Association of
Title IX Administrators

Managing Intake, Jurisdiction, and Dismissals

An ATIXA Best Practices Workshop

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Workshop Introduction

The primary focus of this workshop is exploring best practices for intake, initial assessment, and jurisdictional determinations.

Participants will learn strategies to navigate intake meetings, assess reports of sexual harassment, and apply jurisdictional analyses to allegations.

Our goal is to provide an opportunity to apply new skills and strategies in a risk-free environment to improve participants' competency and practice.

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Content Advisory

The content and discussions in this course will necessarily engage with sex-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 Title IX Coordinators and Title IX team members encounter in their roles including slang, profanity, and other graphic or offensive language.

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Initial Assessment

1

INCIDENT

- Complaint/ Notice to TIXC

2

INITIAL ASSESSMENT

- Jurisdiction
- Dismissal
- Supportive Measures
- Emergency Removal
- Referral to Another Process
- Informal/Formal Resolution

3

FORMAL INVESTIGATION

- NOIA
- Interviews
- Evidence Collection
- Draft Report
- Share Draft & Evidence
- Review/ Comment
- Final Report

4

HEARING

- Questioning
- Credibility Assessment
- Determination & Rationale
- Sanctions
- Remedies

5

APPEAL

- Appeal Grounds
- Determination & Rationale

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Intake: Emerging Best Practices

- 2020 Regulations Distinction
  - Report vs. Formal Complaint
- **Formal Complaint**
  - Written request to initiate an investigation
  - Physical document or electronic submission from Complainant
    - OR signed by Title IX Coordinator (TIXC)
  - Alleging sexual harassment
  - Complainant must be **participating or attempting to participate** (P/ATP)
- If it does not meet the formula, it's not a formal complaint

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Intake: Emerging Best Practices

TIXC must oversee intake but can delegate responsibilities

- Delegation within Title IX office or to another area/office
  - Higher education example: Deputy TIXC in Student Affairs and/or HR
  - K-12 example: Building-based administrators for student complaints

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Intake: Emerging Best Practices

Delegation considerations:

- Role of advocates and/or confidential resources for pre-intake support
- Recordkeeping challenges
- Formal complaints should always go to Title IX office
- Notetaking/documentation
- Witness after the fact
- Connecting parties to Advisors early in the process
  - Timeliness in finding an Advisor
  - Advisor available at intake

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Online Reporting

- Online reporting mechanisms are essential, especially with remote and hybrid employment and instruction
- Structure online reporting to ensure that it has the effect of facilitating a report and not a formal complaint
- Helps to prevent the notification trap
  - Important to Complainant confidentiality
  - Prevents inadvertent submission of formal complaint when only a report was desired
  - Careful sequencing can avoid confusing notification to a Respondent who does not yet know a formal complaint has been filed
    - Dismissal decision
    - Notice of Investigation and Allegation letter (NOIA)

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Group Discussion

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Resolution Process Selection

- Direct the Complainant/report to the right process
- Intake can be overwhelming
  - Don’t expect immediate decisions
  - Don’t expect the Complainant to know what to ask
  - Try to set and manage realistic expectations
  - Consider tone and word choice
  - Avoid sharing personal opinions about the Formal Grievance Process

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Intake Follow-up: Communication

- Follow-up in writing and reiterate options
  - Offer the VAWA Brochure or written summary of options
  - Consider flowcharts, rights guides, and other ways to present information
- Complainant is likely a newcomer to the process
- Research shows that even when students have read policies and procedures, the Formal Grievance Process:
  - Is confusing
  - Seemingly lacks transparency
  - Is inaccessible

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Intake Follow-up: Action Items

- Connect parties with Advisors as soon as possible
- Notetaking/documentation
- Remember that there may be needs related to translation, interpretation, and/or accommodation
  - Offer, don't wait for the request
  - Complainant may not know to request
- Anticipate barriers to access and find workarounds

