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ABHE

Navigating Title IX Investigations & Informal Resolution

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Agenda

1. Trace the Title IX process from beginning to end
2. Distinguish the roles within the process
3. Informal Resolution considerations

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Disclaimer

THIS IS NOT LEGAL ADVICE

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What is Title IX?

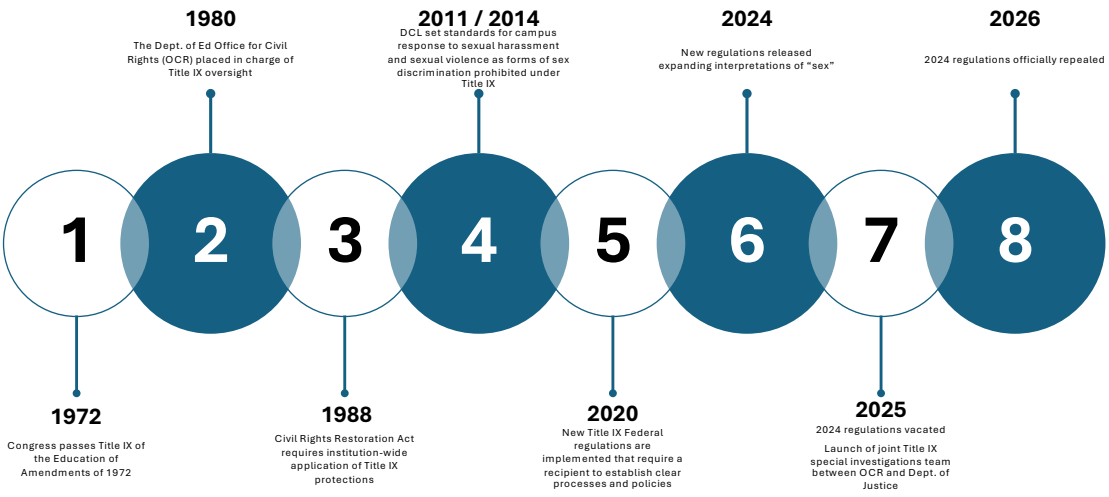
"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

20 U.S.C. § 1681 et seq.

Title IX of the Education Amendments of 1972

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History of Title IX



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Actual Knowledge

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

- 34 C.F.R. § 106.44(a)

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Who Must Report?

- **Officials (employees) with authority to institute corrective measures must report to the Title IX Coordinator (current regulations)**
- **Responsible Employee/Designated Reporter obligations as determined by your institute**

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Who Can Report?

- Anyone including third party reporters
- Anonymous reporting options
- Confidential reporting options

- All avenues to report and TIXC contact information must be easily accessible and distributed to your community (i.e. online, in person, mail, telephone, email, etc)

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Clery Reminder

- Don’t forget your Clery obligations
- Provide sufficient detail but identities are not required
- Remember Clery geography
- It does not matter if the report is provable
- The report must meet the definition of the reportable crime

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Jurisdiction

- Who was involved?
- When did the conduct occur?
- Where did the conduct occur?
- What happened?
- Does another department have jurisdiction?
  - What if there is concurrent jurisdiction? (Deconflict)
  - To the Title IX hammer, everything can look like a nail
- Revisit the same questions after the initial meeting!

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Title IX and Title VII Sexual Harassment



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Quid Pro Quo

Quid Pro Quo sexual harassment laws are effectively the same in both Title IX and Title VII.

In matters of Quid Pro Quo in an institution of higher education, Title IX procedures will take precedence.

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Hostile Environment Sexual Harassment

Title IX - So severe, pervasive, and objectively offensive that it effectively denies a person equal access to the institution's Education Programs and Activities (which includes workplace duties)

Title VII – Severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive

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The Big 4 (VAWA)

- Sexual Assault (includes non-consensual sexual contact)
- Dating Violence
- Domestic Violence
- Stalking

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Jurisdiction Revisited

- Is the conduct sexual harassment?
- Is the conduct based on sex?
- If not Title IX, what department should handle the case?
  - Student Life/Development
  - Human Resources
  - Academic Affairs/Faculty Committee
  - Public Safety
  - Individual Departments

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Intake Meeting

- Always attempt contact with the Complainant
- Allow the Complainant to bring a support person
- Inform the Complainant of their rights and options regarding available support and resolution processes
- Explain the process of filing a formal complaint
- Encourage crimes to be reported to the police
- Meetings are voluntary
- Provide the complainant with resources
- Seek enough information to determine support and jurisdiction
- Follow up plan

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Intake Meeting

Not punitive, disciplinary, or unreasonably burdensome	Referral to counseling, medical, or other healthcare services	Mutual no contact orders	Academic assistance
Safety planning	Alternative work assignments	Meal alternatives	Housing changes

Plus many more to ensure equal access to education programs and activities

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Documentation

Keep records!

