



Association of
Title IX Administrators

Title VI & Title IX Civil Rights Investigation Foundations Level One for Educational Settings

South Carolina Technical College System

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Introduction



This training equips practitioners with an opportunity to explore the critical components of a thorough, neutral, and compliant civil rights investigation.



Practitioners will explore examples and unique considerations for investigating sexual harassment, disparate treatment, hostile environment, and retaliation complaints.



The goal of this course is to introduce the essential knowledge, skills, and best practices that will equip practitioners for success as a civil rights Investigator.

Review: Title VI Applicability, Scope, and Definitions

Title VI of the Civil Rights Act of 1964

“No person in the United States shall, on the ground of **race, color, or national origin**, be **excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.**”

VI

42 U.S.C. § 2000d

Title VI Applicability

- Broad applicability
- “No person”
 - Students
 - Employees (limited coverage)
- Program or activity receiving federal financial assistance
 - Education program or activity
 - States and public agencies
 - Private agency, institution, organization
- In the United States



ATIXA Model Policy Definitions

Race	<ul style="list-style-type: none">Actual or perceived membership in a group characterized by shared physical, cultural, or ethnic traitsIncludes those groups that may be defined by ancestry, ethnic identity, or perceived racial affiliation
Color	<ul style="list-style-type: none">Actual or perceived pigmentation, complexion, or shade/tone of a person's skin regardless of race or ethnicity
National Origin	<ul style="list-style-type: none">Actual or perceived place of origin, ancestry, ethnicity/ethnic characteristics, language or accent, cultural heritage, surname or name associate with a nation, or association with people of a particular nation or origin, regardless of citizenship or immigration status

Discrimination Defined

The act of treating an individual differently, or less favorably, based upon actual or perceived protected characteristics

**Can be intentional or
unintentional**

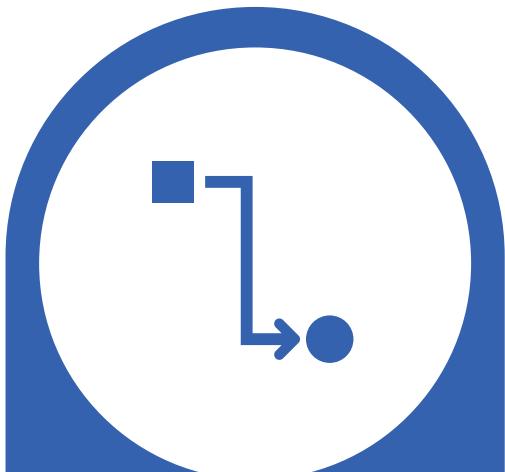
**Always based on
protected
characteristic(s)**

Types of Discrimination



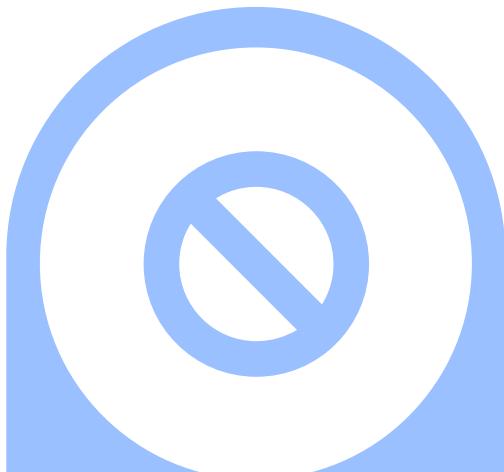
Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliation or perception of affiliation to protected characteristic



Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups



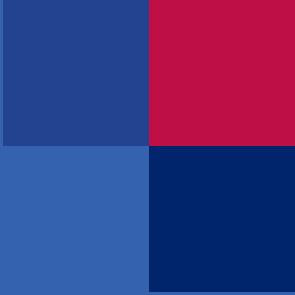
Harassment

- Severe OR pervasive OR persistent behavior that limits a person's benefits, services, or opportunities



Retaliation

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



Review: Title IX Applicability, Scope, and Definitions

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 & 34 C.F.R. Part 106 (1972)

Title IX has always mandated a response to sex discrimination, however the 2020 Title IX Regulations **only** apply to sexual harassment complaints



Applicability

- Education program or activity in the United States
- Control over the Respondent
- Control over the context of the behavior
- Applies to both student and employee complaints



Scope

Title IX

Sex Discrimination

- Disparate Treatment
- Disparate Impact

Sexual Harassment

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

Retaliation (1975)

Review: Sexual Harassment Definitions

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



ATIXA Model Policy

Definitions

- Consent
- Retaliation
- Common additional offenses
 - Sexual Exploitation
 - Harm/Endangerment
 - Intimidation
 - Hazing
 - Bullying



Definitions: Consent

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

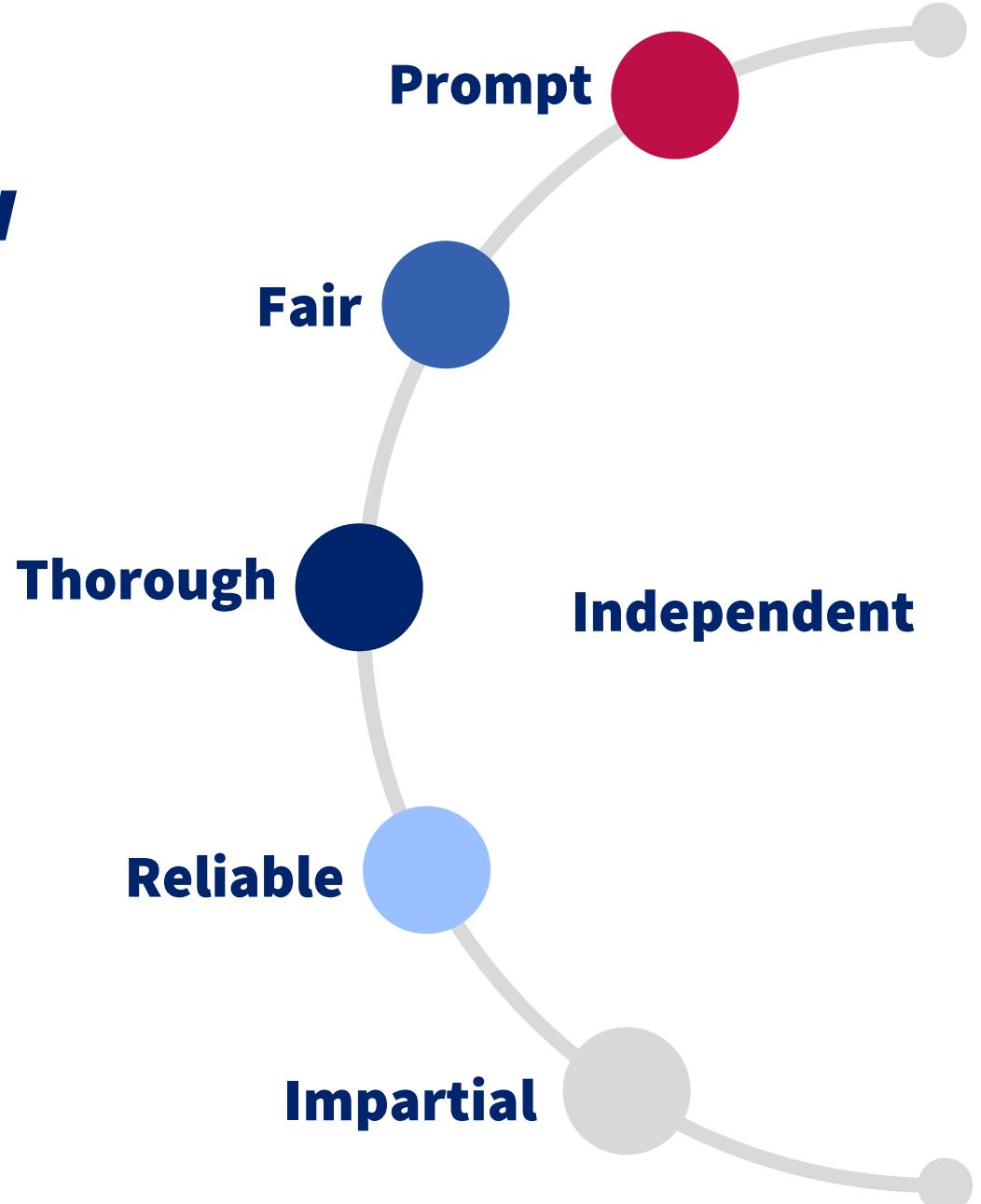
Civil Rights Investigation Process Overview

