



Association of  
Title IX Administrators

# Live Hearings 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 sex- and gender-based harassment, 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 equip Title IX practitioners to prepare for and run live hearings consistent with Title IX regulations.



Title IX Coordinators and Decision-makers must understand live hearing logistics, questioning best practices, relevance determinations, and due process protections.



Our goal is to help Title IX Coordinators and Decision-makers approach live hearings with confidence.

# 2024 Title IX Regulations Litigation

- The 2024 Title IX Regulations are subject to legal challenges across the country
  - Generally, the recent lawsuits are targeting the gender identity provisions and the hostile environment definition
- Opponents of the Regulations are seeking **injunctions** to delay or halt implementation of all or some of the Regulations
  - **Injunction:** A court order requiring an individual or entity to either perform or stop performing a specific action
- Types of injunctions:
  - A **complete injunction** prohibits the Department of Education (ED) from enforcing the 2024 Regulations in its entirety
  - A **partial injunction** prohibits ED from enforcing specified provisions of the 2024 Regulations

# 2024 Title IX Regulations Litigation

- If a court orders an injunction, that decision may be appealed to a higher court
  - Otherwise, the injunction stays in effect until a trial occurs
- ATIXA anticipates that any injunction decision will be appealed
- If the 2024 Regulations are not enforceable in some or all states as a result of injunctions, schools, districts, and institutions in those states will continue to follow the **2020 Regulations**
- **Note:** Some states also have “Do Not Implement” directives from state officials
  - Independent from any federal lawsuits or injunctions
- Implementation will be unsettled for the foreseeable future
  - Consult legal counsel to determine implementation plans
- Track developments on ATIXA’s Regulations website

# Title IX Resolution Process Review

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# Title IX and Equity

- Title IX is a sex and gender equity law
- The principles of equity recognize that not all individuals have access to the same resources and opportunities
  - Equity focuses on increasing access by reducing disparities and barriers in order to increase access
  - Title IX imposes a duty on institutions to stop, prevent, and remedy the inequities created by sex and gender discrimination

# Essential Compliance Elements

The requirement to Stop, Prevent, and Remedy guides the institution's equity and compliance work

**1**

**STOP**

discriminatory  
conduct

**2**

**PREVENT**

recurrence, on both  
individual and  
institutional levels

**3**

**REMEDY** the effects  
of discrimination,  
for both the  
individual and the  
community

# Retroactivity

- The 2024 Regulations apply **only** to sex discrimination alleged to have occurred **on or after** August 1, 2024
  - For conduct alleged to have occurred prior to August 1, 2024, the 2020 Regulations apply, in perpetuity
- Recipients will need to maintain/update policies, procedures, and training that are compliant with the **2020** Regulations and **2024** Regulations