Reports received

Communication with the Parties

Supportive Measures Meeting notes and Reports

Arrangement of Supportive Measures

Jurisdictional determinations

Minimum of 7 year retention period

Emergency Removal

- **Based on allegations – whether or not a grievance process is pending**
- **The Institution must conduct an individualized safety and risk analysis**
- **"Immediate threat to the physical health or safety of any student or other individual arising from the allegations"**
- **Provide the Respondent with notice and the opportunity to challenge immediately following the removal**

Emergency Removal Considerations

- In-Person meeting with the Respondent
- Housing and Safety plan for the Respondent
- Visa and immigration factors
- Collaborate with other departments (Student Life, Legal, Public Safety, Public Relations, Faculty)
- Emergency Removal may mean the TIXC files a complaint
- Document events and reasoning (Show your work)
- Have a process stated in your policy

Administrative Leave

- Not the same analysis as Emergency Removal
- Only applies to Non-Student Employees
- Administrative leave during the pendency of the grievance process (there must be a grievance process)
- Can be paid or unpaid
- Remember your Employee Handbook, Collective Bargaining Agreements, and state or local laws
- Document and show your work

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Formal Complaint

- Written – delivered in person, electronically, or through mail
- Filed by the Complainant or signed by the TIXC
- Alleges sexual harassment
- Requests that the institution investigate
- Institutions must begin the grievance process
- Complainant must be participating or attempting to participate in education program or activity
- Able to consolidate with violations of other policies

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Example

Lucas, a freshman living on campus, reports that his sister who is a Sophomore has been repeatedly "bullied," called "sexually derogatory names," and told that she should be "r*ped." He would like the school to kick the bully out of school immediately.

Do we have a Formal Complaint?

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Assignment of Investigators

- Neutral fact finder
- Free from bias or conflicts of interest
- Independent and professional
- Diligent, exercising due care
- Appropriately trained and experienced
- Can be the TIXC or internal personnel or external contracted hire
- Best to work in pairs if possible
- Consider an Independence Statement

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Notice of Allegations

- Written and sent to both parties
- Describes the alleged policy violation and sufficient facts to allow for a meaningful response/defense
- Names of the parties (if known) – anonymous complaints are not permitted
- Date and location (if known) of the alleged incident
- Describes the grievance procedures (attach a copy of the entire policy)
- States the Respondent is presumed not responsible

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Notice of Allegations Addl. Information

- Determination of responsibility is only made at the end
- Right to an advisor of their choice (may be an attorney)
- Right to inspect and review evidence
- Prohibition against false statements and false information
- Informal resolution options, if available
- Amend as needed in the future
- Other helpful inclusions
  - Name and contact information of the investigators
  - Retaliation provision

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Investigation Plan

- Investigators and TIXC collaborate
- Opportunity to think and plan
- Allegations from the Formal Complaint
- Applicable policy or statutory violations
- Elements of proof needed/met for each violation
- Key issues/anticipated challenges
- Evidence to be sought/important timelines
- Interview plans and order
- Critical investigative steps
- Estimated time and resources for completion

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Investigative Interviews

- Provide adequate notice – written, date, time, location, participants, and purpose
- Consider using interview advisements
- Allow Advisors to be present
- Best practice is to have two investigators
- Prepare an interview outline beforehand
- Take notes – do not add opinions or extraneous observations

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Investigative Interviews

- Provide adequate notice – written, date, time, location, participants, and purpose
- Consider using interview advisements
- Allow Advisors to be present
- Best practice is to have two investigators
- Prepare a flexible interview outline beforehand
- Take notes – do not add opinions or extraneous observations
- Begin with open ended questions and move toward targeted questions
- Establish a timeline of events and context

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Investigation Setting Considerations

- In-Person v Virtual
- Recorded or not recorded – remember to tell participants
- Location of the interview
- Layout of the room
- Desk or no desk; type of chairs; lighting; colors; wall decor
- Think – Conversation; Not – Interrogation
- Food, drinks, or snacks can be helpful (treat parties equally)
- The setting should put the interviewee at ease and facilitate talking