Civil Rights Investigation Process



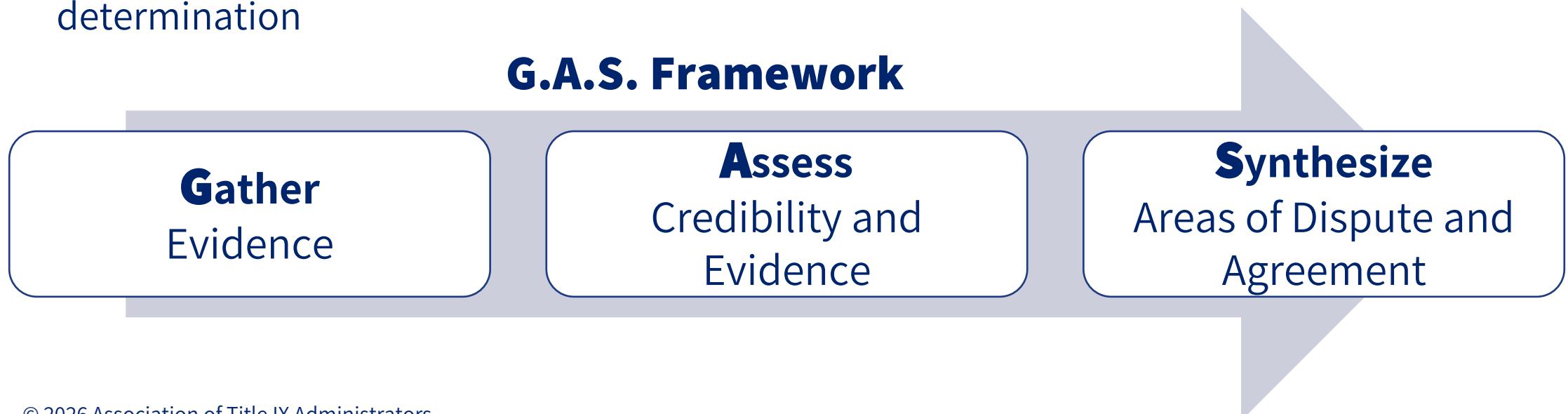
Civil Rights Investigations Overview

- Investigations focus on gathering all available, relevant information
- The institution is responsible for gathering evidence, not the parties



Role of the Investigator

- **Input:** all available, relevant evidence
- **Output:** a comprehensive, detailed written investigation report that fairly summarizes all relevant evidence **and** the investigation
- Follow the G.A.S. Framework to well position the Decision-maker for reaching a determination



A Fair and Prompt Resolution Process

- **Treat all parties fairly**
 - If the institution affords a right, privilege, benefit, or opportunity to one party, consider whether it should be provided to other parties
 - Ensure parties have opportunity to **fully participate** in the resolution process
- Ensure all employees involved in administering the civil rights resolution process **operate without bias and/or conflicts of interest**
- Should be reasonably prompt to enable the institution to fulfill its obligations to address harassment and discrimination under applicable laws and policies
- Due process rights may pertain, especially at public institutions
- Resolution process may take longer than expected; Anticipate, mitigate, and document delays

Required Parties' Rights: Title IX Grievance Process

- Receive detailed, written Notice of Investigation and Allegations (NOIA)
 - Include information about the Formal Grievance Process
 - Provide sufficient time to prepare for any initial interview
- Be accompanied by Advisor of their choice
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Present witnesses, including expert witnesses
- Present inculpatory and exculpatory evidence
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare

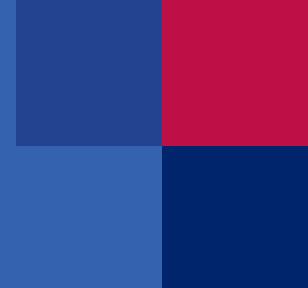
Required Parties' Rights: Title IX Grievance Process, Cont.

- Inspect and review directly related evidence and investigation report
- Opportunity to ask questions for other parties and witnesses
 - To Investigator(s) during the investigation
 - Through Advisor during a live hearing
- Opportunity to appeal the determination
- Reasonable expectation of privacy
- Respondent presumed not responsible until a determination is made
- Written outcome notification

Recommended Parties' Rights: Title VI Resolution Process

Parties should have the right to:

- A thorough, fair, and impartial resolution process free of bias or conflicts of interest
- Notice of the allegations and, if appropriate, any investigation
- Obtain and present evidence and witnesses
- Discuss allegations and consult with confidential resources, parents/guardians, or an Advisor
- Review relevant evidence and the investigation report (if applicable) the Decision-maker (DM) will consider
- Appeal (if offered in other grievance procedures)
- Choose an Advisor (if allowed in other grievance procedures)



Investigation Process

Investigation Oversight and Supervision

Title IX Coordinator (TIXC) or Title VI Coordinator (TVIC) responsibilities:

- Appoint Investigators and ensure training
- Consult and strategize with Investigators
- Ensure timeline compliance
- Oversee recordkeeping
- Serve as parties' primary point of contact



Required Investigator Training: Title IX

- Definition of **sexual harassment** in 34 C.F.R. Section 106.30
- **Scope** of the institution's education program or activity
- **Title IX grievance process**
- Conducting an **investigation**
- **Serving impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Issues of **relevance** to create an investigation report that fairly summarizes relevant evidence
- Investigator training must not rely on **sex stereotypes**

Recommended Investigator Training: Title VI

- Definitions of **national origin, race, color, disparate treatment, hostile environment, and retaliation**
- **Scope** of the institution's education program or activity
- **Title VI grievance process**
- Conducting an **investigation**
- **Serving impartially**, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Issues of **relevance** to create an investigation report that fairly summarizes relevant evidence

Investigation Steps

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Determine Basis for Investigation
4. Notice of Investigation and Allegations (NOIA)
5. Establish Investigation Strategy
6. Thorough, Reliable, Impartial Investigation
7. Draft Investigation Report
8. TIXC Reviews Draft Report and Evidence
9. Parties Review Draft Report and Evidence
10. Final Investigation Report



INCIDENT INVESTIGATION

SUMMARY

Incident Date:

Review Date:

by:

Incident Summary:

Root Causes:

Investigation Phase One: Pre-Investigation

Pre-Investigation Steps

1

**Notice / Formal
Complaint**

2

**Initial Assessment
and Jurisdiction
Determination**

3

**Determine Basis For
Investigation**

Step 1: Notice/Formal Complaint

- Institution receives a report, knowledge, or complaint of alleged discrimination, harassment, or retaliation
- TIXC/TVIC is point person to receive reports and complaints, including referrals from mandated reporters
- **Report:** any information that indicates a potential policy violation
- **Formal Complaint:** a written request for the institution to initiate its Formal Grievance Process
 - Signed by the Complainant or the TIXC/TVIC

Step 2: Initial Assessment and Jurisdiction Determination for Title IX

TIXC or designee will perform several steps including:

- Outreach and Intake to potential Complainant
- Jurisdictional Assessment
- Sign a Formal Complaint (if applicable)
 - Pattern, Predation, Threat, Violence, Weapons, Minors, Employee Respondent, Complainant not participating or attempting to participate (P/ATP)
- Offer and coordinate supportive measures
- Initiate Emergency Removal or Administrative Leave procedures (if applicable)
- Complete Mandatory or Discretionary Dismissal (if applicable)
- Arrange for Informal Resolution, if requested/appropriate (if applicable)

Step 2: Initial Assessment and Jurisdiction Determination for Title VI

- Any individual can report potential discrimination under Title VI
- **Upon receiving notice, the school/institution may:**
 - Require additional information to determine appropriate next steps
 - Discrimination reports/complaints typically need to identify a protected characteristic
 - race, color, national origin, disability, age – an adverse action of some kind, and a causal element
 - “Prima facie”
 - Outreach to individual making disclosure for more information
 - Perform an initial inquiry to gather more information
 - Have an obligation to implement supportive measures and remedies immediately, particularly for hostile environment complaints
 - Supportive measures should be non-punitive

Supportive Measures

- Individualized measures designed to:
 - Restore or preserve access
 - Protect safety of parties or educational environment
 - Can be provided to Complainants, Respondents, or others (e.g., student organization or program) at any time
 - Witnesses may, in rare circumstances, also be provided supportive measures
 - Provide support during investigation process
- Investigator(s) may learn about parties' needs during the investigation
 - Concerns or needs that arise during the investigation should be immediately shared with the TIXC/TVIC or the individual overseeing the complaint

Step 3: Determine a Basis for Investigation

There are three bases for civil rights investigations:

- **Incident:** a specific incident or period
 - May involve one or multiple alleged violations
 - Sexual Harassment
 - Disparate Treatment
 - Retaliation
- **Pattern:** repetitive or similar behaviors or targets by the same Respondent over a period
 - Tend to involve multiple Complainants
- **Climate/Culture:** discriminatory policies, processes, and environments
 - 1975 regulatory framework
 - May have no identifiable Respondent

Step 3: Investigation Scope

- **Scope** refers to the investigation allegations, timeframes, and parties
- TIXC/TVIC (or designee) determines the basis and scope of the investigation (e.g., incident, pattern, culture/climate)
- Considerations:
 - Allegations outside of jurisdiction
 - Individual vs. group
 - Multiple Complainants or Respondents
 - Counter-complaints
 - Complaint consolidation
- May need to adjust scope during process

Notice of Investigation and Allegations

- If a formal investigation is initiated, **ATIXA recommends sending written Notice of Investigation and Allegations (NOIA) to all parties**, simultaneously
 - This is required for Title IX investigations
- **The NOIA should include:**
 - Notice of the allegations and known details, such as identities of the parties
 - A detailed description of the alleged conduct
 - Who, what, where, and when
 - Relevant policy provisions
 - Information about resolution process, including informal resolution options
 - Presumption of non-responsibility
 - Statement prohibiting retaliation
 - Statement about parties' rights (e.g., Advisor, to present and review evidence)

Updating the NOIA

- NOIA may need to be updated for any of the following reasons:
 - Original NOIA was deficient
 - Did not include all potential policy violations
 - Did not identify specific policy provisions alleged to have been violated
 - Did not accurately charge overlapping policy provisions
 - TIXC/TVIC receives additional allegations
 - Allegations are withdrawn
 - Policy provision no longer applies, based on details of incident
 - Counter-complaint is initiated
- Investigator should discuss any proposed NOIA changes with TIXC/TVIC, including rationale

Who Should Investigate?