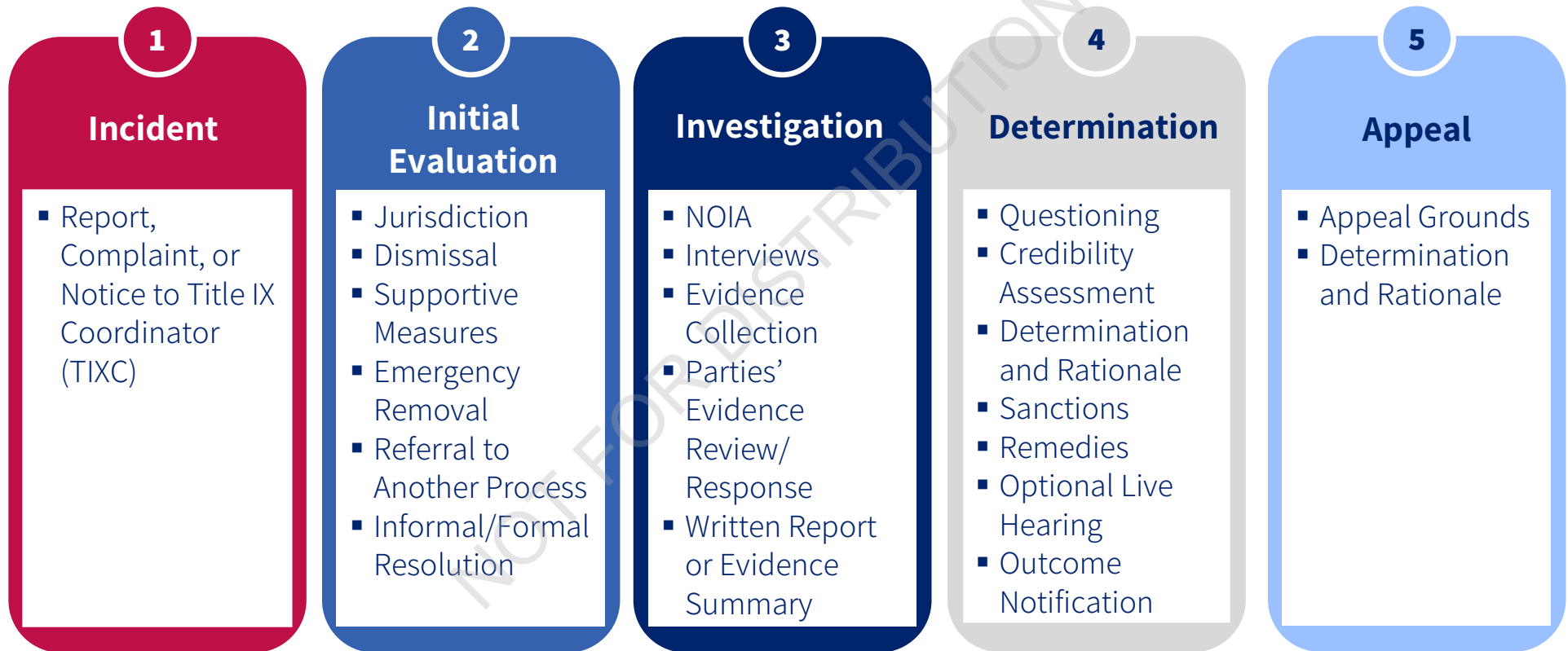


# Decision-Maker Course Review

## Important topics and competencies from the Decision-maker course:

- Role and Responsibilities
- Title IX Scope
- Conflicts of Interest and Bias
- Due Process
- Understanding and Applying Policy
- Evidence
- Credibility
- Sanctioning
- Written Determinations
- Appeals
- Recordkeeping

# Title IX Resolution Process Overview



# Two-Track Resolution Process

- Which Resolution Process applies depends on the identities of the parties
  - Section 106.45 provides a civil rights Resolution Process for resolving complaints
  - Section 106.46 incorporates § 106.45 and adds some due process protections
    - Retains many, but not all, features of the formal process from the 2020 Regulations
- Two separate processes are permitted but **not** required
  - If using only one, it must be § 106.46 (ATIXA’s recommended practice)

§ 106.45	§ 106.46
<ul style="list-style-type: none"><li>▪ Sex discrimination complaints that are <b>not</b> sex-based harassment</li><li>▪ Sex-based harassment complaints that do <b>not</b> involve a post-secondary student</li></ul>	Sex-based harassment complaints involving a post-secondary <b>student</b> Complainant and/or Respondent

# Section 106.45: Investigations

## § 106.45

- Adequate, reliable, and impartial
- Gather evidence
- Permit parties to present fact witnesses; inculpatory and exculpatory evidence
- Recipient reviews all evidence gathered through the investigation and determines relevance
- Provide parties opportunity to access relevant evidence or accurate description of such evidence
- Provide parties reasonable opportunity to respond to evidence
- Investigation report not required
- Take reasonable steps to prevent and address parties' unauthorized disclosure of information and evidence obtained through process

# Section 106.46: Investigations

## § 106.46 ( + non-conflicting elements of § 106.45)

- Parties may be accompanied by Advisors
- Provide written notice of all meetings or proceedings with time to prepare
- Provide parties with the same opportunities to have support persons present
- Provide equal opportunity to review relevant evidence or an investigation report
- Provide opportunity to respond to evidence or an investigation report
  - If using a hearing, must permit review of evidence prior to hearing
- May equitably permit expert witnesses



# Decision-Making Requirements: § 106.45

- Section 106.45 requires institutions to provide a process enabling the Decision-maker (DM) to question parties and witnesses to **assess credibility**
  - No additional guidance provided as to structure
- Process must be outlined in policy and procedures
- Investigator can be the DM
  - TIXC can be the Investigator and/or the DM
- Advisors not required
- Questioning by parties not required
- Parties must notify parties in writing of the determination, rationale, and appeal procedures (if offered)
- Appeal not required

# Decision-Making Requirements: § 106.46

- Section 106.46 **requires** institutions to provide a process enabling the DM to question parties and for parties to **propose and ask relevant questions**
  - Individual meetings or live hearings
- Regardless of whether an institution uses individual meetings or live hearings, the DM makes relevance determinations of all questions prior to a party or witness answering
  - May not permit unclear or harassing questions, advisor may rephrase
- Investigator can be the DM (not recommended)
  - TIXC can be the Investigator and/or the DM (not recommended)
- A DM may place **less or no weight** on statements by a party or witness who refuses to respond to relevant questions
- A DM may not draw an inference about whether sex-based harassment occurred **solely** based on a party or witness's refusal to respond to relevant questions

