



Association of  
Title IX Administrators

# North Dakota State University

System-Wide Custom Training



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

# CONTENT ADVISORY

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

ATIXA faculty members may offer examples that emulate the language and vocabulary that practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

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# Law and Policy Overview

# FEDERAL CIVIL RIGHTS LAWS

Title IX of the  
Education  
Amendments of  
1972

Equal Pay Act

Title VII of the Civil  
Rights Act of 1964

The Violence  
Against Women Act  
(VAWA) Section 304

Title VI of the Civil  
Rights Act of 1964

Americans with  
Disabilities Act

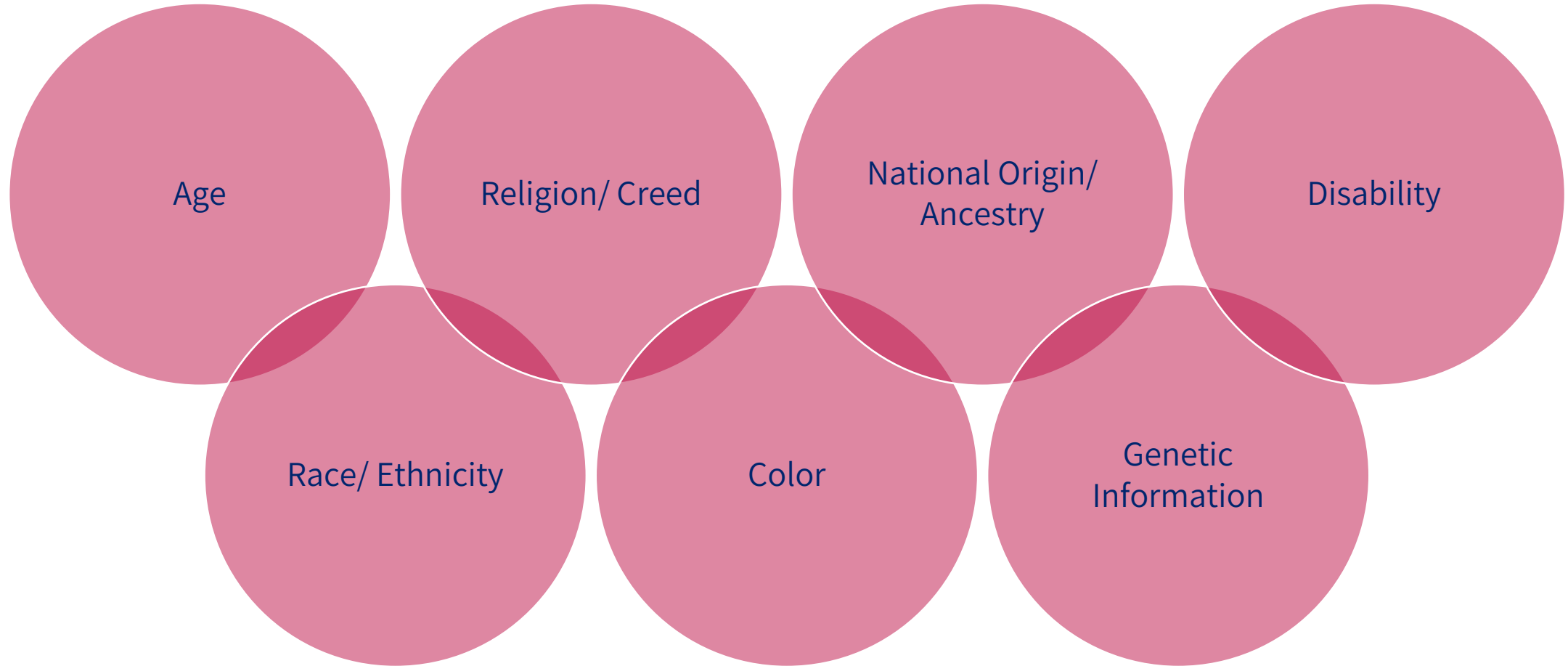
Fair Housing Act

Age Discrimination  
in Employment Act

Pregnancy  
Discrimination Act



# FEDERALLY PROTECTED CLASSES



# MANDATORY REPORTING LAWS

## Title IX

- Sexual assault
- Dating violence
- Domestic violence
- Sex-based stalking
- Sex discrimination
- Sexual harassment

## Clery Act

- Sexual assault
- Dating/Domestic violence
- Stalking (all)
- Criminal offenses
- Hate crimes
- Alcohol, drugs, and weapons

## Title VII

- Race
- Color
- Religion
- Sex
- National Origin
- Disparate Treatment
- Disparate Impact