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

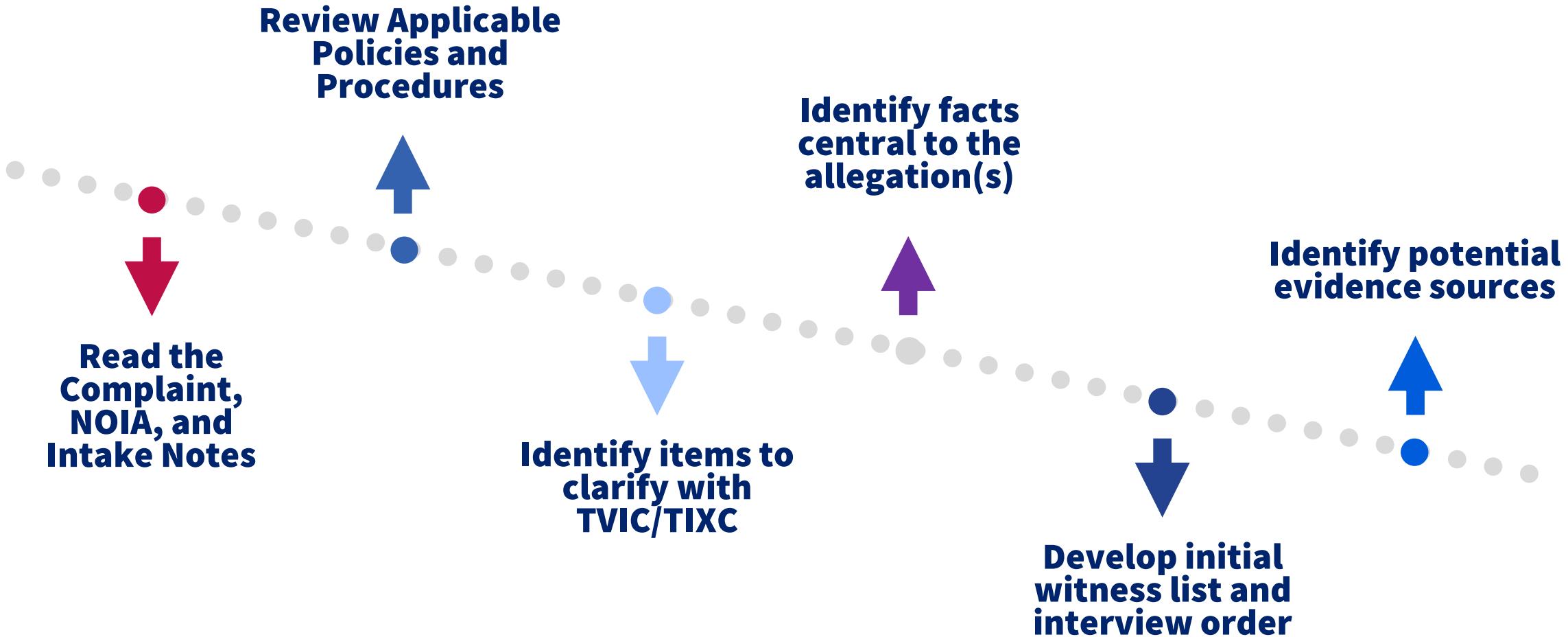
**Full-Time
Investigator(s)**

**Investigator
Pool**

**External
Investigator**

**Coordinator as
Investigator**

Investigation Strategy



Investigation Strategy

TIXC/TVIC consults with Investigator(s) to strategize and plan the investigation:

- The structure of the investigation process will look different based on the type of complaint
 - Disparate Treatment
 - Harassment
 - Program equity/fairness
 - Retaliation



Investigation Phase Two: Conducting the Investigation

Formal Investigation Overview

- The primary method of investigation is through interviews with parties and witnesses
 - Collect relevant documentary evidence and other available evidence
 - Burden of evidence collection is on the institution, **not** the parties
 - Written investigation report (**required for Title IX**)
 - Opportunity for parties to review and respond to the report (**required for Title IX**)
- **Investigation models**
 - Hand-off model with separation of roles (**ATIXA recommendation – Process B**)
 - Investigator as DM (**prohibited for Title IX**)

Interview Sequencing

- Conduct interviews as promptly as possible to capture fresh recollections
 - For Title IX, do **not** interview Respondent before providing the NOIA
- Identify an initial witness list and solicit additional witness suggestions from parties and other witnesses
- Investigator retains discretion to determine whether a suggested witness has relevant information
 - When unsure, err on the side of conducting the interview

Working with Advisors

- Allow parties to use an Advisor of their choice (**required for Title IX & Violence Against Women Act (VAWA)**)
- Investigators may establish participation ground rules; must be applied equally
- The Advisor role differs from that of an attorney in most circumstances, though an Advisor may be an attorney
 - The parties are expected to answer questions, respond to emails, and drive participation in the process
- Consult with human resources regarding additional considerations for employee parties and witnesses (e.g., union representatives)

Coordinating with Law Enforcement

- Law enforcement may also be investigating one or more of the allegations
- Law enforcement may request that the institution pause or stop its investigation; however, Title IX investigations cannot be unreasonably delayed
 - Pausing for a reasonable time to permit law enforcement to gather evidence is permissible, but offer supportive measures in the meantime
- Criminal investigation cannot substitute for the Title IX investigation



Interviewing Skills

Building Rapport

- Rapport is meant to create a level of transparency and trust
 - Establishes expectations
 - Reinforces neutrality and impartiality
 - Sets the tone for the interview
- Building and maintaining rapport occurs throughout the interview, not just in the first five minutes
- Do not sacrifice professionalism or neutrality to build rapport
- Consider introductory spiel (i.e. overview of process, Investigator role, party/witness rights, privacy vs. confidentiality)
- Be prepared for questions that may arise

Party and Witness Investigation Concerns

Privacy vs. Confidentiality vs. Privilege

1

PRIVACY

Statutory protection (FERPA) only allows disclosing records to those who need to know, but cannot guarantee confidentiality

2

CONFIDENTIALITY

Information protection by those who need not report to the TIXC because they are designated confidential or have ethical/statutory confidentiality duties (subject to exceptions)

3

PRIVILEGE

The highest legal protection (attorney giving advice to a client or clergy providing pastoral advice); client/patient/parishioner controls the privilege

Practical Considerations

Attire

Location

Notetaking

Recording

Support
Person/Advisor

Duration

Breaks

Entry/Exit

Trauma-Informed Practices

Key principles of trauma-informed practice:

- Safety
- Trustworthiness and transparency
- Collaboration and mutuality
- Empowerment, voice, and choice
- Cultural and historical considerations

ATIXA Recommendation: Incorporate trauma-informed methods without compromising impartiality or ability to gather credible, relevant evidence

- Trauma-informed practices should not significantly influence evidence evaluation

Questioning Considerations

- An interview is a non-adversarial conversation designed to elicit information
- Ask questions directly to the party; it is critical that they, not their parent/guardian or Advisor, answer (younger children may be an exception)
- Start with broad questions, but focus on timelines and details as well
 - Explore all gaps in information; obtain answers to all questions
 - Ask logical follow-up questions based on answers
- Ask purposeful questions:
 - What do I need to know?
 - Why do I need to know it?
 - What is the best way to ask the question?

Questioning Considerations, Cont.