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Initial Assessment

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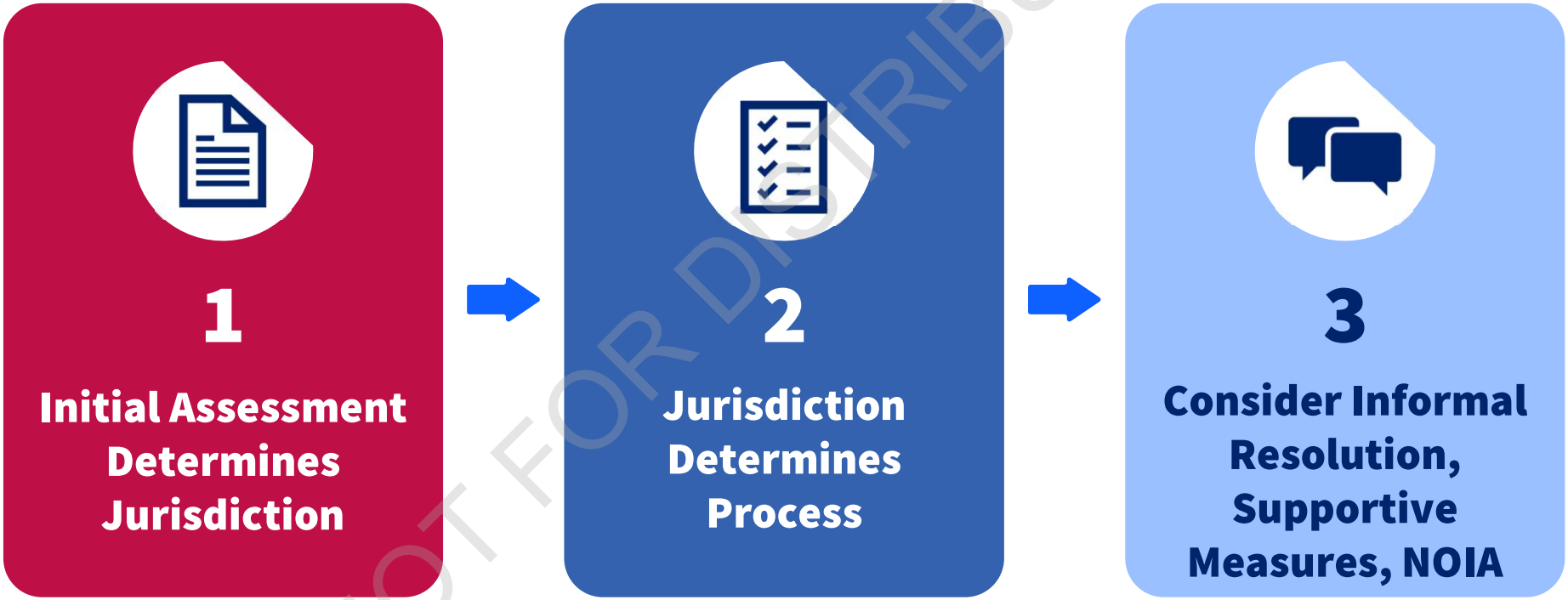
Initial Assessment



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Initial Assessment Framework

Pre-2020 Regulations

- Preliminary Inquiry
- TIXC as gatekeeper
- No dismissal framework

2020 Regulations

- Initial Assessment (Preliminary Inquiry "Light")
- Formal complaint triggers gate to open
- Mandatory and discretionary dismissals

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Title IX Coordinator Signing Complaint

- TIXC has authority to sign complaint when the Complainant can't/won't, or when anonymous or third-party notice is provided
- Can be very disempowering; remember trauma-informed best practices when making this decision
- Uncommon and exceptional for higher education
  - More frequent in K-12

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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

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Third-Party Notice and/or Anonymous Reports

- Third-party notice has its own set of hurdles and challenges
  - Analyze third-party notice as reports
  - Consider analysis akin to a Complainant who is not P/ATP
- Anonymous report mechanisms are a best practice
  - May be required by law in school/institution's jurisdiction
  - Inherent challenges for TIXCs
  - Anticipate needing to decide whether the TIXC should sign more frequently