# MANDATORY REPORTING LAWS (CONT.)

## Title VI

- Race
- Color
- National Origin
- Disparate Treatment
- Disparate Impact

## VAWA Section 304

- Sexual Assault
- Dating Violence
- Domestic Violence
- Sex-based stalking
- Non-sex-based stalking

## ADA

- Disability discrimination
- Harassment
- Disparate Treatment
- Disparate Impact

# ESSENTIAL COMPLIANCE ELEMENTS (T9)

The requirement to **Stop, Prevent,** and **Remedy** guides Title IX Coordinators in their equity and compliance work

**1**

**STOP** discriminatory conduct

**2**

**PREVENT** recurrence, on both individual and institutional levels

**3**

**REMEDY** the effects of discrimination, on both individual and institutional levels

# DISCRIMINATION

- The act of treating an individual differently, or less favorably, based upon specific or perceived protected characteristics
  - Discomfort vs. discrimination

**1**

**Can be connected  
with prejudice**

**2**

**Can be intentional  
or unintentional**

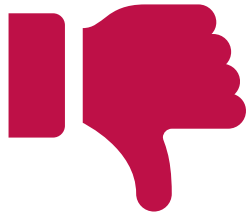
**3**

**Always based on a  
protected  
characteristic**

# REVIEW: DEFINITIONS

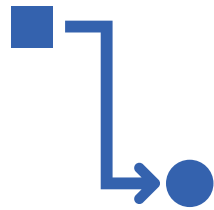
- **Sex discrimination** encompasses discrimination based on:
  - Inequitable treatment based on sex or gender
    - Sex characteristics
    - **Sex stereotypes**
    - Pregnancy or related conditions
    - Sexual orientation
    - Gender identity
  - Exclusion from participating on the basis of sex or gender identity
- **Retaliation**

# TYPES OF DISCRIMINATION



## Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliated or perception of affiliation to protected class



## Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups



## Harassment

- Quid Pro Quo
- Hostile Environment



## Retaliation

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

# **Role & Responsibility of Title IX Office**



# TITLE IX AND EQUITY

- 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

# ESSENTIAL COMPLIANCE ELEMENTS

The requirement to **Stop, Prevent,** and **Remedy** guides Title IX Coordinators in their equity and compliance work