- Use policy definitions to inform questions
 - “What specific derogatory language was used related to your race?”
- Avoid unnecessary repetition or traumatic re-triggering, but get the details you need
- Choose or blend effective questioning strategies/methodologies
 - Cognitive interviewing techniques are likely to be helpful
- Be mindful of age and use developmentally appropriate questioning techniques and language



Questioning Tips

- Adjust your questions based on the **type** of alleged discrimination
 - Motive is important with Disparate Treatment complaints
 - Timeline evidence is important with Retaliation complaints
 - Totality of the circumstances is part of a Hostile Environment Harassment analysis
- Some allegations may require targeted and specific questions, but others require broader questions that speak to context or other variables
- When asking direct questions, it's okay to explain them
 - E.g., explain the Retaliation definition and why it is important to know when the underlying complaint was submitted and who knew about it

Interview Challenges: Resistance, Reluctance, and Lying

- Recognize difficulty in discussing issues of race, color, and national origin or other protected characteristics
 - “I know this is difficult and I really appreciate your willingness to discuss this matter with me”
- Offer a reminder of Investigator’s role as a neutral fact-gatherer
 - “I am sensing some reluctance to share information, which is understandable. What questions do you have for me about the process?”
- Maintain rapport and avoid accusation
 - “I think I’m missing something...”
- Offer a situational change, if available
 - “Sometimes it’s easier to write the actual words rather than saying them. Do you think that would help you?”

Interview Challenges: Resistance, Reluctance, and Lying, Cont.

- Reframe or restate what the interviewee has told you
- Allow opportunity for the interviewee to restate (e.g., in cases of lying)
- Review retaliation protections, amnesty policies (if applicable), and expectation of truthfulness
- Avoid statements reflecting moral judgment
- Attempt to understand the barrier and remove or remedy it

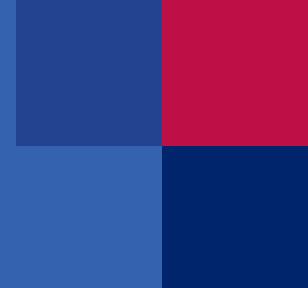
Interview Wrap-Up Questions

Examples

- “Is there anyone else that you think we should talk to?”
- “Are there any questions you expected that we didn’t ask?”
- “Is there anything else you think we need to know?”
- “What questions should I pose to other witnesses/parties?”
- **FOR THE PARTIES:** “Are there any questions that you would like us to ask a witness or party?”
 - Keep a running list of the questions suggested/requested by each party
 - Whether the question was asked and rationale when question not asked
 - Rationale for not asking any question(s)

Interview Documentation and Review

- Maintain interview transcripts or written summaries
 - **Transcript:** word-for-word documentation of a recorded interview
 - **Summary:** Investigator's summation all information gathered during entire interview (may be several paragraphs or pages, depending on interview length)
- Recording is an increasingly common practice; no real downside
- Parties and witnesses should be invited to review their interview transcript/summary
 - Verify accuracy, clarify where needed, and/or provide additional information
 - Not an opportunity to remove information that was provided



Evidence

Evidence Collection

- Active process to gather evidence
- Identify potential sources of information
- Seek to verify/authenticate evidence obtained
- Document efforts to gather, even when not successful

What are the most common types of evidence in your investigations?



Understanding Evidence

- Duty to collect and objectively evaluate all relevant evidence
- **Evidence** is any kind of information presented to help determine what occurred
- **Relevant** means related to the allegations under investigation:
 - Questions are relevant when they seek evidence that may aid in showing whether the alleged policy violation occurred
 - Evidence is relevant when it may aid a DM in determining whether the alleged policy violation occurred or in assessing credibility
- All relevant evidence must be objectively evaluated and considered, including both inculpatory and exculpatory
 - **Inculpatory:** supports a finding of responsible for a policy violation
 - **Exculpatory:** supports a finding of not responsible for a policy violation

Title IX: Privileged and Medical Information

The party must provide written permission to obtain and/or include:

- Evidence protected under a legally recognized privilege
- Records made or maintained by:
 - Physician
 - Psychiatrist
 - Psychologist



Title IX: Relevant Evidence Exclusions

- Evidence of the **Complainant's sexual predisposition** is never relevant
- Evidence of the **Complainant's prior sexual behavior** is not relevant except:
 - If offered to prove that someone other than the Respondent committed the alleged conduct; or
 - If offered to prove consent with respect to prior consent with the Respondent
 - Any prior consensual sexual conduct between the parties does not by itself demonstrate or imply the Complainant's consent
- Both exclusions apply even if admitted/introduced by the Complainant
- Exclusions do **not** apply to Respondent's prior sexual behavior or predisposition

Title VI: Collecting Evidence of Motive

When necessary, an Investigator should look for direct evidence of a motive

- Motive is often found in various sources of evidence:
 - Documentary evidence
 - Emails, performance reviews, text messages, grading patterns, etc.
 - Testimonial evidence
 - Party and/or witness statements
 - Indirect or circumstantial evidence
 - Similarly situated individuals
 - Deviation from previous practices
 - Inaction despite known discriminatory practices or policies
 - Close-in-time actions may make it easier to assess intent

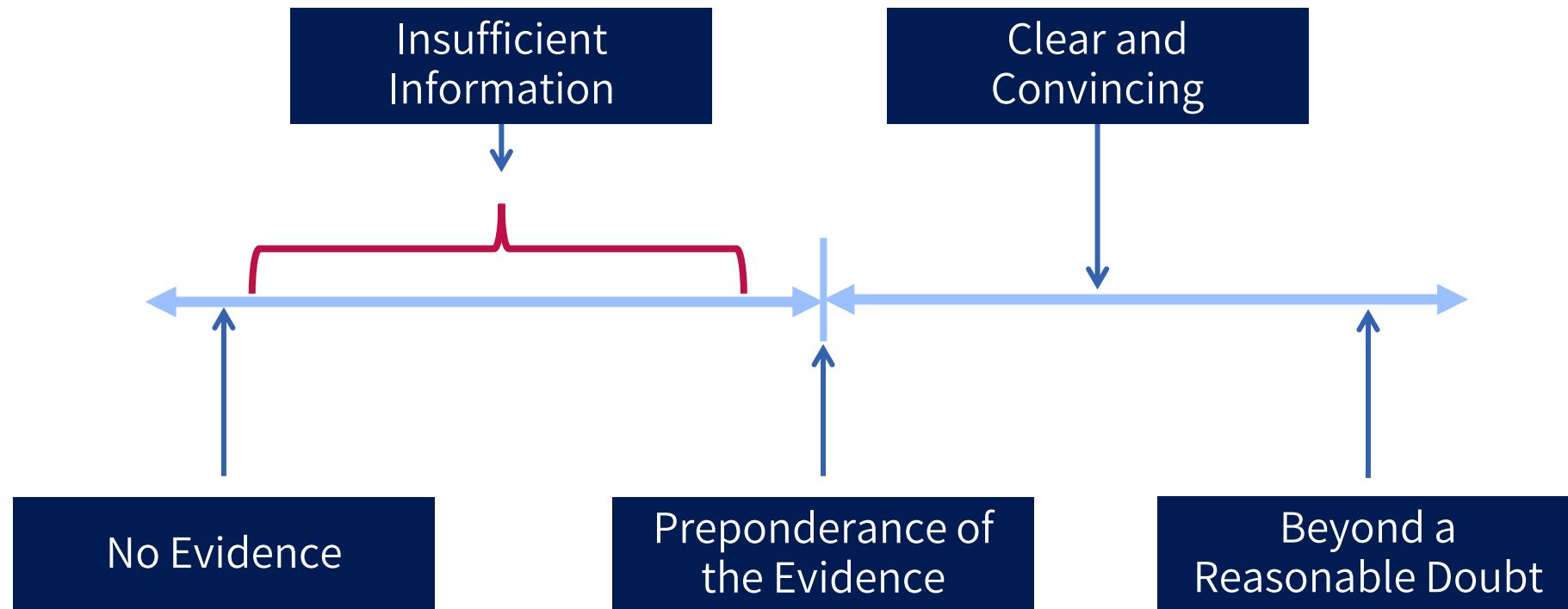
Evidence Authentication

- Not all evidence has the same degree of credibility
 - Less credible evidence may be less reliable evidence
- Investigator should seek the **highest quality evidence** available
- Investigator should try to **authenticate all evidence** provided
 - Check for possible evidence fabrication or alteration
 - Corroborate information between witnesses
 - Try to obtain complete, rather than partial, records when possible
 - Test assertions to verify accuracy when possible
 - Example: “I don’t remember if I wore a condom, but the condom in my wallet is no longer there”

Standard of Evidence

- **Two options:**
 - Preponderance of the evidence
 - Clear and convincing evidence
- Standard of evidence must be consistent for all formal complaints of sexual harassment in all policies
- Must apply the same standard for complaints against students and employees, including faculty
- Investigator must be familiar with the standard in institutional policy
- ATIXA recommends the preponderance of the evidence standard

Standard of Evidence



Preponderance of the Evidence is the current industry standard



Credibility Assessment

Credibility Assessment

- Credibility assessments weigh the accuracy and reliability of relevant information
- Primary considerations are **consistency** and **corroboration**
- Credibility is not synonymous with a person being “truthful” or “honest”
 - Avoid moral judgment phrases in reports such as “lying,” “honest,” “deceitful,” “sincere” etc.
- Evasion, misleading testimony, or memory errors may impact credibility
- Avoid too much focus on **non-relevant** information
- Use significant caution if relying on demeanor to determine credibility

Primary Credibility Factors

Corroboration

- Aligned testimony and/or physical evidence

Consistency

- Is a person's account consistent over time?