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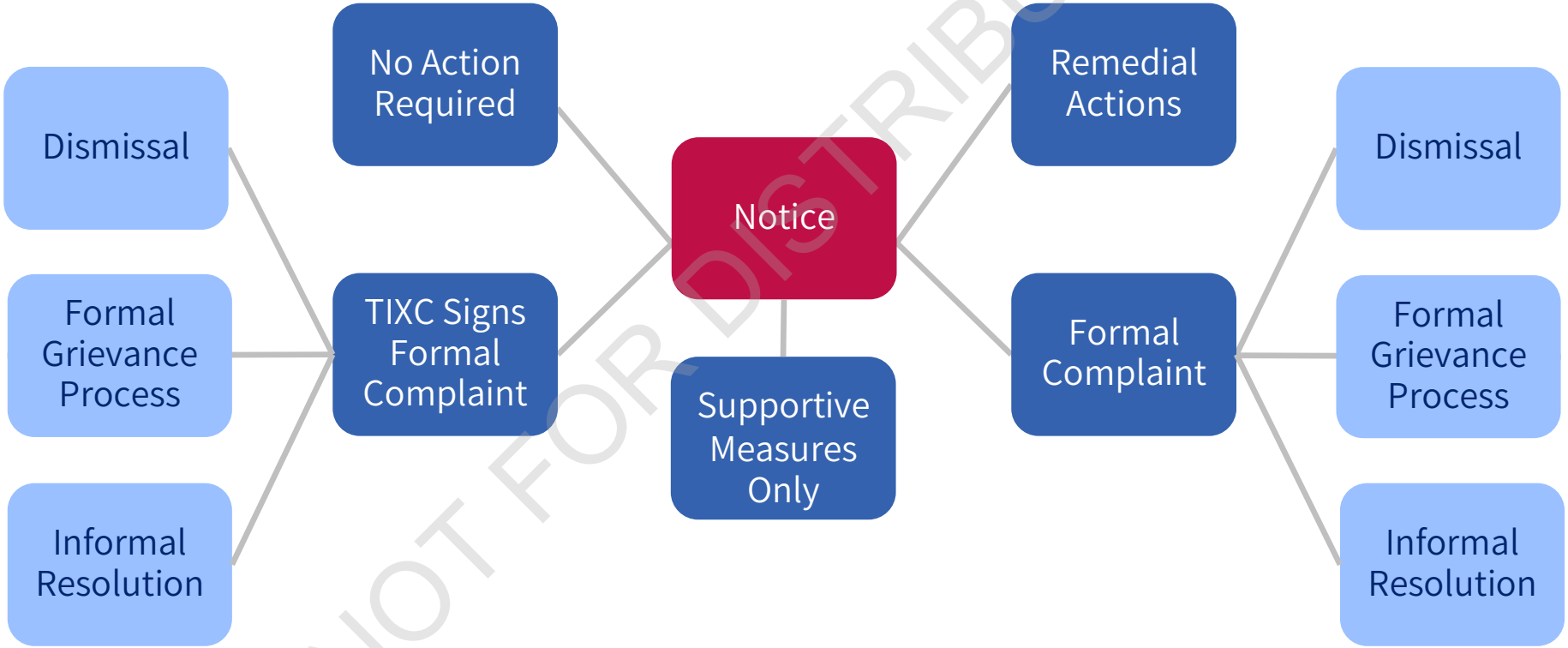
Intake Decision Tree