**1**

**STOP** discriminatory conduct

**2**

**PREVENT** recurrence, on both individual and institutional levels

**3**

**REMEDY** the effects of discrimination, on both individual and institutional levels

# ROLE OF THE TITLE IX OFFICE- PART I

Respond to reports or complaints of sexual harassment and sex discrimination

Oversee complaint resolution process

- Intake
- Investigation
- Adjudication

Facilitate a prompt and equitable process to resolve complaints

Conduct reliable, adequate, and impartial investigations

Implement and monitor supportive measures for impacted individuals

# ROLE OF THE TITLE IX OFFICE- PART II

## Lead efforts to ensure gender equity across the institution

Manage policies and procedures prohibiting sex discrimination and harassment

Track systemic issues or patterns

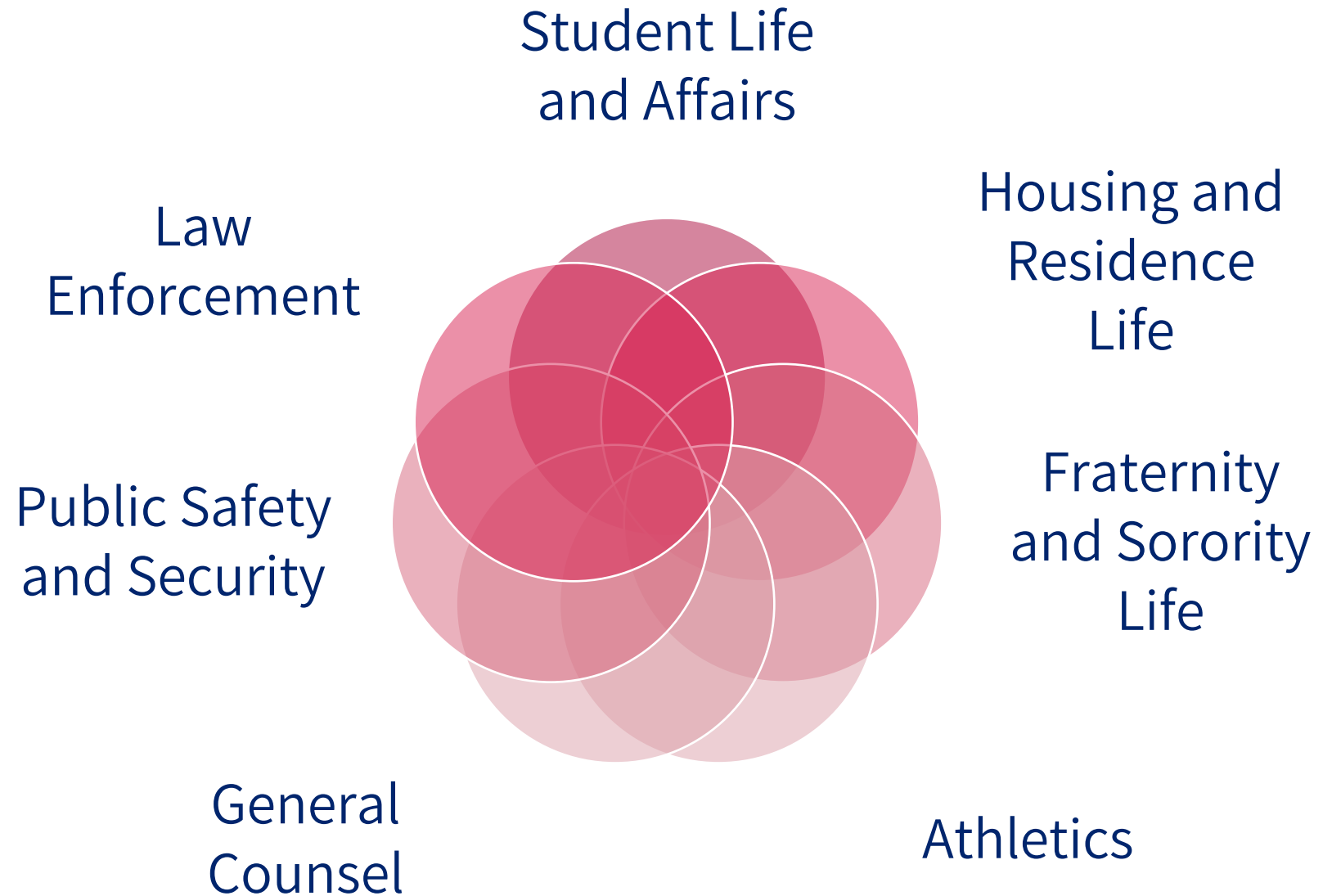
- Take remedial action to prevent recurrence
- Maintain records
- Assess compliance efforts and program effectiveness

Provide education and training on Title IX and sex discrimination

Serve as a central resource for questions or concerns related to sex discrimination

- Respond to government inquiries
- Update institutional leadership on Title IX issues
- Liaise with institutional legal counsel

# TITLE IX OFFICE PARTNERS



# What Must be Reported

# TITLE IX PROHIBITED BEHAVIORS

## Sex-Based Discrimination

- Pregnancy & Parenting Status
- Sexual Orientation
- Gender Identity
- Gender Expression

## Retaliation

- Protected Activity
- Adverse Action
- Causal Connection

## Sexual Harassment

- The “Big 4”
- Quid Pro Quo
- Hostile Environment

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

# SEXUAL HARASSMENT

**Sexual Harassment** is conduct on the basis of sex meeting one of the following conditions:

- An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient's education program or activity; or
- "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v)  
"Dating violence" as defined in 34 U.S.C. 12291(a)(10)  
"Domestic violence" as defined in 34 U.S.C. 12291(a)(8)  
"Stalking" as defined in 34 U.S.C. 12291(a)(30)



# SEXUAL ASSAULT\*

- **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 the consent of the Complainant.
- **Fondling** – The touching of the private body parts of the Complainant (buttocks, groin, breasts) **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 a temporary or permanent mental incapacity.
- **Incest** – Sexual intercourse between persons who are related to each other, within the degrees wherein marriage is prohibited by [insert state] law.

# SEXUAL ASSAULT\* (CONT.)

- **Statutory Rape** – Sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

**Note:** Sexual Assault also includes having another person touch you sexually, forcibly, and/or without their consent.

\* This definition set is not taken from the FBI Uniform Crime Reporting (UCR) system verbatim. ATIXA has substituted Complainant for “victim,” has removed references to his/her throughout, and has defined “private body parts.” These are liberties ATIXA thinks are important to take with respect to the federal definitions, but practitioners should consult legal counsel before adopting them.

# 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. For the purposes of this definition —
  - 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 the domestic or family violence laws [insert your state here];
  - 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 [insert your state here].
- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

# STALKING

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to —
  - Fear for the person’s safety or the safety of others; or
  - Suffer substantial emotional distress.
- For the purposes of this definition:
  - 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.

# STALKING (CONT.)

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- The TIX regulations insist this definition not be interpreted to violate First Amendment.