Inherent Plausibility

- Does the explanation make sense?
- Be careful of bias influencing sense of “logical”

Motive to Falsify

- Do they have a reason to lie?

Past Record

- Is there a history of similar behavior?



Credibility Assessments

- Investigator should use credibility assessments to **direct** the DM to areas needing closer examination
 - Focus the DM on alignment or discrepancies that may be significant for their analysis
 - Summarize the evidence to provide a snapshot
 - Use citations or references to help DM find the evidence within the report



Common Credibility Errors

- Misplaced emphasis on:
 - Nonverbal indicators (e.g., nervousness, anxiety)
 - Irrelevant inconsistencies
 - Reputation
- Confusion about memory
 - Stress and emotion can complicate memory
- Parties' status as a Complainant or Respondent
- Investigator's conflict of interest or bias



Special Considerations for Credibility

- Disparate Treatment and Retaliation analyses rely heavily on credibility
- Investigator should seek corroboration of any-non-retaliatory reason(s) offered by Respondent
 - Provide Complainant with the **opportunity to respond** to a non-retaliatory reason
- Investigators have an obligation to investigate pretext
 - May solely be **circumstantial**
 - Look for evidence of personal or discriminatory animus
- Potential sources of corroboration may include:
 - Past practice in similar situations
 - Interviews with other employees/students
 - Verification of practice/policy by senior officials



Title IX Complaint Analysis Tools

Sexual Harassment Charging Rubric

- “Sexual harassment” is an umbrella term, though it is often thought of as a specific charge for hostile environment harassment
- A Hostile Environment/SPOO analysis (severe, pervasive, and objectively offensive) **is never needed for a sexual assault allegation**
 - Sexual Assault = SPOO by definition
 - If sexual assault is found to have occurred, sexual harassment (umbrella term) is automatically proven
- There may be a separate sexual harassment (hostile environment) charge alongside a sexual assault charge when the allegations arise from separate facts

Evaluating Sexual Harassment Rubric

- Unwelcomeness is considered from a subjective lens
- Generally considered a “self-proving” element when a Complainant says the conduct was unwelcome
 - Includes a quid pro quo situation
- Investigators should primarily be focused on the “severe, pervasive, and objectively offensive” elements of sexual harassment

Consent Construct: Three Questions

1. Did the Respondent use **force** used to obtain sexual or intimate access?
2. Was the Complainant **incapacitated**?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated
3. What **clear words or actions** by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?



Disparate Treatment Investigations

Disparate Treatment

ATIXA Model Policy Definition

- Any intentional differential treatment of a person or persons that is based on a person's actual or perceived race, color, or national origin (OR protected characteristic(s)) and that:
 - Excludes a person from participation in;
 - Denies the person benefits of; or
 - Otherwise adversely affects a term or condition of a person's participation in a Recipient's program or activity

Examples of Disparate Treatment

When based on protected characteristics, the following can constitute disparate treatment:

- Abusive verbal or physical behavior
- Benching/lack of playing time
- Differential discipline for similar misconduct
- Differential protest or posting policy enforcement
- Demotion/Termination
- Funding disparities for student orgs or programs
- Limiting program access
- Poor performance reviews
- Promotion/Tenure denial
- Recommendation letter/reference denial
- Student leadership opportunity denial
- Unfair grading

Disparate Treatment Construct

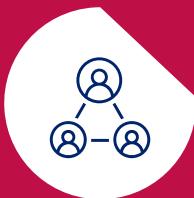
Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?

Step 2: Does the Respondent offer a non-discriminatory reason for the adverse action?

Step 3: Is there evidence that the offered reason is pretext for discrimination?

Step One: Complaint

Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?



1(a)

Does the complaint implicate a protected characteristic?



1(b)

Does the complaint identify an adverse action?



1(c)

Does the complaint assert that the protected characteristic status caused the adverse action?

Step One: Initial Allegation Assessment

- A complaint may implicate multiple Respondents, a department, a division, or an entire school/institution
- When receiving a report or complaint of disparate treatment:
 - Determine whether the allegations, if proven, have all three elements
 - If not, conduct an initial inquiry to gather more information
 - May be conducted by an Investigator or the Coordinator
- Cannot disregard because the Complainant's initial report does not “check all the boxes”
 - Examples of how to obtain additional information during this step:
 - Meet with the Complainant to learn additional information
 - Consult with human resources or a department chair (if appropriate)
 - Perform a preliminary data review

Step One: Initial Allegation Assessment, Cont.

Some evidence must connect the adverse action to the protected characteristic

- Examples:
 - “Similarly situated individuals” outside the protected characteristic group are treated differently than those in the protected group (comparator analysis)
 - Any individual is **“similarly situated”** if it is reasonable to expect that they would receive the same treatment as the Complainant, within context
 - Fact-specific analysis
 - Direct evidence of a connection
 - Documents or witnesses who have evidence of discriminatory intent/animus
 - Can also be circumstantial or indirect evidence
 - Satisfactory academic or job performance data

Similarly Situated Individuals

- “**Similarly situated**” is not precisely defined
 - Individuals may be similarly situated in one context but not another
 - Generally, the similarly situated comparison is most useful if the similarly situated individuals **are not** part of the Complainant’s protected group
- Investigators must determine which individuals, in the same context as the Complainant, should receive the same treatment as the Complainant
 - Make the **most relevant comparisons possible** based on the available evidence

Similarly Situated Individuals, Cont.

- **Consider the scope of the complaint**
 - If a student reports an individual faculty member, similarly situated students may be the other students in that course and students in the faculty member's other courses
 - If a student reports a student organization leader's bias in membership decisions, similarly situated students may be students in a related organization or students from the prior years' membership cycles
- If there are no individuals in the same position as the Complainant, the Investigator should consider other individuals in the most similar situations
 - Do not force a comparison where there really is no comparator

Comparative Evidence

- Investigators may use a variety of tools to obtain comparative evidence from similarly situated individuals
 - Focus groups
 - Historical data
 - Grading records/reviews
 - Performance reviews/other evaluations
 - Policy reviews
 - Previous complaints
 - Surveys



Step One: Examples

“The College of
Engineering hates
White people!”

- No specific discriminatory treatment alleged
- Meet with the Complainant to get additional information; may not ultimately result in an investigation

“I did not get admitted to
the College of Engineering
because of my race!”

- Discriminatory treatment alleged, but need additional information
- Meet with the Complainant, possibly request admissions' records about relevant standards to get started

Step One: Examples, Cont.

“The College of Engineering denied my application to the program because I am a White woman. All candidates who applied who were people of color, even those who had less experience and had fewer letters of recommendation, were admitted. All the White candidates were denied.”

- Complaint identifies a protected characteristic, an adverse action, and points to comparators to connect the admissions decisions to the alleged disparate treatment
- Establishes all three required elements of disparate treatment for Step One

Step Two: Non-Discriminatory Reason

- Interview the Respondent about the allegations to elicit an explanation:
 - Ask about the **why** behind the adverse action or disparate treatment
 - “Why didn’t Olivia make the basketball team?”
 - “Why did John get into the music program when Sally didn’t?”
 - Gather any evidence that supports the stated reason(s)
- Investigator should seek corroboration of any offered non-discriminatory reason(s)
 - Analyze the Respondent’s offered reason in light of relevant evidence
 - Statistical evidence may also be used to rebut a discriminatory motive

Common Rebuttal Arguments

Respondent may offer evidence that:

- Complainant's allegations are **factually incorrect**
 - Examples:
 - A Complainant's pay disparity allegations are based on inaccurate compensation information
 - Complainant, a student with a disability, was offered housing with private bathrooms at no additional cost but chose their room with community bathrooms
- Complainant has been **improperly compared** to individuals not similarly situated
 - Example: A Complainant alleges student conduct outcome disparities, but Complainant had previous violations, while comparators did not
- Complainant was compared to **some**, but not **all**, similarly situated individuals

Common Rebuttal Arguments, Cont.