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Questioning Techniques

- Consider the best technique for each circumstance
- The Funnel Technique is best for early stages of an investigation
- Establish credibility, trust, and rapport
- Be professional, respectful, calm, and conversational
- Be Christlike throughout the process
- Acknowledge the discomfort or unease involved and give a brief overview of the subject matter
- The quality of the questions directly affects the quality of the information obtained

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Questioning Techniques

Ask open-ended questions	Use closed-ended questions intentionally	Ask single questions, not compound	Don't interrupt
Be flexible	Ask follow-up questions	Stay curious	Refrain from judgment
Avoid leading questions	Close out each subject	Clarify ambiguous answers/slang	Who, what, where, when, why, and how

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Ending the Interview

- **Is there anything else you would like to state on the record?**
- **Is there anyone else that you think I should talk to?**
- **Do you know of any other information or evidence that would be relevant to our investigation?**
- **Are there any other questions I should have asked you?**
- **Invitation to contact the investigator with any additional information**

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Evidence Collection

- Keep records of evidence requests and responses
- All relevant evidence – any tendency to make a fact in question more or less likely – inculpatory and exculpatory
- Directly related evidence
- Medical and mental health records – must have voluntary, written consent
- Privileged communications – attorneys, pastors, counselors
- Rape Shield – Prior sexual history of the Complainant is not relevant evidence, Except:
  - To prove that someone else is the perpetrator
  - To prove consent between the Respondent and Complainant

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Types of Evidence

- Interviews – parties, witnesses, process, experts
- Internal Records – class schedules, surveillance videos, fob activity, police reports, emails, class assignments
- Public Information – social media posts, FOIA, news media
- Information from Individuals – text messages, private emails, pictures, audio recordings
- Be careful about certain kinds of evidence – child pornography

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Interview Report Purpose

- Critical component of the investigation (tells the story)
- Documents adherence to legal obligations
- Documents who participated in the interview
- Identifies any exhibits
- Summarizes information that the interviewee provides
- Describes the tone and context of the interview

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Interview Report Elements

- Preliminary Information
  - Interviewer Names
  - Parties Present – names and identity (incl. advisor/support person)
  - Location
  - Date
  - Time
  - Advisements

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Interview Report
Example Opening Paragraph

On September 12, 2026, at 1:00 p.m., Title IX Investigators John Smith and Jane Smythe interviewed student Margaret Carter in person in Smith 324. Carter was accompanied by Brandon Jones who was acting as her advisor. There were no other individuals present. At the beginning of the interview, Smith read aloud the interview advisements to Carter, which she acknowledged orally. In summary, Carter stated the following.

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Interview Report Elements Cont.

- Not a verbatim transcript – summary
- Include basic, background information
- Information provided by the interviewee
- Essence and the tone of the interview
- Summary of the interview, not just the information
- Contains facts: who, what, where, when, why, and how
- Clearly represent the interviewee's opinions and verbatim statements both within the reported situation and during the interview
  - Use quotation marks for critical information that you repeat with complete accuracy

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Interview Report Elements Example

When the Title IX Office asked Swanson if he had sex with Carter in the car, Swanson paused and then stated, "What would happen to me if I said that I did?" Swanson then requested a break to confer with his advisor. After the break, Swanson denied having sex with Carter.

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Writing Style

- **Narrative Format – straightforward and concise**
- **Third person**
- **Objective and unbiased**
- **Chronological, thematic, or topical**
- **Active voice**
- **Generally, not necessary to write, "_____ stated…"**
- **Generally, the questions do not need to be reported**
- **Clarity over creativity**

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Writing Elements to Avoid

Awkward grammar	Excessively long sentences	Too many pronouns	Conclusions
Subjective opinions	Slang, abbreviations, colloquialisms	Informal language	First names
Misspellings	Poor grammar	Inaccuracies	Confusing references

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Evidence Review Period

- Prior to completing the investigative report:
  - Equal opportunity to inspect and review
  - Directly related evidence (including evidence the institution does not intend to rely on)
  - Inculpatory and exculpatory evidence
  - Electronic or hard copy to party and advisors
  - At least 10 days to submit a written response
  - Investigators must consider any response
  - Able to provide a draft "Final Investigative Report"

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Final Report Review Period

- The culmination of the investigation
- Fairly summarizes relevant evidence
- Use a template
- Send to each party and advisors
- At least 10 days before a Live Hearing
- Electronic or hard copy
- Review and written response

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Final Report Elements and Considerations

- Who is the audience for the report?
- Allegations, relevant Policy sections, and background on the parties
- Factual and procedural timelines
- Analysis
  - Credibility – not a judgment on credibility but an analysis of the evidence pertaining to credibility
  - Disputed and undisputed facts
  - No conclusions on responsibility
  - Recommendations?