# CONSENT

- **Consent** is not defined by the Title IX regulations, but institutions are required by law to provide a definition (some states prescribe a definition applicable in that state)
- While each institution defines consent, you will see similarities with 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

# Reporting Obligations



# MANDATORY REPORTING POLICY

*North Dakota University System SBHE Policy 308.2*



*All employees are required to report, orally or in writing, suspected violations of SBHE, NDUS, or institution policy or procedure, or suspected violations of any other applicable federal or state law, regulation, or rule.*

# Point Person for Reports and Complaints

- TIXC (or designee) receives all reports or complaints regarding sex/gender harassment, misconduct, and discrimination
  - The institution may designate multiple entry points for receipt of information
- **All employees are mandated reporters** (except for **confidential resources**):
  - 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

# REPORTING

## Confidentiality vs. Privilege vs. Privacy

**1**

### **CONFIDENTIALITY**

Those who receive reports from students (and sometimes employees) and need not report to the TIXC

**2**

### **PRIVILEGE**

A legal obligation, such as an attorney giving advice in an attorney/client relationship or clergy providing pastoral advice

**3**

### **PRIVACY**

Only disclosing the allegations to those who need to know, but cannot guarantee confidentiality

# 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)

# Report vs. Complaint

- Online reporting form
- Anonymous reports
- Requests for confidentiality
- Take all reasonable steps to follow the Complainant's wishes
  - Institution must respond effectively and prevent harassment of other students or Complainant
- If TIXC takes no formal action in response to a report, document rationale

# Steps for Reporting

# REPORTING: LIKE BREATHING A.I.R.



ASSESS HEALTH AND  
SAFETY



INFORM OF YOUR  
REPORTING OBLIGATIONS



REPORT TO TITLE IX

# ASSESS

Immediate  
safety

Physical  
safety

Emergency  
medical or  
mental  
health needs



# INFORM



Inform the individual of your reporting obligations and privacy of the process



Preferably before a disclosure



Frame reporting as a resource referral



Listen and minimize your questions

# REPORT

## The Title IX Office wants to know:

- The four W's of the conversation
  - Who is involved and Who you are
  - What was reported
  - When was it reported and when did the allegation(s) occur
  - Where did the allegations occur
- Resources you provided/referred

# MANDATORY OR PRIVATE



Only individuals with a legal or institutional need to know the information will receive it



Required of all faculty, staff, administrators of the institution



Must report all known information regarding an incident to the Title IX Coordinator without delay

# REMEMBER...

Assess

Inform

Report

 Investigate

 Mediate

 Divulgate

 Terminate

 Adjudicate

 Enforce

# REPORTER'S NEXT STEPS



May be contacted after the report is made to provide additional information or clarify information



May be asked to participate in the administrative process as a witness after the report is made



May be asked to attend or participate in a hearing if one takes place



May be asked to provide supportive measures

# Implementation Resources

# TRAINING OTHERS

- Identify...
  - Concerns when reporting disclosures
  - Existing expectations
  - The behaviors that must be reported
    - Consider adding issue-spotting scenarios
  - How they respond to a disclosure, what helps, and what hurts
    - A.I.R.
  - How they report
    - Multiple points of entry (e.g., online, phone, in-person, etc.)
  - Case study prompts to practice responding to a disclosure
  - Culturally responsive techniques

# Case Studies



# CASE STUDY #1: IN-PERSON

A student comes to your office and asks if you are available to talk. They say they want to talk to you about something that happened over the weekend. They are worried about talking to anyone else because they don't want to get in trouble.

- How would you handle this situation?

# CASE STUDY #2: VIA EMAIL

Someone you supervise emails you to tell you they will have to miss their shift next week because they must go to court. In the email, they tell you it is because of something their ex did to them.

- How would you handle this situation?

# CASE STUDY #3: VIA ASSIGNMENT (PT. I)

You receive an assignment from a student. Within the assignment, there is a statement that the student was sexually assaulted by a friend while in high school. In the assignment, you read that the assault was perpetrated by someone who does not attend the institution.

- How would you handle this situation?

# CASE STUDY #3: VIA ASSIGNMENT (PT. II)

The student also shares that the person who assaulted them is of the same sex and the student is having trouble coping because they are both part of the LGBTQA community in their small hometown and the student is not out to anyone at home.

- How would you handle this situation now?

# CASE STUDY #4: DR. REIDNER

- Dr. Taylor Reidner is a senior administrator. He jokes he could have retired years ago but “has more left in the tank.”
- Over the last couple of years, you’ve observed Dr. Reidner call the women who report to him by nicknames like “sweetheart,” “honey,” or “dear.”
- He also calls all his male reports “buddy,” or “boss.”
- Several female direct reports have commented that although they don’t like the nicknames, it seem harmless.
- Additionally, it looks like women are fairly promoted, supported, mentored, compensated, and generally well-respected within his division.