Respondent may offer evidence that:

- Actions were based on **favoritism**
 - Investigator should consider whether favoritism is **pretext** for discrimination
- Statistical evidence the Complainant relied upon **does not raise an inference** of disparate treatment because:
 - Comparison group in the statistical data is not appropriate
 - Disparity is not statistically significant enough to derive conclusions
 - Example: The hiring pool is 50/50 but successful candidates are 55/45

Common Rebuttal Arguments, Cont. 2

Respondent may offer evidence that:

- Not **all** members of a group have received disparate treatment
 - This could be a red herring
 - The question is whether the **Complainant** was treated less favorably than similarly situated persons outside the protected group
- Respondent treated Complainant the same as a member of a **different** protected group
 - Unless that other individual is **similarly situated**, this is not a justification

Common Rebuttal Arguments, Cont. 3

Respondent may offer evidence that:

- A Complainant was qualified for a position but asserts that another person was selected because that person was **better qualified or a better fit**
 - This type of argument requires close examination
 - Respondents should articulate why the other person was more qualified than the Complainant
 - An expert witness may be helpful in these situations; deference to academic judgments may be reasonable
 - Qualifications can be multifaceted and subjective

Mixed motives for adverse actions are possible

- If any one of the motives is discriminatory, even if other motives are non-discriminatory, a policy violation occurred

Step Three: Pretext Analysis

- If the Respondent offers a non-discriminatory reason for the adverse action, the Investigator must then seek relevant evidence to determine if that reason is “legitimate”
 - Is the Respondent’s stated reason just pretext for discrimination?
 - **Pretext** occurs when an adverse action occurred for discriminatory reasons, but an individual nonetheless (falsely) asserts a legitimate reason for the action
- Provide the Complainant with an opportunity to respond to the Respondent’s reasoning
 - Use follow-up interview to identify any evidence to rebut the Respondent’s reasoning
 - Direct evidence (e.g., data, video, emails)
 - Other witnesses or documents
- Consider other sources to thoroughly investigate whether the reasoning is pretextual
 - Inherent plausibility is useful tool for assessing credibility in such contexts

Hostile Environment Harassment Investigations

Title VI Hostile Environment Definition

- **Title VI Hostile Environment**

- Harassing conduct that is
 - sufficiently severe, pervasive, **or** persistent
 - so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities, or privileges provided by a school/institution

Hostile Environment

ATIXA Model Policy Definition

- Unwelcome conduct on the basis of actual or perceived Protected Characteristic(s),
 - Which, based on the totality of the circumstances,
 - is subjectively and objectively offensive, **and**
 - is so severe **or** pervasive,
 - that it limits or denies a person's ability to participate in or benefit from the Recipient's program or activity
- ATIXA's model is designed to encompass multiple civil rights laws, with the exception of Title IX

Understanding Hostile Environment

- Hostile environment harassment complaints are primarily incident- and context-based and involve one or more Respondents
 - Investigators should consider prior/subsequent incidents re: pattern charges
- A hostile environment can exist even if Respondent did not target any individual
- A person can also experience a hostile environment based on their association with someone from a particular protected group
- Harassment must usually consist of more than isolated, minor incidents
- Unwelcomeness is a subjective standard, but logical to treat as rebuttable if significant evidence shows that conduct was in fact welcomed

Hostile Environment Construct

Step 1: Did the behavior occur as alleged?

Step 2: Did the Respondent engage in the behavior?

Step 3: Is the behavior on the basis of a protected characteristic?

Step 4: Is the behavior subjectively and objective offensive?

Step 5: Is the behavior sufficiently severe or pervasive?

Step 6: Does the behavior limit or deny Complainant's ability to benefit from or participate in Recipient's education program or activity?

Totality of the Circumstances

Totality of the circumstances pervade and apply to all steps of the analysis

- Frequency, nature, and severity of the conduct
- Identity of and relationship between the parties
- Age of the parties
- Size of the school/institution, location of the incidents, and context in which they occurred
- Whether the conduct unreasonably interfered with Complainant's educational/work performance
- Effect on the Complainant's mental or emotional state
- Whether the expression was the (mere) utterance of an epithet
- Whether the speech or conduct is protected by academic freedom or the First Amendment

Subjectively and Objectively Offensive

- **Subjectively Offensive:**

- Typically relies on statements made or evidence provided by Complainant and others
- Usually established by the Complainant's testimony or the fact that they made a report/complaint

- **Objectively Offensive:**

- “Reasonable Person” standard
- Context in which the alleged incident occurred and any similar, previous patterns that may be evidenced
- Usually look at similar grade level, age, and protected characteristic as the Complainant
 - “In the shoes of the Complainant”

Severity

- Egregious; more than just hateful, rude, or insulting behavior
- Actions are more likely to be severe when they are accompanied by physical conduct, threats, and/or violence
- Consider the circumstances/context (e.g., the ability for Complainant to remove themselves from the situation)
- Some symbols are “inextricably connected” to such acts of discrimination and hatred that a single incident involving them can meet the standard
 - Ex. A noose used to represent the hanging of Black people
 - Ex. Swastikas painted on the residence hall room door of Jewish students

Pervasiveness

- Pervasiveness hinges on whether the behavior is:
 - Widespread
 - Openly practiced
 - Well-known among students or employees
 - Impacting the reputation of a department, person, etc.
 - Distributed
- Behavior that occurs in public spaces and information posted online or shared electronically is more likely to be pervasive
- Persistence, the quality of repetition (especially when acts are concentrated in time rather than dispersed), can also likely satisfy the standard

Out-of-Program and Online Harassment

- A hostile environment could be created within an education program based on the **downstream effects** of out-of-program behavior
 - Policies may not allow jurisdiction to investigate off-campus behaviors
 - However, Title VI requires Recipients to remedy the downstream effects
 - Investigators need to track any potential downstream effects
- Online harassment is increasingly becoming an issue
 - Ask for timestamped screenshots, websites, usernames, and other information to facilitate gathering information related to online harassment
 - Authenticate evidence
 - Note when authentication is not possible

Downstream Effects

- **Scenario 1:**
 - Out-of-program conduct occurred
 - Creating in-program effects that do **not** constitute a policy violation
 - Result: Obligation to provide a remedial response
- **Scenario 2:**
 - Out-of-program conduct occurred
 - Creating in-program effects that constitute a policy violation
 - Result: Obligation to provide a remedial response, likely jurisdiction to investigate and discipline if appropriate

Retaliation Investigations

Retaliation

ATIXA Model Policy Definition

- The Recipient or any member of the Recipient's community,
 - taking or attempting to take materially adverse action,
 - by intimidating, threatening, coercing, harassing, or discriminating against any individual,
 - for the purpose of interfering with any right or privilege secured by law or Policy, or
 - because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the policy and associated procedures

Title VI Retaliation

- Title VI prohibits a Recipient or another person from:
 - Intimidating, threatening, coercing, or discriminating against any individual making a complaint, or testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing
- A Recipient engages in unlawful discrimination when:
 - It takes an adverse action against an individual
 - Either in response to the exercise of a protected activity or
 - To deter or prevent protected activity in the future

Retaliation Reports

- Screen for retaliation concerns during interviews and follow-up communications
 - Direct and secondhand reports of potential retaliation
 - Note sudden changes in a desire to participate in the process
- Communicate the prohibition on retaliation at every opportunity
 - Be prepared to answer questions, including how to report retaliation
 - Retaliation is often a concern for reluctant Complainants and witnesses
 - In addition to **encouraging reporting**, also remind each person **not to retaliate**
- No guarantee someone will not be retaliated against, but Investigators should assure parties and witnesses that any retaliation will be addressed
 - Follow-up with TVIC about any potential retaliation

Retaliation Investigation Timing

- Retaliation allegations often arise during an ongoing grievance process
- May address in a consolidated investigation with the original allegations
 - Always update NOIA
- May address separately at the end of the original grievance process
- Consider approach on case-by-case basis:
 - Timing
 - Complexity



Retaliation Construct

Step 1: Does the complaint satisfy the required elements for a retaliation complaint?

Step 2: Can the Respondent offer a non-retaliatory reason for the adverse action?

Step 3: Is there evidence that the offered reason is pretext for discrimination?

Step One: Complaint

Step 1: Does the complaint satisfy the required elements for a retaliation complaint?



1(a)
Does the complaint implicate a protected activity?



1(b)
Does the complaint identify an adverse action?



1(c)
Does the complaint assert that the adverse action was because of the protected activity?