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Documentation

Keep records!

All evidence and acquisition reports

Interview reports

Final investigative reports

Communication with parties, witnesses, and advisors

Evidence

Minimum of 7 year retention period

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Decision Maker Role

- Cannot be the investigator or TIXC
- Single Decision Maker or panel is allowed
- No bias or conflict of interest - impartial
- No prior involvement in the case
- Trained on technology used at the hearing
- Trained on Title IX policy, definitions, process, relevant questions, and evidence
- Understands the standard of evidence

Pre-Hearing Conference - Recommended

- Meet with the individual Party Members
- Establish rapport
- Answer questions
- Provide insight into how the live hearing works
- Discuss concerns
- Clarify what is relevant to the hearing
- Establish advisor conduct expectations (e.g. attorney role)

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Live Hearings

- They must be live but not required to be in person
- Must been recorded– audio/visual or transcript
- Party Advisors must be present and allowed to ask questions
  - Decorum
  - Directly, orally, and in real time
  - Including questions challenging credibility
- Only relevant questions are permitted
- Decision Maker must decide if a question is relevant or not relevant – must explain if excluding

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Relevant Evidence and Questions

- Relevance – any tendency to make a fact in question more or less likely – inculpatory and exculpatory
- Medical and mental health records – must have voluntary, written consent
- Privileged communications – attorneys, pastors, counselors
- Rape Shield – Prior sexual history of the Complainant is not relevant evidence, Except:
  - To prove that someone else is the perpetrator
  - To prove consent between the Respondent and Complainant

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Live Hearing Considerations

- No exclusionary rule
- No negative inference for not appearing
- Appearance is voluntary for parties and witnesses
- Attorneys are allowed to be Advisors
- Institutions have discretion
  - Opening or Closing statements
  - Objections
  - Redirect or Re-Cross examination
  - Decision Maker panels – unanimous or not

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Written Determination

- Must be in writing
- Independently made determination regarding responsibility
- Issued by the Decision Maker or Panel
- Written Determination must contain
  - The allegations
  - Procedural timeline beginning at the formal complaint
  - Standard of evidence
  - Findings of fact
  - Rationale/Analysis for the result as to each allegation
  - Sanctions and remedies imposed and rationale
  - Appeal procedures and bases

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Written Determination Cont.

- Provided to the parties simultaneously
- The decision becomes final on:
  - Date of appeal decision, or
  - Date the appeal was due
- TIXC is responsible for remedies
- TIXC should dialog with the Decision Maker
- Incorporate other departments as needed
- Use templates
- Consider Impact or Mitigation statements

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Written Determination Sections

- Introduction
- Allegations
- Jurisdiction
- Policies
- Procedural Steps
- Findings of Fact
- Analysis
- Conclusion
- Sanctions and Remedies
- Appeal Procedures
- Retaliation

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Written Determination Writing Style

- Narrative Format – straightforward and concise
- Third person
- Objective and unbiased
- Active voice
- Clarity over creativity
- Show your work in reaching conclusions – include policy application and analysis
- Focus analysis on the disputed facts and issues
- Only use facts and evidence in the record

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Findings of Fact

- What happened?
- Narrative of the events
- Both uncontested and contested facts
- Evidentiary determinations
- Credibility determinations
- Explain all of your reasoning
- The reader cannot read your mind
- Assume the reader has not read anything else about the case
- Include standard of evidence

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Findings of Fact Example

The parties dispute whether Swanson gave Carter alcoholic drinks at the party. The Decision Maker determines by a preponderance of the evidence he did based on _____.

- Witnesses
- Video
- Credit card receipts
- Text messages
- Carter's demeanor, signs of intoxication, hangover
- Barnes's recollection or lack thereof
- Motive, interest, or bias – credibility

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Analysis

- Organize by topics or issues
- Identify the issue about to be discussed
- Add the relevant policy definition
- Apply the facts to the policy and discuss whether the facts meet the policy definition
- Only use the facts from the evidence
- Base the conclusion on that analysis
- IRAC – Issue, Rule, Application, Conclusion

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Analysis - IRAC

- Issue – Was Carter incapacitated when she and Barnes had sex?
- Rule – Incapacitation occurs when the person is unable to give knowing, voluntary consent to sexual activity due to drugs or alcohol or mental or physical impairment.
- Application – Apply (don't just repeat) facts from the case (alcohol was present, slurred speech, unable to walk, vomiting, couldn't undress herself.....utilize "because," "since,""shows."
- Conclusion – Based on this analysis, the Decision Maker finds by a preponderance of the evidence that Carter was incapacitated and thus unable to give consent.