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Jurisdiction

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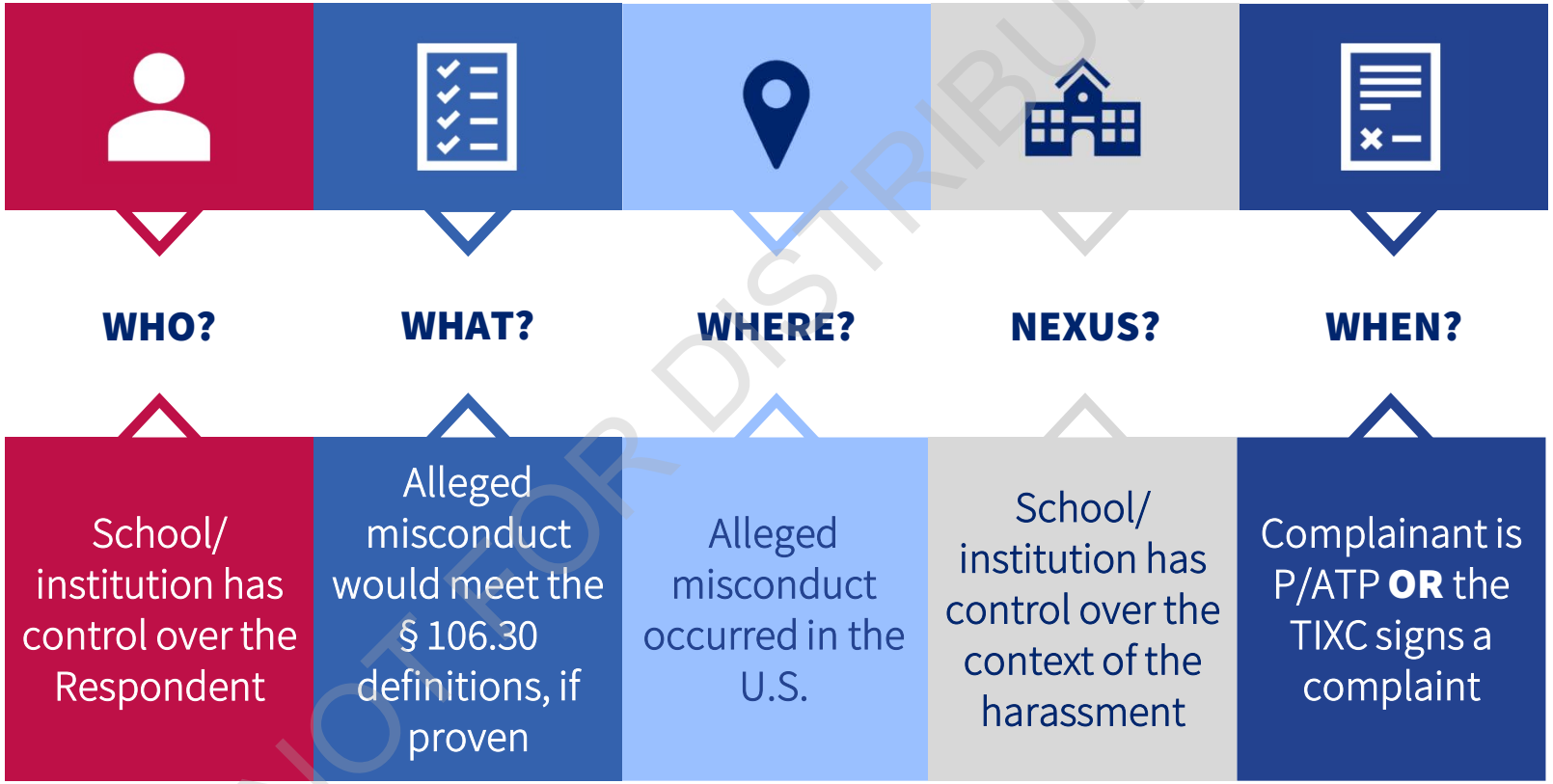
Title IX Sexual Harassment Jurisdiction



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Jurisdiction: "Process A" and "Process B"

- **All five** = **Title IX Sexual Harassment** under the 2020 Title IX regulations
  - Use Process A (complies with all § 106.45 elements)
- **Fewer than five** = May/must dismiss/refer to another process (Process B)

Process A	Process B
• Title IX sexual harassment jurisdiction • Must follow process compliant with Title IX regulations • Process must also be VAWA-compliant (higher ed)	• No Title IX sexual harassment jurisdiction • May use other process such as: stand-alone Process B, student conduct, employee conduct • Process must also be VAWA-compliant for SA, DV, DV, and Stalking (higher ed)

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Process A or B?

**When you're a Title IX hammer,
everything can tend to look like a Title IX nail**

- Don't push toward Process A (the regulations-based §106.45 process) if Process B will suffice
- Institutional and intake preference for Process B
- Process A is the default, but Process B will likely be used more frequently
- Some institutions choose to only have Process A for all (mostly public institutions)

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Referral to Other Processes

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Referral

- TIXC must determine whether Process A or B applies
  - Not the decision of the dean of students, director of human resources, principal, director of student conduct, or anyone else
  - Other officials must consult with the TIXC before proceeding to investigate/resolve an incident that may fall under Title IX, or risk retaliating
    - Requires training
    - Specific challenge for K-12 and building-based administrators
- Complainant doesn't get to opt for Process A or B (mostly)
  - Title IX regulations define which complaints must follow Process A
- Document the referral and communicate decision to parties

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Referral Corrections

- If another office/administrator investigates as a Process B allegation, **and**
- TIXC finds out and determines there is Title IX jurisdiction, **then**
- Incident must be referred over to the Title IX office for proper resolution

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Dismissal

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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 or Respondent
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

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Discretionary Dismissal

The TIXC <u>may</u> 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

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Dismissal Notification and Appeals

- TIXC must promptly notify parties of the dismissal
- Notification includes information about how to appeal the dismissal
  - Dismissal rationales should be drafted carefully
  - Appeal Decision-maker(s) must be trained; must not have prior involvement in the complaint
  - A successful appeal of a dismissal decision will result in reinstatement of the formal complaint
- Institution may, and often will, address reported behavior under other applicable policy

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Appeals

Appeal grounds are the same for dismissal decisions as for final determinations.