Step 1(a): Protected Activity

- Engaging in **protected activity** is a required element of all retaliation claims
 - Without the protected activity, being mistreated is not enough for retaliation
- **Examples of a protected activity:**
 - Making a Title VI report
 - Initiating a discrimination complaint
 - Assisting someone reporting discrimination or initiating a complaint
 - Participating in the process (e.g., investigation, meetings, hearings)
 - Protesting discrimination

Step 1(b): Adverse Action

- If there is protected activity, move on to the next step:
 - **Did an adverse action occur?**
- An adverse action:
 - Significantly disadvantages or restricts
 - An individual in their status as a student/employee, **or**
 - Their ability to gain the benefits or opportunities of Recipient's program
 - Could deter a reasonable person individual from future protected activity (e.g., bringing or supporting an allegations of discrimination)
- Very broad definition
 - Could be based on action or non-action

Step 1(c): Causation Element

- If there is protected activity and adverse action, move on to the next step:
 - **Does a causal connection exist between the two?**
- While causation is required, **direct** evidence of motive or intent is not required
 - Often only indirect evidence is available
 - Consider whether the individual performing the adverse action knew of the protected activity
 - Timeline evidence



Step One: Next Steps

- If the initial assessment in Step One does not establish the required complaint elements, attempt to meet with Complainant to gather more information
 - If still not met, consider dismissal and/or referral to a different process or office, as appropriate
- If an initial case of retaliation is established, the complaint moves forward
 - Step Two and Step Three roughly correspond to the investigation phase



Step Two: Non-Retaliaitory Reason

Interview the Respondent about the allegations:

- Ask about the **why** behind the adverse action
 - “What led to the decision to deny Sally’s membership application?”
 - “Describe what led to the student receiving a C+ in your class”
- Gather any evidence that supports their rationale
 - Respondent may need to direct the Investigator to potential sources for that evidence, but the burden to collect evidence remains on the Investigator and the school/institution

Common Non-Retalatory Reasons for Adverse Actions

Any reason that is not based on discrimination, including:

- Poor academic or work performance
- Inadequate qualifications for role or position
- Other better qualified candidates
- Evidence of misconduct and/or history of misconduct
- Insubordination
- Budget cuts or hiring freezes
- Does not qualify for requested accommodation or adjustment

Step Three: Pretext Analysis

- **Pretext** occurs when the Respondent asserts that there was a legitimate reason/justification for the adverse action, but it is not the real reason and the action occurred for retaliatory reasons
- When determining whether an alternative explanation for the adverse action is pretextual, consider whether:
 - The explanation makes sense
 - Other actions taken are inconsistent with the explanation
 - The explanation is inconsistent with past policy or practice
 - There is evidence of other individuals being treated differently in similar situations
 - There is witness testimony, including experts
 - The timeline of events aligns

Absent Information

Information Not Obtained

Investigators should **document** all efforts to obtain evidence and an explanation for any information that could not be obtained

- Did/does not exist
- Cannot be located
- Party/witness not available or declines to respond to question(s)
- Party/witness declined to submit
- Deleted, destroyed, damaged
- Unable to access without a court order
- Cannot be released based on an ongoing criminal and/or agency investigation

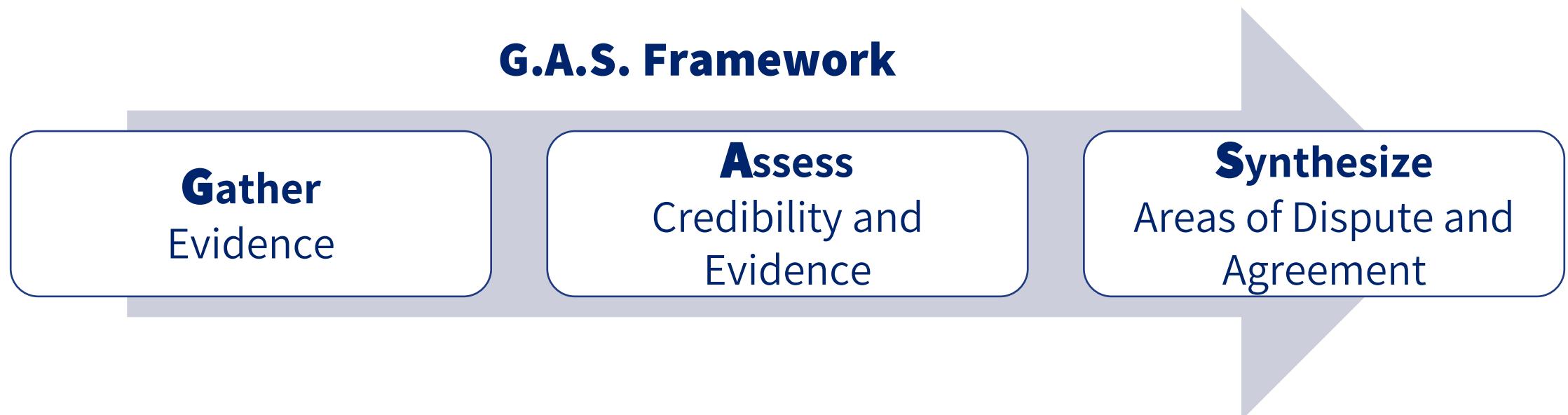
Unanswered Questions

- ATIXA recommends including unanswered questions asked during the investigation to:
 - Demonstrate a thorough investigation
 - Help guide the DM to topics that may need further exploration
- If relevant, document in the interview summary
 - Example: “Witness 2 did not provide additional information regarding their text conversation with Complainant on February 19, 2024. Witness 2 was informed that Complainant voluntarily submitted screenshots of the text messages in question for purposes of this investigation.”

Investigation Phase Two: The Report

Step 7: Draft Investigation Report

- Title IX requires a written investigation report that fairly summarizes all relevant evidence and the investigation (ATIXA recommends the same practice for Title VI)
- ATIXA recommends sharing draft report in Step 9 when the parties are entitled to review the evidence



Example Investigation Report Sections

- Allegations Overview
- Jurisdiction
- Applicable Policies and Relevant Definitions
- Investigation Timeline
- Incident Timeline
- Relevant Evidence Summary
- Evidence File
- Synthesis/Recommended Findings/
Determination (depending on policies and
procedures)



Sensitive Information

- Offensive, triggering, or explicit language (e.g., slurs)
- Graphic images/videos
- Medical information, including test results
- Mental health information



Redaction Practices

Full redaction vs. role identifiers

- Example:
 - **Original:** Teagan stated that Jesse called her the N-word
 - **Full:** [REDACTED] stated that [REDACTED] called her the N-word
 - **Role Identifiers:** Complainant stated that Respondent called her the N-word
- Full redaction is a common practice in law enforcement, but is not recommended for civil rights investigations
- Provide key with names for parties/witnesses, if identifiers are used

Investigation Report Steps



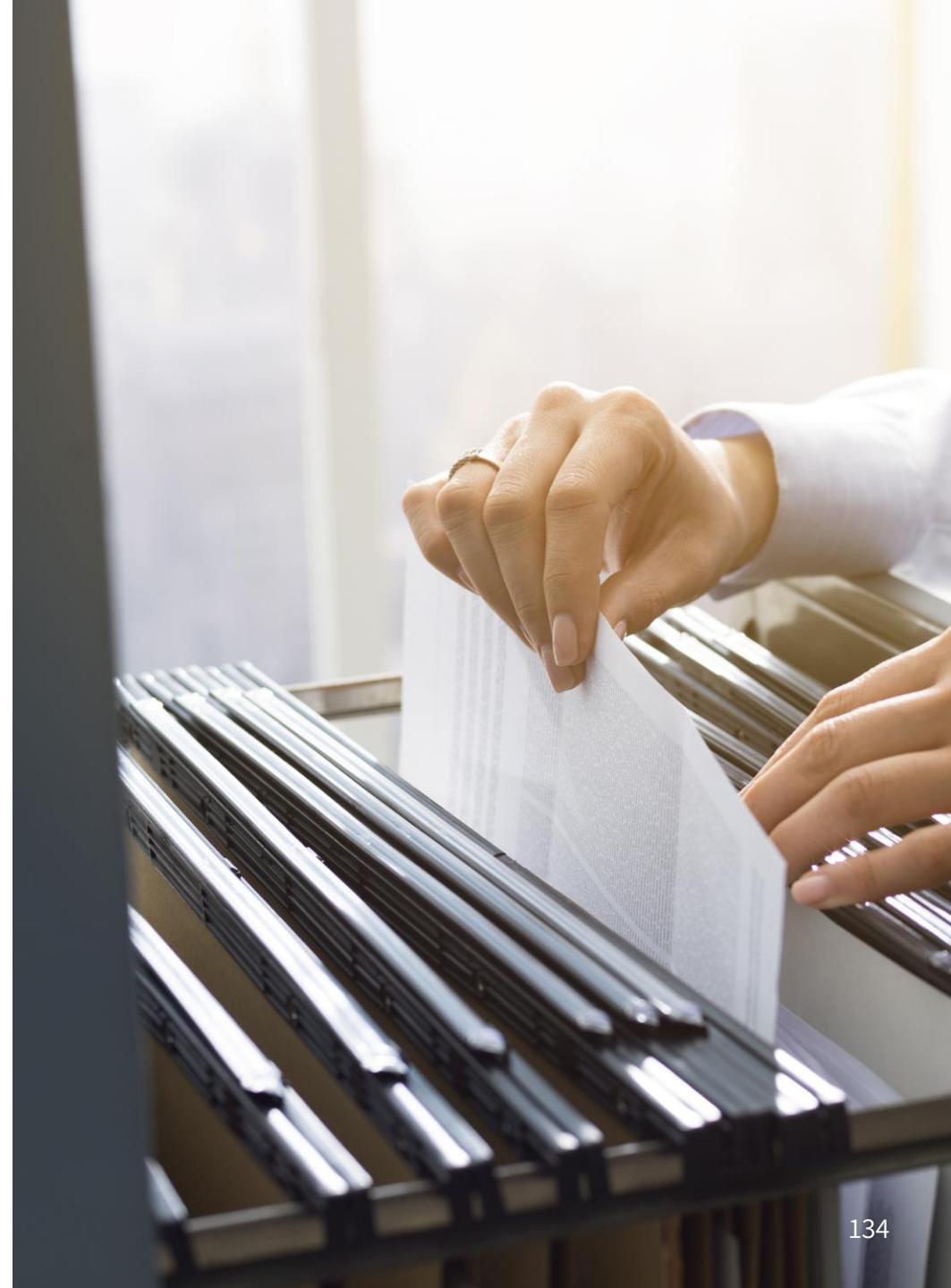
Tips for Report and Evidence File Sharing

