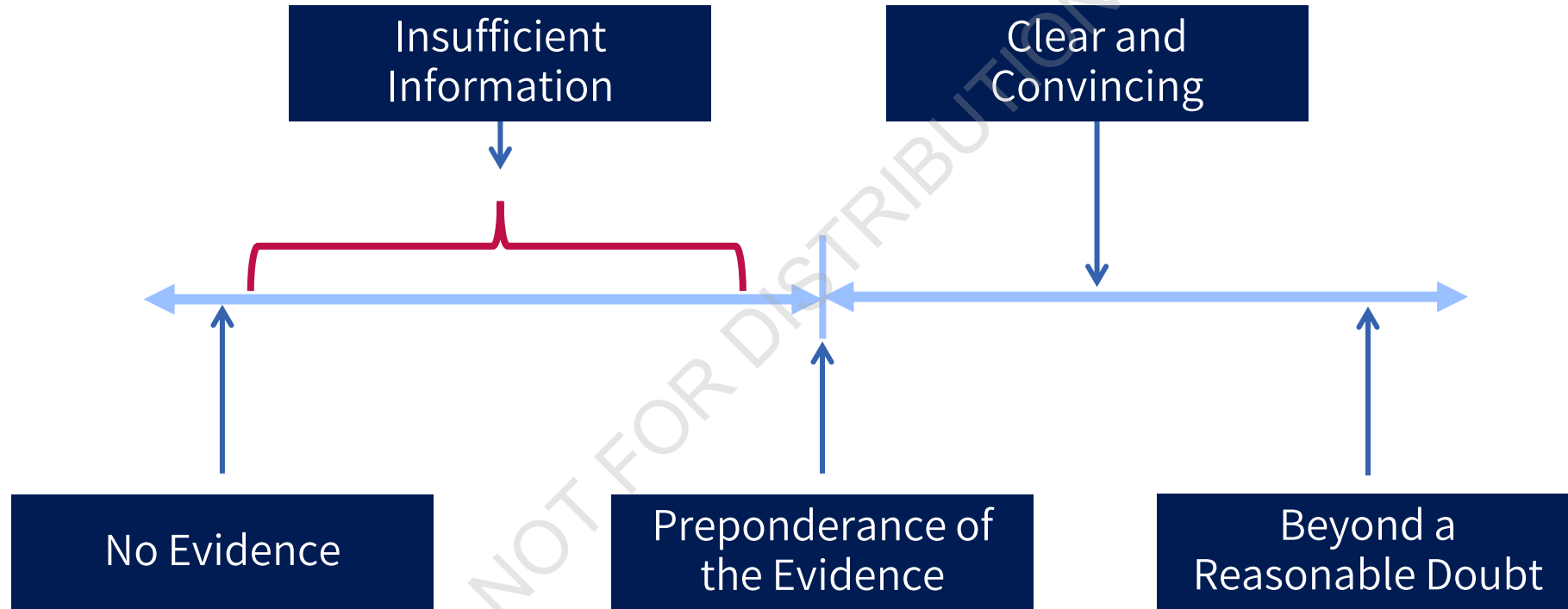


Directly Related Evidence

- Connected to the complaint but neither inculpatory nor exculpatory and will not be relied upon by the Decision-maker (DM)
- Must be provided to the parties and their Advisors for review
 - ATIXA recommends providing an organized directly related evidence file
- Decision-maker(s) ultimately determine what is relevant, directly related, or neither



Standard of Evidence



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

Investigation Report

Comprehensive investigation report for all Title IX complaints

- Required for Sexual Harassment complaints
- Recommended for non-Sexual Harassment Title IX complaints (industry standard practice)
- Creates an opportunity for equal access to all relevant evidence
- Shows Investigator's work
- Provides Investigators with a standard and consistent format
- Helps protect institution on complaints that may be subject to scrutiny



The Investigation Report: Common Elements

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

Parties' and Advisors' Review of Report and Evidence File

- Draft report summarizing all Relevant Evidence
- Directly Related evidence file 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
- 10 + 10 rule
 - Investigator must:
 - Allow **minimum** of 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 **minimum** of 10 days prior to the hearing

Decision-Making and Appeals

Decision-Making Under 2020 Regulations

- Under the 2020 Title IX Regulations, all postsecondary institutions must hold a **live hearing** to address Title IX Sexual Harassment allegations, unless resolved by IR
 - DM can ask relevant questions
 - Advisors can ask relevant questions on behalf of Parties
- TIXC and Investigator may not serve as DM
- Not required to use a live hearing for non-Sexual Harassment Title IX allegations (e.g., Disparate Treatment)

Live Hearings

- Questions must be asked by the parties' Advisors and/or DM(s)
 - If the party does not have an Advisor, the institution **must** provide an Advisor for the purpose of asking questions during the hearing, if the party wishes to ask questions
 - DM must determine whether a proposed question is relevant and permissible
- Hearing can be in one location or virtually through technology
 - DM and parties must be able to simultaneously see a party or witness when they are speaking/communicating
- Must create an audio or video recording or transcript and make it available to parties to inspect and review
- May impose reasonable decorum rules

Relevance Determinations

- The regulations establish a questioning protocol
 - The Advisor poses the question
 - Party/witnesses pauses while the DM considers the relevance of every question and decides whether to permit the question
 - Party may answer if DM deems question relevant
 - The DM must explain to the party proposing the questions any decision to exclude a question as not relevant
 - The regulations are silent on whether the DM can instruct other options beyond excluding a question, such as rephrasing or asking the Advisor to reframe
- Abusive and unduly repetitious questions are not relevant
- Regulations leave open the question of whether Advisor can/should make a showing of relevance to the DM

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 institution 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

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, Decision-maker that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds

Recordkeeping

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Recordkeeping

- Recipient must maintain records for a minimum of **seven** years:
 - Sexual Harassment formal complaints, including determination and discipline/remedies
 - Appeals and results
 - Rationales for all determinations and appeals
 - Informal Resolution
 - Supportive measures
 - Measures taken to preserve/restore access
 - All training materials (see next slide)
- Document how response was **not** deliberately indifferent



Training Records

- Make all materials used to train Title IX Coordinators, Investigators, Decision-makers, and Informal Resolution Facilitators publicly available on the Recipient's website
 - Or if the Recipient does not maintain a website, the Recipient must make these materials available upon request for inspection by members of the public
- Post the most recent materials used to train the Title IX Team
 - But keep seven years of training materials



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Questions?

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