# Section 106.46: Individual Meetings

Institutions may use **individual meetings** rather than conducting a live hearing

- Investigator or DM asks relevant and follow-up questions during individual meetings with parties and their respective Advisors
  - Each party may propose questions to be asked of any party or witness, **AND**
  - Has the right to have those relevant questions, including questions challenging credibility, asked by the Investigator or DM during individual meetings
    - If question deemed unclear or harassing, party must have an opportunity to clarify or revise for reconsideration by DM
- Each party has the right to a recording or transcript of the meeting(s) with a reasonable opportunity to propose follow-up questions
- DM must have the ability to ask more questions, if needed

# Section 106.46: Live Hearings

Institutions may use a **live hearing**

- DM asks parties and witnesses questions directly
- There are **two options** for parties to question other parties and witnesses
  - Parties can ask questions of other parties and witnesses through DM **or** through Advisors
    - **DM-Facilitated Questioning:** parties may submit proposed questions to the DM and the DM will ask those deemed relevant; **OR**
    - **Advisor-Led Questioning:** Advisors ask relevant questions of the other parties and witnesses on behalf of their Advisee
      - Tracks the 2020 model

# Section 106.46: Live Hearings

- If an institution uses Advisor-Led Questioning, the institution must provide an Advisor for each party for the purpose of questioning unless parties already have Advisors
  - Institution-appointed Advisor may **not** be a confidential employee
- Hearings via technology (e.g., Zoom, Teams, or WebEx) are permitted
  - DM and parties **must** be able to simultaneously see and hear the party or witness while that person is speaking
- Institution must create recording or transcript of hearing

# Hearing Participants and Logistics

# Who Will be Present at the Hearing?

Parties

Witnesses

Advisors

Investigator(s)

Decision-  
maker(s)

Hearing  
Facilitator

# General Logistics

- Party and witness attendance
- Advisor attendance/participation
- In-Person: Location and physical space
  - Accessibility
  - Parking
  - Privacy
  - Restrooms
  - Waiting areas
  - Furniture





# General Logistics

- Virtual/remote: Hearing platform
  - Party and Advisor in same location or different locations
    - If in same room, beware of multiple device interference
  - Virtual waiting room
  - Breakout rooms
  - Accessibility
  - Professional setting for DM
  - “Camera on” policies
  - Ensure parties and witnesses are not in the location of the alleged misconduct
  - Background guidelines

# General Logistics

- Recording
- Hearing technology
- Administrative, tech, or audiovisual support
- Evidence availability for parties, Advisors, and witnesses
- Breaks



# Hearing Facilitator

- Not required by the regulations, but a best practice
  - May be TIXC (if not DM) or a different person
- Facilitate a smooth hearing and help problem-solve
  - Maintain hearing schedule and order of events
  - Communicate with parties, Advisors, and witnesses during the hearing
    - Manage in-person or virtual waiting rooms and breakouts
  - Ensure recording; manage devices and files
  - Provide access to evidence during the hearing
  - Coordinate additional support (food, facilities, technology, materials)

# Scheduling Considerations

- Agenda/schedule flexibility based on availability
- Availability of:
  - Parties, witnesses, and Advisors
  - Decision-maker(s)
  - Investigator(s)
  - Interpreter or other accommodation
  - Physical space
- Reasonable number of hours per day
- Multi-day hearings
- Breaks
- Finals/Graduation
- Employees on soon-to-be-expiring contracts

# Virtual Hearing Considerations

- Any party may request a virtual hearing
- Virtual hearings provide helpful flexibility
  - No travel required
  - No large physical space needed
- Choose software or platform to meet hearing needs
  - Zoom is a common option
  - Participants must be able to see and hear each other
- Prepare for Wi-Fi issues or other tech problems
- Individuals may need to participate virtually from campus
- Address any concerns related to privacy

# Single Decision-Maker vs. Panel

## Single Decision-Maker

- Simpler scheduling
- Easier to staff and train
- Streamlined deliberation
- Streamlined drafting process
- Only one perspective
- Bias concerns
- Can overtax a single person

## Panel

- Additional scheduling considerations
- Costs more to staff and train
- Deliberation and drafting may take longer
- Majority vote or consensus
- Diversity of perspectives
- Reduce bias concerns