1. Procedural irregularity that affected the outcome of the matter
2. New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter
3. Conflict of interest or bias by the TIXC, Investigator, Decision-maker that affected the outcome of the matter

Institutions have the discretion to add additional appeal grounds, which may make sense if dismissal appeals are to be viable at all

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Can a complaint be withdrawn without dismissing it, and if so, under what circumstances?
If withdrawn, can it be refiled later?

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Charging

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Charging

- Complainant does not:
  - Pick the process
  - Determine the allegations
- TIXC should charge with all applicable policies, noting which are overlapping, and which charges stand alone
  - Example: Charging a person in a couple with sexual assault = automatic dating violence charge
- Charge under the version of the policy that was in effect at the time of the reported incident(s)

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Charging

TIXC determines the basis of the investigation:

- **Incident:** specific incident or period
- **Pattern:** repetitive or similar behaviors or targets chosen by the same Respondent over a period*
- **Climate/Culture:** discriminatory policies, processes, and environments

*Does school/institutional process permit pattern charges vs. viewing pattern as corroborative?

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Charging

- Avoid automatically overlapping sexual harassment and sexual assault charges
  - Under the 2020 regulations, if sexual assault is found to have occurred, sexual harassment is automatically proven
  - A **SPOO** analysis (**s**evere, **p**ervasive, and **o**bjectively **o**ffensive) is never needed for a sexual assault allegation under the 2020 regulations
  - Sexual Assault = SPOO, by definition
- There may be a separate sexual harassment charge alongside a sexual assault charge when the allegations arise from separate facts
- As a general charging guide, verbal conduct = SH; physical conduct = SA/DV

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Charging: Sexual Assault

Sexual Assault definition transition:

- Took effect January 2021
- Title IX regulatory definitions refer to underlying FBI reporting system, which changed
- Evaluate whether school/institutional policy needs to be amended

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Sexual Assault Definition Changes

Previous Language	Current Language
▪ Forcible Rape	▪ Rape
▪ Forcible Fondling	▪ Fondling
▪ Forcible Sodomy	▪ N/A
▪ Sexual Assault with an Object	▪ N/A
▪ Sex Offenses, Forcible and Non-Forcible	▪ Sexual Assault

- Incest and statutory rape are still offenses
  - Don't charge with incest unless intercourse occurred
  - Don't charge with statutory rape (only) if the offense was forcible or without consent, as the proper charge is rape

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Charging Under Broader Policies

- Public institutions need to be cautious about additional sexual harassment policies that use lower (broader) standards than SPOO – they may lead to outcomes that violate a Respondent's free speech rights,
  - Likely needed for Title VII and Fair Housing Act (FHA)-covered complaints
  - Caution is especially needed with respect to allegations of intentional misgendering, deadnaming, or using incorrect pronouns
- Policy should have a collateral misconduct provision
  - Allows non-Title IX sexual harassment offenses to be charged alongside Title IX sexual harassment offenses
  - Allegations are resolved together in the same process

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Charging Skills: The Basics

- Charge with all applicable Title IX Sexual Harassment violations (§ 106.30)
  - Consider any non-Title IX additional charges that are applicable
  - Process should allow efficient charging with and resolution of collateral misconduct
    - Example: Sexual Harassment and Acceptable Use Policy (IT) violations
  - Address all charges simultaneously when there is a nexus or because the alleged violations arose from the same incident/interaction
- Update NOIA as circumstances change or new information comes to light

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Charging Skills: Intermediate

- **Sex Discrimination**
  - SPOO analysis
    - Disparate treatment
    - Sex- and gender-based harassment
- **Retaliation**
  - Retaliation provision is dense, complex
  - Not a § 106.30 offense
  - May use Process B unless it makes sense to resolve in Process A
- Retaliation and SPOO may overlap; may impact charging decisions

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Charging Skills: Title VII

- Title IX and VII overlap
  - Occurs when there is an employee Complainant
- Title VII sexual harassment/hostile environment
  - **S**evere or **p**ervasive or **p**ersistent and objectively offensive (**SORPP**)
- Sexual harassment allegations by an employee Complainant likely = need to charge with:
  - Title IX Sexual Harassment (SPOO)
  - Sexual Harassment (SORPP)