# CASE STUDY #5: MARCUS & ANGIE

- Angie is new to the department but is getting along well with her co-worker, Marcus. He's been helping her learn the ropes and is very friendly.
- One Monday, while Marcus and Angie are chatting in the break room about their weekends, Marcus tells Angie he went to a “gentlemen’s club” over the weekend because he loves to surround himself with beautiful women.
- Angie isn't sure how to respond because Marcus winked when he said, “gentlemen’s club” and she’s surprised Marcus would mention this in the workplace. She just laughs off the comment.
- Marcus says he appreciates a good-looking woman and he’s so glad that Angie joined the team because he hasn’t had anybody “easy on the eyes” in the office in a while.

# CASE STUDY #6: THEO & CHARLES (PT. I)

- Theo is a financial assistant who wears earrings, bracelets, and other jewelry.
- His supervisor, Charles, has commented several times about how he thinks it is weird for Theo, a man, to wear jewelry.
- Theo would like to be promoted to a customer service role that he is well qualified for but has been told by Charles that there's if “keeps dressing the way he does,” no one will take him seriously.
- Charles also thinks that Theo might be gay. He says he's cool with that because he has several gay friends but doesn't understand why Theo is hiding it, so Charles asks Theo if he's married, has kids, has a partner, and other personal questions.
- Theo politely says no but is uncomfortable and later learns that Charles has been telling others in the office that Theo is “for sure gay.”

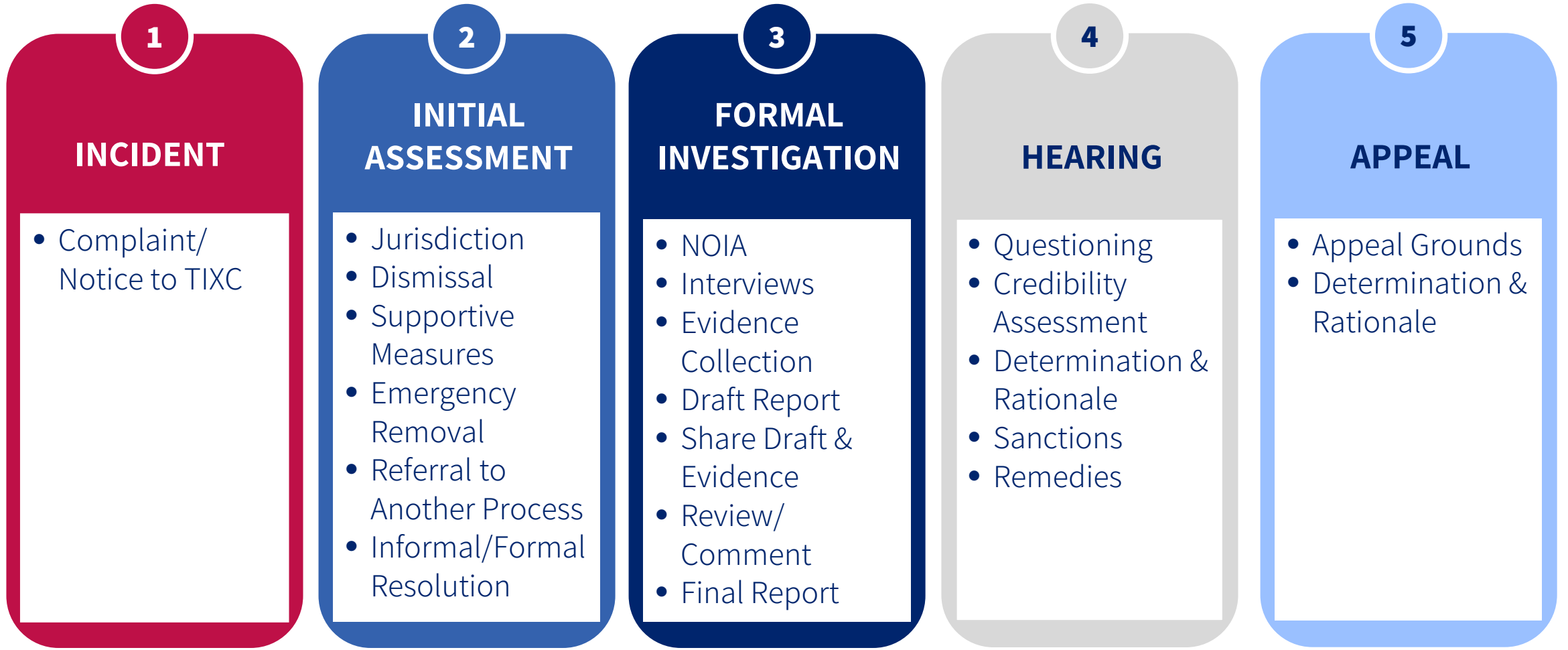
# CASE STUDY #6: THEO & CHARLES (PT. II)

- Theo reports Charles' behavior because he worries Charles may not recommend Theo for the customer service position and because he now feels gawked at by others.
- The outcome from that report is that Theo's jewelry does not violate any policies, that Charles' behavior is sexual harassment, and that he must refrain from making comments of a similar nature, gossiping about Theo's personal life, and asking Theo intrusive questions.
- Charles discontinues all his commenting, questioning, and gossiping and Theo applies for the position.
- The hiring authority later fails the search and reposts the job with minimum qualifications that now exceed Theo's qualifications.