# Advisors

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# Advisors

The Title IX regulations contemplate two types of Advisors:

## Party-Selected Advisor

- Title IX regulations specify that a party may select an Advisor of choice
- May accompany the party throughout Resolution Process
- May be present for every meeting, interview, and hearing
- Institution may not limit the choice

## Institution-Appointed Advisor

- Only required to appoint for the hearing if party has not chosen an Advisor by the hearing, if Advisor-led Questioning is to occur
- If appointed early enough, may accompany the party throughout Resolution Process
- May be present for every meeting, interview, and hearing



# Advisors

- Advisors may be involved in the Resolution Process from the beginning (best practice) or permitted only for the hearing
- No Advisor training mandate (training institution-assigned Advisors is a best practice)
- Can be an attorney, but attorney not required
- May regulate Advisor participation, so long as applied equally to all parties



# Advisor Roles in the Resolution Process

## The Advisor may support their advisee with:

- All phases of the Resolution Process
- Strategic issues, such as whether to:
  - File a complaint
  - Participate in Informal Resolution
- Accessing supportive measures, community resources, and advocacy services
- Participating in the investigation, including review and comment on the investigation report
- Preparing for a hearing
- Conducting questioning/cross-examination at a hearing
- Submitting or responding to an appeal

# Managing Advisors Generally

- Advisors approach the role differently, depending on training and background
  - All Advisors need management, not just attorney Advisors
- Be firm, but flexible
- De-escalate conflicts
- Advisor may be removed if disruptive, after warning
- Decorum expectations
  - Generally, parties should speak for themselves
  - Hearings are not court processes
- Advisor must respect confidentiality policy; can be required to sign a Non-Disclosure Agreement (NDA)

# Chair/Single Decision-Maker Role and Responsibilities

# Responsibilities in the Process

	Before Hearing	Hearing	Deliberation
Panelists	<ul style="list-style-type: none"><li>▪ Review investigation report and evidence file</li><li>▪ Ensure no conflict of interest</li><li>▪ Prepare questions</li></ul>	<ul style="list-style-type: none"><li>▪ Listen actively</li><li>▪ Ask/pose questions</li><li>▪ Assess credibility</li></ul>	<ul style="list-style-type: none"><li>▪ Analyze relevant evidence</li><li>▪ Balance credibility and reliability</li><li>▪ Determine outcome, sanctions, remedies</li></ul>
Chair/DM	<p><b>Panelists' tasks plus:</b></p> <ul style="list-style-type: none"><li>▪ Pre-hearing meeting</li><li>▪ Technology training</li><li>▪ Witness list</li><li>▪ Evidence review and redaction (if applicable)</li></ul>	<p><b>Panelists' tasks plus:</b></p> <ul style="list-style-type: none"><li>▪ Follow procedures</li><li>▪ Manage questioning, including relevance determinations</li><li>▪ Consult w/counsel/TIXC</li></ul>	<p><b>Panelists' tasks plus:</b></p> <ul style="list-style-type: none"><li>▪ Lead discussion</li><li>▪ Take notes</li><li>▪ Draft rationale/outcome letter</li></ul>

# Chair/Single Decision-Maker Responsibilities

- Follow the hearing procedures
- Guide other DMs (i.e., panel members) on procedures
- Enforce decorum expectations
- Manage Advisors
- Determine question relevance
  - Parties/witnesses pause before responding to a question
  - Chair makes relevance determination, states rationale if question deemed not relevant
  - Cannot permit questions that are unclear or harassing; opportunity to clarify or revise
- Facilitate the deliberation discussion
- Lead rationale writing/outcome letter process

# Other Chair Considerations

- Clarify with TIXC prior to hearing whether DM:
  - Determines relevance and provides verbal rationale for questions deemed not relevant
    - For all questions from the panel or Advisors, if permitting Advisor questions
  - Permits Advisors to “argue” whether a question should be deemed relevant
- Ask questions of parties and witnesses **before** or **after** Advisor-led Questioning
- Determine how to provide an opportunity for follow-up questions
- Address evidence that DMs should not rely upon

# Pre-Hearing Meetings: Purpose and Format

- ATIXA recommends **pre-hearing meetings**; not required by Title IX regulations
  - Check whether institutional policy describes pre-hearing meetings
- May hold several separate meetings with each party and their Advisor
  - May hold combined meetings
  - Summarize decisions in a memo to the parties and Advisors, as needed
- May be virtual or in-person
- Address questions, concerns, expectations prior to hearing
- May flow more efficiently if Advisors are able to speak freely with the Chair/DM