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Charging Skills: Fair Housing Act (FHA)

- Only applies to residential facilities for students and/or employees
- Behaviors occurred in the residential facility Mirrors Title VII definition
- **SORPP:** severe or pervasive or persistent and objectively offensive
  - Charge SORPP for allegations of sexual assault, sexual harassment, dating/domestic violence, or stalking in addition to Title IX policy charges

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Charging Skills: State Law

- Several states have state-based campus sexual misconduct laws that may provide for different offenses in addition to Title IX definitions of sexual harassment
- Typically applies in higher education contexts only (but not always)
  - Students
  - Employees
  - Both
- Consult with local counsel
- May not apply in all states
- Some state laws may also have jurisdictional distinctions

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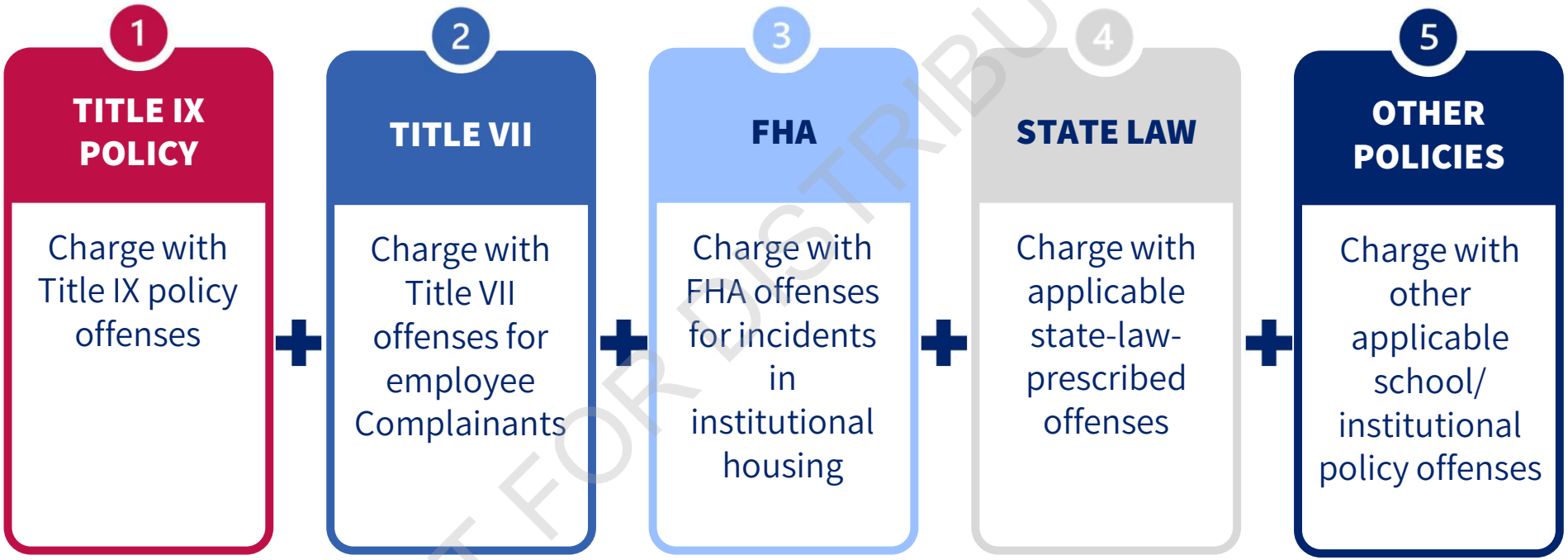
Charging Rubric



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Charging Skills: Pattern and Joint Allegations

- Combine when Respondents act in concert against one Complainant
  - Example: multiple-Respondent rape
- Combine when a single Respondent has allegedly engaged in pattern misconduct toward more than one Complainant
  - Pattern = similar motivation, targets, similar types of offenses
- Goal: Avoid Complainants serving as witnesses to a pattern in other grievance processes
  - Use one process to address the entire alleged incident or pattern of incidents
- Avoid joining if multiple Complainants alleged dissimilar, disconnected offenses by a single Respondent
- A pattern can be a corroborative element and/or its own charge; can only impact sanctions when charged as pattern

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Case Studies

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Case Study 1

- TIXC assigns an investigation and provides the Investigator with a copy of the NOIA to get them started
- Complainant and Respondent are students and former significant others
- The NOIA charges the Respondent with sexually assaulting the Complainant in the Complainant's residence hall room after they broke up
- The Investigator is concerned that the NOIA is too narrow in assigning just the sexual assault charge

What would you do if you were the Investigator?