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Sanctions vs. Remedies

Sanctions	Remedies
• Only allowed after a fair grievance process • Must provide a rationale for the sanctions • Sanctions should be listed in the Title IX Policy • Must be proportionate to the violation • Compare with past cases	• Must provide a rationale for the remedies • Available for the complainant • Designed to restore or preserve equal access to education programs and activities • Like supportive measures, but if finding of responsibility, can be disciplinary, punitive, and burdensome (i.e. one sided no contact stipulations)

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OCR Considerations on Determinations

The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.

34 C.F.R. § 106.44(b)(2)

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Appeals

- Must allow for determinations regarding responsibility and for dismissals
- Available for both the Complainant and the Respondent
- Institution must notify the other party when an appeal is filed
- Must have equal procedures for both parties
- Both parties must have opportunity to write statement in support of challenging the appeal
- Appeal Decision Maker cannot be prior Decision Maker, TIXC, or investigator

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Appeals Cont.

- Single or panel Appeal Decision Maker
- Must issue a written decision
- The decision must provide the result of the appeal and the rationale for that result
- Employs the same analysis methodology as in the Written Decision (IRAC)
- Use templates
- Must provide training for appeal decision makers
- Simultaneous notification

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Appeals Bases

1. Procedural irregularity that affected the outcome of the case
2. New evidence not reasonably available at the time of the decision that could affect the outcome of the case
3. TIXC, investigator, or Decision Maker had a conflict of interest or bias that affected the outcome of the case (general or specific)
4. Any other basis as long as it offered to both parties – check State law

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Documentation

Keep Records!

Final investigative reports

Live Hearing recordings/transcripts

Written Determinations

Appeals – responses and decisions

Communication with parties, witnesses, and advisors

Minimum of 7 year retention period

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Informal Resolution

- Permissible to offer informal resolution – schools do not have to offer
- Must follow a signed Formal Complaint
- Requires the voluntary participation and agreement of both Party Members
- Not permitted within a situation involving an employee respondent and a student complainant
- Not recommended when there is significant power differential, violence, safety concerns, or inability to appropriately participate in the informal process
- No formal guidance or regulations – schools must put in their policy how their informal resolution option works

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Informal Resolution Cont.

- Parties may request Informal Resolution at any point prior to the Final Determination
- Common off-ramps toward Informal Resolution include
  - Intake meeting/first respondent meeting
  - First report review
  - Final report review

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Informal Resolution Benefits

- The Parties retain a sense of control and agency in the outcome of their issue
- Can include creative solutions (including sanctions if in agreement)
- Can be more effective to resolve issues
- Can allow for direct communication if desired
- May provide more closure than the formal process
- Focus on needs, harm done, and moving forward

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Informal Resolution Options

Sometimes referred to as “Alternative Resolution”

- Shuttle negotiation
- Mediation
- Facilitated dialogue
- Restorative practices

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Informal Resolution Considerations

- Ensure that the facilitator is properly trained in the model your school elects to use
- May be the TIXC
- Not permitted to be the Investigator or Decision Maker
- Unsuccessful Informal Resolutions may return to the Formal Resolution Process

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Informal Resolution Agreement Terms

Considerations:

- Academic or employment overlap
- Facility access and use
- Social overlap
- Group overlap (e.g., student organizations, employee committees)
- Confidentiality and non-disparagement expectations
- Contact restrictions
- Respondent's education or employment record
- Financial implications (e.g., scholarships, grants, loans)
- Institutional minimum sanctions
- Associated costs (e.g., Advisor fees, medical bills, travel costs)
- Non-compliance / violation repercussions

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Informal Resolution Documentation

- Consider what will happen with the documentation
  - Will it be admissible in the Formal Resolution Process if the Informal Resolution be unsuccessful?
  - What records will be kept? How will they be retained?
  - What could be evaluated should a pattern emerge?
- Resolution agreements
  - Written by the Facilitator
  - Reviewed, agreed upon, and signed by the Parties and Facilitator (and TIXC if different person)
  - Copies provided to the Parties and maintained by TIXC

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Questions

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