# Pre-Hearing Topics

- Answer questions about procedures
- Review technology
- Discuss interpretation, translation, or accommodation needs
- Address scheduling questions or concerns
- Review flow and logistics for before, during, and after the hearing
- Reinforce expectations and decorum rules
- Explain cross-examination procedures



# Common Pre-Hearing Meeting Discussions

## Pre-hearing meetings can provide an opportunity to:

- Discern whether parties intend to ask questions of any or all witnesses, or whether a party intends not to testify at the hearing
- Invite parties to submit questions in advance; encouraged, but not required
- Discern any conflicts of interest/vet recusal requests
- Consider any questions regarding evidence or proposed question relevance and make pre-hearing rulings
- Decide whether to redact inadmissible information or just disregard it
- Address expectations or issues regarding new evidence consistent with institutional policy

# Hearing Preparation

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# Hearing Preparation

## **Prior to the hearing, DMs must review:**

- Notice of Investigation and Allegations (NOIA)
- Policies alleged to have been violated
  - Policy elements
- Applicable procedures
- Investigation report and evidence file
  - Review more than once, as needed
  - Note facts in dispute and not in dispute
  - DM annotations or notes may be subject to Family Educational Rights and Privacy Act (FERPA) or discoverable
- If investigation insufficient, request it be reopened with specific instructions from DM

# Hearing Preparation

- Prepare questions in advance of hearing
  - Helps DMs structure their questions in a logical, organized way
  - Ensures no significant disputed fact or inconsistency is missed
  - Helps DMs understand and analyze the evidence in the report
- Meet as a panel (if applicable)
  - Discuss investigation report and evidence file
  - Review questions for parties and witnesses
  - Determine questioning order

# Hearing Script and Flow

# Hearing Script and Flow

Typically  
Not  
Recorded



## **TECHNOLOGY REVIEW**

- Video requirement
- Party and Advisor communication



## **LOGISTICS**

- Breakout/Waiting rooms
- Restrooms
- Breaks



## **INTRODUCTIONS**

- Participant introductions
- Hearing purpose
- Rulings



## **RECORDING & CONFIDENTIALITY**

- Confidentiality and privacy expectations
- Recording and post-hearing access

# Hearing Script and Flow

5

## HEARING PROCEDURES

- Decorum expectations
- Roles
- Order of testimony

6

## ALLEGATIONS

- Formal charges
- Confirmation of acceptance/non-acceptance of responsibility

7

## INVESTIGATOR STATEMENT

- Complaint introduction
- Questions from DMs then Advisors (if applicable)

8

## PARTY STATEMENTS

- Complainant then Respondent
- Statement then DM and Advisor Direct/Cross-Examination (if applicable)



# Hearing Script and Flow

9

## WITNESS QUESTIONING

- Expectation of truthfulness/Honor Code
- Questions from DMs then Advisors (if applicable)

10

## ADDITIONAL QUESTIONS

- DMs
- Advisors (if applicable)

11

## CLOSING STATEMENTS

- Complainant then Respondent
- Hearing closure

Not  
Recorded

12

## DELIBERATION

- Deliberation guidelines and process
- Determine rationale and evidence relied upon

# Recommended Best Practices

- Keep microphones muted when not speaking
- Use a different platform or breakouts for parties to actively communicate with Advisors
- Prevent distractions in video/audio backgrounds
- Facilitate DM, parties, Advisors, and other personnel introductions
- Establish confidentiality expectations
- Exclude impact/mitigation statements during hearing; accept after responsibility determination

# Hearing Decorum

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# Setting the Tone

- Hearing is a significant event in the parties' lives at that time
- Formal, administrative process
- Decision-making is a neutral role
- Clear, direct communication
- Active listening
- De-escalate as needed
- Maintain control

# Decision-Maker Decorum Practices and Pitfalls

## DO

- Set the tone with your own behavior
- Behave professionally while around any participants
- Maintain composure
- Evaluate the relevant evidence
- Minimize distractions

## DON'T

- Escalate tensions or conflict
- Act like a judge
- Treat the hearing like a courtroom
- Use legal terms
- Interrogate parties or witnesses
- Make sarcastic comments or jokes
- Set out to prove or disprove allegations

# Day of the Hearing

- Follow professional attire expectations
- Arrive early and prepared (either in-person or virtually)
  - Investigation report, evidence file, and preparation notes
  - Notetaking materials
  - Snacks and beverages
  - Comfort items
- Do not schedule anything else that day
- Turn off or silence technology