# Title IX Specific Application

# TITLE IX GRIEVANCE PROCESS OVERVIEW



# **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

# 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 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, a Complainant is not P/ATP
  - AND the TIXC determines they do not need to sign a formal complaint

# 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

# 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, address reported behavior under other applicable policy

# WHO SHOULD INVESTIGATE?

- Investigator(s) may not be Decision-maker(s) for the same complaint
- Tasks:
  - Conduct prompt, thorough, and impartial investigations
  - Collect the maximum amount of relevant information available
  - Write comprehensive investigation report summarizing all relevant evidence

**Full-Time  
Investigator(s)**

**Investigator Pool**

**Coordinator as  
Investigator**

# DETERMINING A BASIS FOR INVESTIGATION

There are three bases for investigations:

- **Incident:** a specific incident or period
  - May involve one or multiple alleged violations
- **Pattern:** repetitive or similar behaviors or targets chosen by the same Respondent over a period
  - Tend to involve multiple Complainants
- **Climate/Culture:** discriminatory policies, processes, and environments
  - May have no identifiable Respondent
  - May cue up a subsequent incident or pattern investigation based on information gathered during climate/culture investigation



# DECISION-MAKING

- TIXC may not serve as a Decision-maker
- Under Title IX, all formal complaints must be resolved through a live hearing unless an Informal Resolution is reached, or the complaint is dismissed

## **Title IX Coordinator**

- Oversees process
- Facilitates scheduling and communication
- Ensures sanction compliance
- Implements remedies
- Provides institutional memory and precedent information
- Trains Decision-makers
- Maintains institutional records

## **Decision-maker(s)**

- Conducts Pre-Hearing Meetings (if any)
- Facilitates hearing process, including questioning
- Determines relevance
- Assesses credibility
- Makes a finding of fact
- Determines whether policy was violated
- Assigns sanctions (if applicable)
- Writes determination rationale

# Title IX Case Studies

# BLAKE & TAMIKA

- Tamika is a graduate student serving as a graduate teaching assistant for a first-year organic chemistry course.
- Blake, a student in the course, has visited Tamika's office hours each week to ask questions and seek help with the course materials.
- With the midterm coming up, Tamika offered Blake her phone number so he could message her with questions and allow her to respond more quickly than email.
- After the midterm, Tamika continued texting Blake and they often talked about personal things. Tamika started flirting with Blake and he flirted back.

# BLAKE & TAMIKA

- After a few weeks, Tamika asked Blake to get a drink with her after class. Blake declined.
- Over the following few weeks, Tamika sent Blake several sexually explicit text messages, including a few partially nude pictures of herself.
- Blake tried to tell Tamika he wasn't interested, but then gave up on responding.
- Eventually, Blake blocked Tamika. Tamika then resorted to winking at Blake during class and making thinly veiled sexual comments in front of Blake's classmates.
- Tamika then used her school email address to ask Blake to come to her office hours, implying his grade would suffer otherwise.

# SEXUAL HARASSMENT DEFINITION

- Conduct on the basis of sex, or that is sexual in nature, that satisfies one or more of the following:
  - **Quid Pro Quo**
    - An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service
    - under the recipient’s education program or activity
    - explicitly or impliedly
    - conditioning the provision of such an aid, benefit, or service on a person’s participation in unwelcome sexual conduct.

# SEXUAL HARASSMENT DEFINITION

- Conduct on the basis of sex, or that is sexual in nature, that satisfies one or more of the following:
  - **Hostile Environment**
    - Unwelcome 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.

# AMINA & DARIUS

- Amina and Darius are two first-year students who met during their institution's Welcome Week festivities.
- In October, Amina invited Darius to come with her to a play on campus.
- During the show, Darius tried to grab Amina's hand, which was resting on her leg.
- Amina pulled her hand away, but Darius left his hand on her thigh for awhile. Amina froze and did not remove Darius's hand.
- At one point during the play, Darius leaned over to try and kiss Amina, but Amina moved so Darius could not reach her mouth. He kissed Amina on the cheek instead.

# AMINA & DARIUS

- Then Darius put his arm around Amina and squeezed her shoulder, pulling her into him.
- After the play, Amina and Darius walked back to Amina's residence hall.
- Darius put his arm around Amina's waist during their walk, again pulling her in closer to him.
- When they reached Amina's residence hall, Darius pulled Amina closer to try and kiss her again. Amina pulled him in for a quick hug, said goodbye, and bolted for the door.