What other charges should be considered?

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Case Study 2

- During an investigation of alleged stalking, the Investigator learns that there are many (dozens?) instances where the Respondent derisively referred to the Complainant as a CU^+ (the C-word)
- The Investigator relays this information to the TIXC and asks whether the NOIA needs to be updated

How should the TIXC respond?

What steps would should they take?

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Case Study 3

- TIXC receives a complaint alleging that the Respondent sexually assaulted the Complainant while they were in a relationship
- They have since broken up
- Complainant alleges that after the breakup, they told the Respondent that they were going to file a Title IX complaint
- As a result, the Respondent threatened, cajoled, and pressured the Complainant not to file the complaint

Which charges should be included in the NOIA and why?

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Case Study 4

- A student comes to the Title IX office to file a complaint
- The student is well-prepared for the meeting, having already consulted with an attorney who is a Title IX expert
- The student shares that they are victim of dating violence (sexual assault in a previous relationship) and tells the TIXC that they have gone over the policy with their attorney, and they think the appropriate charges are:
  - Title IX Sexual Harassment (SPOO), FHA Sexual Harassment (SORPP), and Title IX Dating Violence

Do you agree or disagree? Why?

What charges should be included in the NOIA?

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Case Study 4 - Part II

- The student further informs the TIXC that they choose to use Process B, and that they are unwilling to file a Process A complaint
- They argue that the applicable FHA charge is outside of Title IX, thus allowing the institution to file it under Process B and consider the other charges collateral misconduct, which can be addressed in the same process

How should the TIXC respond?

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Case Study 5

- The Respondent in a sexual assault complaint requests to meet with the TIXC to discuss supportive measures
- During this meeting, the Respondent shows the TIXC a text message timestamped one hour before the alleged sexual assault, in which the Complainant texted the Respondent, “Let’s fuck”
- The Respondent shows the TIXC a second text message from the Complainant to the Respondent one hour after the alleged incident, stating, “You totally rocked my world. Just what I needed.”
- Based on these texts, the Respondent informs the TIXC it is obvious they have been falsely accused and expects the TIXC to dismiss the complaint

What should the TIXC do?

How should they respond?

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Case Study 6

- The Respondent in a sexual assault complaint requests to meet with the TIXC to discuss supportive measures
- During this meeting, the Respondent shows the TIXC a text message timestamped one hour before the alleged sexual assault, in which the Complainant texted the Respondent, “Let’s fuck”
- The Respondent shows the TIXC a second text message from the Complainant to the Respondent one hour after the alleged incident, stating, “You totally rocked my world. Just what I needed.”

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Case Study 6

- Based on these texts, the Respondent informs the TIXC it is obvious they have been falsely accused and expects the TIXC to dismiss the complaint
- The TIXC declines to dismiss the complaint
- The Respondent then insists on filing a complaint against the Complainant for making a false complaint and a sexual harassment charge for alleging sexual assault in bad faith, as evidenced by the text messages

What should the TIXC do?

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Case Study 7

- The TIXC issued a no-contact order (NCO) to Justine and Alyssa based on Justine's allegation that Alyssa gave her a laced vape, resulting in Justine becoming "out-of-it," and Alyssa then sexually assaulting Justine
- Justine does not want to file a Formal Complaint
- Alyssa requests a meeting with the TIXC about the NCO
- At the meeting, she shares that she is traumatized by the NCO, is confused why the Title IX office is involved, and believes that her freedoms are being restricted by the NCO without any evidence and on a student's unsupported say so

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Case Study 7

- Alyssa doesn't know what the allegations are, but she denies anything other than getting high together took place, and nothing that would implicate Title IX
- She asks the TIXC to lift the NCO, as it presumes her guilt

Assume that the TIXC refuses. What should they tell Alyssa?

Alyssa responds that she wishes to appeal the decision. What now?

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Case Study 8

- Jasper is upset that his ex-girlfriend is allegedly going around telling many other students that Jasper abused her during their relationship and sexually assaulted her multiple times
- Jasper wants the TIXC to protect him from these falsehoods being spread further, and to ensure that his ex recants these allegations, because they are completely untrue

Devise three resolution routes that could be presented to Jasper as options, road-mapping each.