# Decorum Rules

- Institutions may have reasonable decorum expectations
- Govern behavior for parties, witnesses, Advisors, and DMs
- Address disruptive, disrespectful, or other prohibited behaviors
- Promote consistency across hearings



# Party Decorum Expectations

- No party should directly address another
- During cross-examination, only the DM or a party's Advisor, if applicable, may speak to or address another party or witness
- No participants may interrupt the proceedings with applause, heckling, outbursts, or other disruptive behavior
- Any threat of violence will be addressed immediately
- May not act abusively or disrespectfully during the hearing



# Advisor Decorum Expectations

## **An Advisor may not:**

- Yell, scream, badger, or physically invade the space of a party, witness, or DM
- Act abusively or disrespectfully during the hearing
- Intimidate a party, witness, or DM
- Make irrelevant personal attacks on a party or witness
- Ask repetitive questions or make accusations in their questions
- Ask questions that harass a party or witness

# Advisor Decorum Expectations

- If in-person, may not approach another party or a witness without obtaining permission from a DM
- Should remain seated during testimony and active proceedings
- Any relevant question that violates the decorum rules will be deemed not relevant by the hearing body because it is abusive
  - The question may be reframed in a way that adheres to decorum expectations

# Warning and Removal

- DMs have sole discretion to determine if decorum expectations have been violated
- DMs should provide one warning prior to removal, unless decorum violation is egregious
- If an Advisor is removed, the party may select a different Advisor, or the institution will provide one
  - Reasonable delays may be appropriate to find a new Advisor
  - A party may not serve as their own Advisor
- Any removal will be documented

# Interpersonal Skills

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# Building Rapport

- Be hospitable, but mindful that small talk may come across as inappropriate
- Be clear about DM role and transparent about the process
  - A hearing script may be helpful
- Maintain a calm demeanor
- Listen actively
- Monitor own body language
- Treat all participants with empathy and respect

# Active Listening



## **PAY ATTENTION**

- Focus on responses
- Avoid interrupting



## **SHOW YOU'RE LISTENING**

- Communicate nonverbally
- Avoid distractions



## **PROVIDE FEEDBACK**

- Reflective tone
- Seek clarification

# Questioning Skills and Considerations

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# Asking Questions

- DMs may ask parties and witnesses questions, regardless of whether the hearing permits Advisor-led questioning
- Appropriate questions have clear intent, are relevant to the allegations or credibility, and are thoughtfully phrased
  - Avoid multi-part and leading questions
- Goals:
  - Learn the facts
  - Establish a timeline
  - Understand each party and witness's perspective
  - Eliminate vagueness and gaps



# Questioning Strategies & Pitfalls

## DO

- Ask short, precise questions
- Use open-ended questions
- Repeat and clarify the language the parties and witnesses use
- Prepare questions from policy definitions
- Listen carefully, ask related follow-ups
- Look for cued or rehearsed answers

## DON'T

- Ask accusatory or argumentative questions
- Use a critical or sarcastic tone
- Ask compound or confusing questions
- Offer evaluative responses
- Sanitize participants' language
- Rely solely on closed-ended questions
- Chase “gotcha” moments

# Questioning Tips

- Outline questions in advance, but remain flexible
  - Allows for comprehensive and thorough approach
  - If working with other DMs, consult on questions to reduce potential bias
- Prior to asking a question, consider:
  - Is the answer already available in the investigation report?
  - What are the relevant issues?
  - What do I need to know?
  - Why do I need to know it?
  - What is the best way to ask this question?

# Asking Difficult Questions

- DMs will need to ask difficult questions about sensitive topics
- Acknowledge if a topic may be hard to discuss
  - DO NOT avoid asking questions because the topic is difficult to discuss
- Provide opportunities to take breaks
- DMs can show empathy **without** sacrificing their impartiality
  - Offer that empathetic response equitably to all parties and witnesses during the hearing, so that there is no appearance of favoritism

# Trauma-Informed Questioning

**ATIXA Position Statement:** Application of trauma-informed practices in our field has perhaps gotten ahead of the actual science

- **ATIXA Recommends:** Incorporate trauma-informed **questioning** practices without allowing trauma to influence the evaluation of credible, relevant evidence
  - DM must only assess the available relevant evidence
  - DM must avoid substituting trauma indicators for evidence
  - Trauma is neutral; it neither enhances nor detracts from proof
  - Be attuned to potential biased thinking
- Assume that any party or witness could have trauma; therefore, treat everyone with sensitivity