- Provide electronically using a secure file-sharing platform
 - Consider functional and time limit restrictions as appropriate
- Include a separate watermark for each party (parent/guardian/Advisor)
- Ensure the parties have a user-friendly method for providing feedback



Step 8: Internal Report Review

- TIXC and/or legal counsel reviews draft investigation report prior to providing it to the parties
- Reviewer(s) identifies gaps, logic leaps, typographical errors, and substantive issues
- Reviewer(s) should not rewrite any section of the report but can ask questions and provide suggestions
- Investigator should review and incorporate helpful edits and suggestions
- Institutions may elect to complete this review after the parties' review or have two separate TIXC/legal counsel reviews



Step 9: Parties' and Advisors' Review Draft Investigation Report

- Draft report and directly related evidence must (**Title IX required**):
 - Be sent to each party and Advisor in an electronic format or hard copy
 - Include evidence upon which the Recipient does not intend to rely
 - Include exculpatory and inculpatory evidence
- Investigator must (**Title IX required**):
 - Allow 10 days for written response
 - Consider parties' feedback and incorporate where appropriate
 - Document rationale for not making recommended changes as appropriate

Step 10: Final Investigation Report

- Institutions determine the final investigation report review process
 - Once finalized, the investigation report is distributed simultaneously to the parties and their Advisors
 - The Title IX>Title VI office provides the report and directly related evidence file to the DM(s)
- Parties and Advisors will be sent the final investigation report for review at least 10 days prior to the hearing (**required for Title IX**)

Recordkeeping

Investigation File

- Investigator is responsible for developing and maintaining an **investigation file** throughout the duration of the investigation, including:
 - Copies of the policies in place at the time of the incident(s) and the procedures in place at the time of the investigation
 - Original NOIA and any subsequent NOIA updates
 - Verified interview transcripts/summaries
 - Correspondence with the Investigator(s) and contact log
 - Collected evidence (e.g., screenshots, written statements) and evidence log
 - Final Investigation Report
- Investigation file becomes part of the **comprehensive complaint file**

Contact Log

- All forms of contact with any party, witness, or third party regarding the complaint or associated needs
- Date, time, method of contact, topics discussed, determinations, and any agreed upon action steps for each interaction related to the Complaint

Date	Time	Contact	Type	Notes	Follow-up/ Resolution
1/25/25	1:00 PM	Sam Smith	Phone	Discussed getting emails from IT	Received emails from IT on 1/26/25
1/27/25	2:00 PM	Sally Harris	Email	Interview Scheduling Request	Interview scheduled for 1/29/25
1/29/25	3:00 PM	Sally Harris	In Person	Investigation Interview	Send transcript for verification

Evidence Log

- All evidence gathered with:
 - Description
 - Date of receipt
 - Source
 - Method of receipt
- Any evidence verification/authentication information



Evidence Log Example

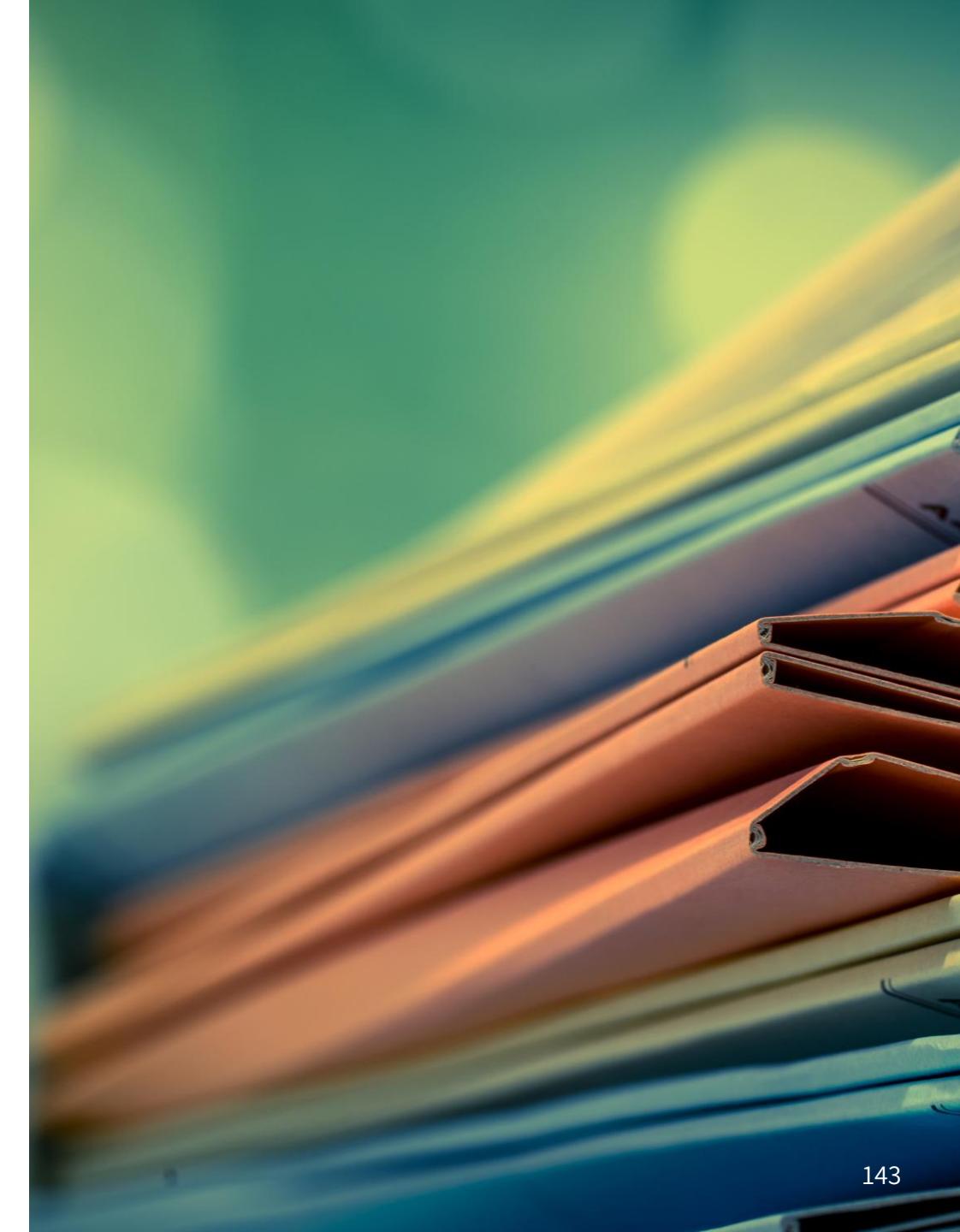
Date	Source	Method of Receipt	Type	Description	Authentication
1/25/25	Sam Smith	Email	Security video footage; USB drive	Elevator video footage from 9:10 – 10:10 PM on 12/10/24	Closed circuit from Public Safety
1/27/25	Sally Harris	Social Media Screenshot	Social Media Screenshot	Post made by Respondent at 9:22 PM on 12/10/24	
1/29/25	Sally Harris	In Person	Call Record	Phone call log from Complainant's cell phone carrier	Email with attachment from carrier to Complainant

Investigation Timeline

- Investigators begin documenting an investigation timeline upon assignment of the formal complaint
- The comprehensive timeline should include:
 - Dates of all significant investigation steps
 - Dates of all meetings and interviews
 - Evidence collection and review periods
 - Report writing and review periods
- Often included in the investigation report

Recordkeeping

- Investigators should compile documentation related to:
 - Reports or complaints of discrimination and harassment
 - Resolution process
 - Hostile environment assessments
 - Supportive measures and remedies
- Records should be stored centrally by the TVIC/TIXC or in a file management system
- Records should be maintained as required by state law or institutional policy (often 7 years)



Questions

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