What are Jasper's options?

What are the repercussions of each that he should consider?

What would you advise Jasper to do, if he asks you for your advice?

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Case Study 9

- Employee Nate comes to the TIXC stating that he “hooked up” with another employee, Jacques
- Jacques told a friend, Nefertari, that Nate may have sexually assaulted Jacques
- Nate found out about this conversation, and to combat anyone’s perception that he sexually assaulted Jacques, he told several other co-workers that he consensually hooked up with Jacques, including providing details and video (non-graphic) to back up his assertions
- The TIXC reaches out to Jacques to discuss the situation and offer him a chance to file a Formal Complaint

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Case Study 9

- Jacques alleges that Nate's discussion of their hookup with co-workers is retaliation for the private conversation he had with Nefertari about his feelings about the situation

Should the TIXC accept this retaliation complaint?

How should Nate be charged, if at all?

What considerations should influence the TIXC's decision?

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Case Study 10

- During intake, Noelia alleges a series of sexually violent acts by Serge
- She states she wants to file a formal complaint, and the TIXC explains the process
- Noelia says she prefers Process B, but the TIXC explains that the institution's jurisdiction rules and policies require that these allegations be resolved through Process A
- Noelia asks some questions and agrees to think about filing a formal complaint

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Case Study 10

- Noelia comes back one week later and says that she wishes to file a formal complaint about all of Serge's actions that took place off campus, only, and does not wish to address the allegations of misconduct she made earlier involving on-campus conduct
- She states that as a result of this narrower scope of her allegations, she believes she is eligible for a Process B resolution

How should the TIXC respond?

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Case Study 11

- The TIXC receives an e-mail from a parent indicating that they have knowledge of a sexual relationship between a high school student (not their child) and the school resource officer
- The sexual interactions have taken place both on school property and out of school
- The parent indicates that they have also notified the local sheriff's office because they employ the school resource officer
- The sheriff's office has commenced an investigation

Does the school/district have jurisdiction over the school resource officer's conduct? Why or why not?

What steps should be taken?

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Case Study 12

- The TIXC receives a report from a teacher indicating that they overheard several high school students discussing what sounded like explicit text messages one of the students received from a student-teacher while on a school-sponsored trip for the band
- The student-teacher is enrolled at the local university and is assigned to complete their student-teaching for the current semester with the music program at your high school
- The reporting teacher did not see any specific messages, and the students wouldn't tell her what they were discussing when she asked

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Case Study 12

- The TIXC invites the Complainant to meet with them, and the Complainant confirms during the meeting that they received text messages from the student-teacher that made them "uncomfortable," but they do not want to file a formal complaint and just want to forget about it

Does the school/district have jurisdiction over the student-teacher's conduct? Why or why not?

What should be done under these circumstances?

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Case Study 13

- An Investigator receives a formal complaint from a parent who reports that their student is being harassed and called names like “slut,” “whore,” and “Master Missy” by other students both in person during school hours and via social media
- The parent is able to identify some of the students by name in the complaint

Which behaviors, if any, warrant charges?

What should those charges be?

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Case Study 13 - Part II

- Upon issuing a NOIA to one of the responding students, their parent calls and informs the Investigator that the Complainant is the one that should be investigated because she took a cell phone video of herself masturbating and sent it to another student
- The parent states that is the reason that the other students were calling the Complainant names

Is it appropriate to charge the Complainant?

If so, which charges would be appropriate and why?

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Case Study 14

- The TIXC receives an anonymous e-mail with three attached video files
- The first video shows a group of students gathered at an out-of-school location and a female student is berating a male student in front of the others
- The second video shows the same female and male student in a school stairwell
- The female student snatches the male's cell phone out of his hand, and the female says, "I guess I have to take this away from you again since you can't seem to follow my rules and stop talking to other girls"
- The third video again shows the same two students in what appears to be an empty classroom

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Case Study 14

- The male student is on his knees and the female student is standing over him
- The male student can be heard saying, “Please, baby, I love you, don’t break up with me,” and the female student responds, “You’re such a dumb fuck; why should I stay with you? You can’t do anything right”

The TIXC is able to confirm that the two students in the videos are enrolled at their school

What should the TIXC do?

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Questions?

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