# Credibility in the Hearing

- A key purpose of a hearing is to afford an opportunity to assess credibility
- DMs and/or Advisors can explore credibility in questioning, to the extent credibility is in dispute and relevant to evaluating one or more allegations
- Fundamental to due process
- Distinguish performance or presentation skills from believability

# Activity: Questioning

# Activity: Question Asking

- Using the **Sample NOIA Excerpts** and **Sample Investigation Report Excerpts** in the course lobby:
  - Work independently or in small groups
  - Review the relevant materials
  - Draft five questions a DM should ask the Complainant
  - Provide a rationale for asking each question
- This activity illustrates the process of developing questions prior to the hearing based on an independent review of the report

# Managing Advisor-Led Questioning



# Managing Advisor-Led Questioning

- Advisors may ask relevant questions of parties and witnesses
  - Direct questioning
    - E.g., Respondent’s Advisor questioning Respondent
    - Valuable way to elicit important information
    - Check institutional policy to determine whether direct questioning is permitted
  - Cross-examination
    - E.g., Respondent’s Advisor questioning Complainant
- All questions must intend to elicit relevant information, which could include information relevant to assessing credibility

# Cross-Examination Challenges

- A party or witness may decide not to attend the live hearing, despite participating in the investigation
- DMs and Advisors should ask all relevant questions even if a party/witness refuses to answer or is not present
  - Possible missed opportunity for corroborative or consistent testimony
- **Recall:** DM must not draw an inference about whether sex-based harassment occurred based **solely** on a party's or witness's refusal to respond to such questions
  - A DM may place **less or no weight** on statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible

# Advisor-Led Cross-Examination

- Advisor asks question; party/witness pauses before answering
- DM determines relevance
  - Permit relevant questions and follow-ups, including those challenging credibility
  - Disallow questions that are not relevant and state rationale
- Unduly repetitive questions are not relevant
  - Reject questions already answered in the hearing unless expected to lead to additional relevant evidence
  - Should not repeat questions already asked by DM
  - May ask questions answered in investigation report, to confirm facts
- Permit rephrasing of unclear or harassing questions

# Advisor Cross-Examination

- Parties may opt for their Advisor not to ask any questions
- Advisors may not refuse to ask relevant questions their advisee wishes for them to ask
  - Otherwise, the institution must appoint an Advisor who will ask those questions
- Advisors may ask questions their advisee wishes for them to ask even if the advisee does not attend the hearing
  - Advisor should **not** ask questions without their advisee's approval

## Regulations Imagine:

Advisors will not do more than repeat or rephrase questions framed by the party

## In Reality:

Advisors are much more active and engaged, especially attorneys

# Activity: Relevance Determinations

# Relevance Determinations Part I

- Using the **Questions for Respondent** document in the lobby and following the directions in the document:
  - Work independently or in small groups
  - Review **Sample NOIA Excerpts** or **Sample Investigation Report Excerpts** as needed
  - Make relevance determinations for each question in the **Questions for Respondent** document and explain your rationale

# Relevance Determinations Part II

- Course faculty will act as **Respondent's Advisor** posing questions to the **Complainant** aloud
  - Taking turns, participants will act as Chair and make relevance determinations aloud and explain rationale behind the decision
- This activity demonstrates the cross-examination mechanics

# Deliberation

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# Deliberation

- Post-hearing discussion of relevant evidence
  - Analyze relevant evidence
  - Determine credibility (if relevant)
  - Assign evidentiary weight
  - Evaluate reliable, relevant evidence considering standard of proof
- If using a panel, check policy to see if consensus or majority is required
- Assign sanctions, as appropriate

## Finding

Whether the conduct occurred as alleged, by the standard of evidence

## Final Determination

Whether the conduct that is proven to have occurred violates policy

# Panel Considerations

- Develop deliberation guidelines
- Provide an opportunity for each DM to independently assess the evidence and share their viewpoint
  - Be aware of power dynamics within the panel
  - Avoid any outside influence or commentary
  - Select one DM to take notes
- Choose one DM, generally the Chair, to compose initial drafts
  - All DMs should approve of final draft
  - May seek input/feedback from TIXC or legal counsel
- May consult TIXC on process-related questions

# Communicating Outcomes

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# Communicating the Final Determination