# FONDLING DEFINITION

- The touching of the private body parts of the Complainant (breasts, groin, buttocks),
  - 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 impairment

# Grievance Process for Non-Title IX

Non-Title IX Sex (or Other) Discrimination

# GRIEVANCE PROCESS FOR SEX DISCRIMINATION (SD)

- The 2020 regulations do not mandate a detailed grievance process for sex-discrimination (SD) complaints
- However:
  - Must still stop, prevent, and remedy promptly and equitably
  - 2022 NPRM foreshadows a grievance process for SD complaints

# GRIEVANCE PROCESS FOR SD

- ATIXA recommendations, rather than regulatory requirements
  - Model Policy – 1P2P
  - “Process B”
    - Borrows elements from 2020 grievance process, including key due process protections
    - Ensures a fundamentally fair process
- ATIXA Best Practice and compliant under the current regulations
  - Prepare and ease transition to new regulations

# SD INITIAL ASSESSMENT CHALLENGES

- First Amendment protection implications
  - Free speech and expression
  - Academic freedom for faculty
- Disparate Impact or Disparate Treatment complaints
- Specificity of allegations
  - Need to determine scope and applicable policies
- Title IX Sexual Harassment (SPOO)

# SEXUAL HARASSMENT

## Generally

Unwelcome conduct determined by a reasonable person to be so...

## Title IX

severe, pervasive, and objectively offensive that it effectively denies a person equal access to the university's education program or activity; or

## Title VII

severe or pervasive/persistent, and objectively offensive

# HOSTILE ENVIRONMENT: “UNWELCOME”

- Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

# HOSTILE ENVIRONMENT: “REASONABLE PERSON”

- Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced



# HOSTILE ENVIRONMENT: “SEVERE”

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Physical conduct is more likely to be severe

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Accompanied by threats or violence

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Consider the circumstances (e.g., the ability for Complainant to remove themselves from the harassment)

# HOSTILE ENVIRONMENT: “PERVASIVE”

- Widespread
- Openly practiced
- Well-known among students or employees – reputation of a department, person, etc.
- Occurring in public spaces (more likely to be pervasive)
- Frequency of the conduct is often a variable in assessing pervasiveness (look to intensity and duration)
- Unreasonable interference with school or job
- A “gauntlet of sexual abuse” Meritor v. Vinson, 477 U.S. 57 (1986)

# HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”

- Reasonable person standard in context
- “I know it when I see it...”
- Age and relationships of Complainant and Respondent
- Number of persons involved
- Frequency
- Severity
- Physically threatening
- Humiliating
- Intimidating
- Ridiculing
- Abusive

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- Hostile environment analysis requires an evaluation of the “totality of the circumstances.”
- Totality of the circumstances to consider:
  - Frequency, nature, and severity of the conduct (see factors previously discussed)
  - Identity of and relationship between the parties
  - Age of the parties
  - Size of the school, location of the incidents, and context in which they occurred

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

- Totality of the circumstances to consider:
  - Whether the conduct unreasonably interfered with the Complainant's educational/work performance
  - Effect on the Complainant's mental or emotional state
  - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
  - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection
  - "Constellation of surrounding circumstances."

# SIGNS OF A HOSTILE ENVIRONMENT

- The environment is toxic
  - Culture of exclusion, insults, etc.
- The hostile behaviors happen consistently and persistently
  - Does not include one-off incidents
  - Occurs over a period of time or multiple times
- The hostile behaviors are objectively offensive
  - Reasonable person standard
- The hostile behaviors become aggressive
- The hostile behavior is discriminatory
  - Based upon protected characteristics
- The hostile behavior disrupts the ability to work and learn
- The victim of such behavior feels they can't report or seek a remedy

# WHAT IS *NOT* A HOSTILE ENVIRONMENT

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Objectionable, unprofessional or impolite conduct that is not based on a protected class or is objectionable to all may not be discriminatory/illegal harassment

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Simple teasing

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Off-hand comments

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Isolated incidents

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General hostility does not equate to illegal harassment

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# WHO SHOULD INVESTIGATE?