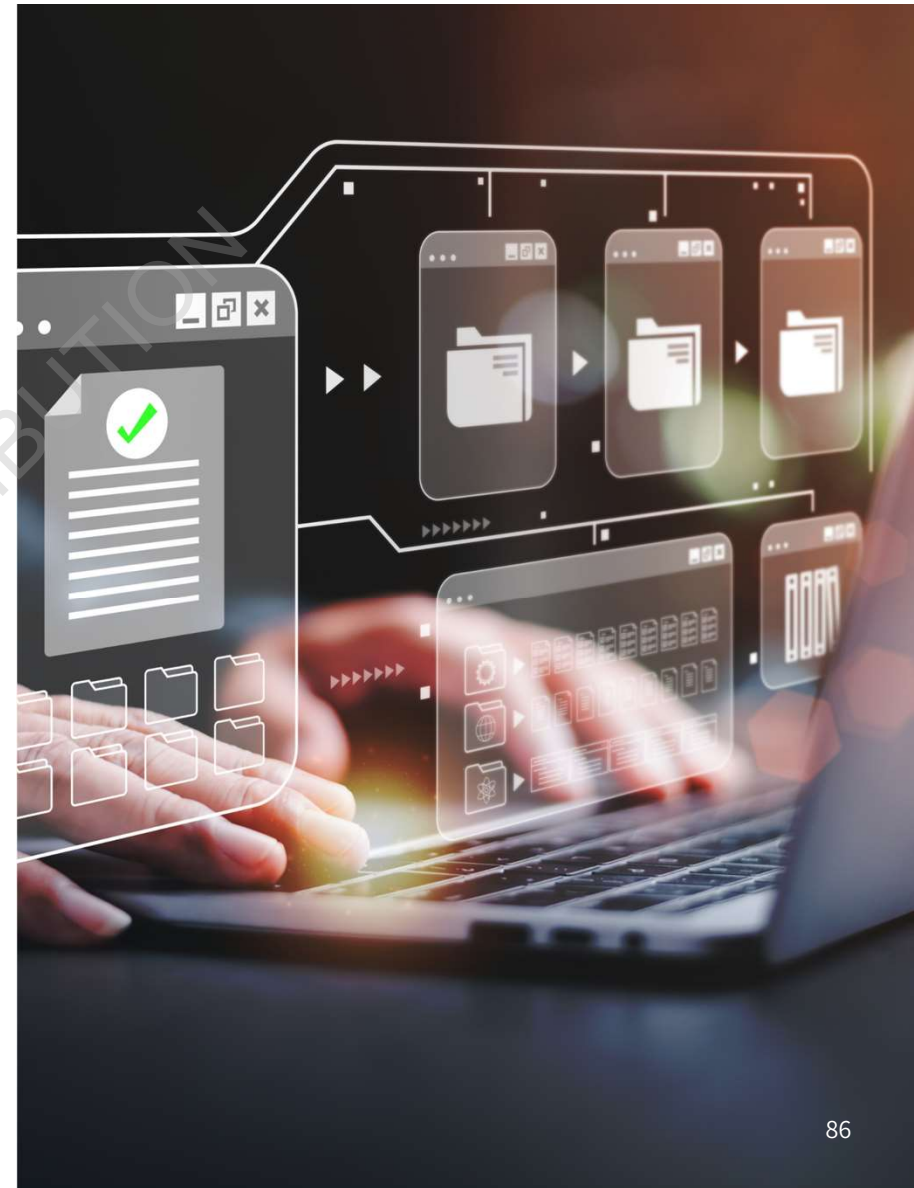
- DMs communicate their decision to the TIXC in writing
- TIXC will then:
  - Deliver the determination to sanctioning body, if process is bifurcated, or arrange for DM to meet with those who have sanctioning authority
  - Deliver the determination simultaneously to parties in writing
    - Sharing the decision does not violate FERPA
  - Inform relevant stakeholders, as appropriate
    - Residence Life
    - Campus Security/Police
    - Legal Counsel
    - Employee's supervisor

# Recordkeeping and Documentation

# Recordkeeping

DM may need to compile all decision-making and hearing-related documentation to provide to the TIXC after the hearing

- **Timeline** of decision-making process
- **Interactions** and pre-hearing meetings with parties, other DMs, TIXC, etc.
- **Determination** with any associated sanctions
- **Rationales** for all determinations
- **All work product** from the DM and hearing process
- **Recording/transcription**



# Decision-Maker Notes and Drafts

- A hearing creates opportunities to generate paperwork and paper trails
- Be judicious with notetaking, annotating, draft writing, and communication
- Anticipate that the parties (or others) could see your work product
  - Student FERPA rights
  - Employee personnel record rights
  - Litigation or agency investigations
- TIXC should provide guidance and clear expectations about saving work product, including personal notes



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**Questions?**

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