- ATIXA recommends Investigator(s) not be Decision-maker(s) in the same process
  - More flexibility to assign roles in SD complaints
- Tasks:
  - Conduct prompt, thorough, and impartial investigations
  - Collect the maximum amount of relevant information available
  - Write comprehensive investigation report summarizing all relevant evidence



# INVESTIGATION AND DECISION-MAKING MODELS

**Four Corners Approach:** Every Title IX team member serves a distinct role with no overlap in the same complaint

## Pros:

- Avoids perception of bias
- Does not bog TIXC down with fulfilling other roles so they can provide process oversight
- Title IX team members may develop expertise in certain roles or types of complaints

## Cons:

- Need personnel and budget for training
- Coordinating team member schedules
- Each new Title IX team member needs to review complaint material to get up to speed, less familiarity with specific complaints

# INVESTIGATION AND DECISION-MAKING MODELS

**TIXC Serves as Investigator:** Separate Decision-maker(s) chosen from TIX team

## **Pros:**

- Middle ground to reduce perceptions of bias
- Helpful structure for resource-strapped institutions

## **Cons:**

- Decision-maker(s) must commit to thoroughly understanding the facts to render a fair and accurate decision
- TIXC must juggle dual roles
- TIXC cannot consult with Decision-maker(s)
- TIXC becomes witness in Decision-making phase

# INVESTIGATION AND DECISION-MAKING MODELS

**Single Investigator Model:** Investigator also serves as the Decision-maker.

## **Pros:**

- Investigator is the individual most familiar with the facts of the complaint
- Has established rapport with parties and witnesses
- Can reduce time and staffing needs

## **Cons:**

- Perception of bias
- Only one perspective/viewpoint on the complaint
- May miss critical information

# INVESTIGATION AND DECISION-MAKING MODELS

## ATIXA recommends:

- Investigators make non-binding recommended findings and recommended final determinations
- Separate Decision-maker makes findings, policy violation determination, and sanctions/remedies
- Robust appeal opportunity



# **Activity: Is it Discrimination?**

# STUDENT-ATHLETE CURFEW

- The coach for the women’s volleyball team has been at the institution for five years. Each year, he reminds his players to “get to your rooms by 10:00 p.m.” because “nothing good happens after 10:00 p.m. and I want you girls to be safe.”
  - The men’s volleyball coach does not make the same request
- **Is this discrimination?**

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- **What if the women’s coach has never made curfew a team rule or disciplined any curfew violations?**

# STUDENT-ATHLETE CURFEW

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  - The men’s volleyball coach does not make the same request
- **What if the women’s coach makes 10:00 p.m. curfew a team rule and will discipline or dismiss players that violate curfew?**



# VISITATION POLICY

- An institution with residence halls has a policy that prohibits students of one gender hosting an individual of another gender in their residence hall room overnight.
- A male student complains to housing, saying it is not fair that they cannot have their girlfriend spend the night, but a gay student could have their partner spend the night.
- **Could this be a discriminatory policy? Why or why not?**

# VISITATION POLICY

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- A male student complains to housing, saying it is not fair that they cannot have their girlfriend spend the night, but a gay student could have their partner spend the night.
- **What changes could be made to this policy to avoid being discriminatory?**

# VISITATION POLICY

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- A male student complains to housing, saying it is not fair that they cannot have their girlfriend spend the night, but a gay student could have their partner spend the night.
- **A few weeks after the student filed his complaint, his Resident Assistant documented him for underage alcohol consumption.**
- **The student claims the documentation was retaliation for his complaint.**
- **What are your next steps?**

# Non-Title IX Case Study

# CASE STUDY: SASHA

- Sasha is a sophomore theatre major and just found out she is pregnant. Sasha is having a very rough first trimester and is having to miss a lot of rehearsal time for a play in which she was recently cast as the lead role.
- Professor Alexa, Sasha's Acting II instructor and the director of the production Sasha is in, has a very strict attendance policy when it comes to missing rehearsals.
- Professor Alexa's policy prohibits a student from missing more than two rehearsals, otherwise they are removed from their role. Sasha has now missed her third rehearsal and has been removed from the lead role and the play altogether.

# CASE STUDY: SASHA

- Sasha is mad that she has been removed from the cast of the show and reports to the TIXC that she is being discriminated against based upon her sex and pregnancy status.
- Professor Alexa states that Sasha's removal has nothing to do with her sex or pregnancy status and has everything to do with the attendance policy which is applied equally to all students in productions.
- Furthermore, according to the national theatre accrediting body, each production must include a minimum of twenty rehearsal hours for each actor prior to the first full dress rehearsal in order for the play to be considered of educational quality, and for it to count toward the student's degree requirements.

# CASE STUDY DISCUSSION: SASHA

- Rehearsals take place one day per week for six hours each session. Missing one rehearsal is the equivalent of missing three weeks of course material.
- Sasha's three absences have significantly impacted the others involved in the production, including other students not having the ability to rehearse scenes with her, which has in turn decreased their total number of rehearsal hours.
- Sasha tells the TIXC that she has been rehearsing during the weekends with her scene partners and knows her lines despite missing the three class periods.

**What would you do as Title IX Coordinator?**

# Questions & Discussion





Association of  
Title IX Administrators

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