ATIXA Association of Title IX Administrators

Implementing the Title IX Regulations for Higher Education Overview

Training and Certification Course

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

Content Advisory

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

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language. It is not used gratuitously, and no offense is intended.

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2024 Title IX Final Rule

- Issued **April 19, 2024**
- Effective and enforceable **August 1, 2024**
- Apply to incidents occurring **on or after August 1, 2024,** regardless of when the incident is reported
  - Incidents occurring from August 14, 2020, to July 31, 2024, will still be resolved using 2020 Regulations training and procedures, in perpetuity
- Combination of 2011 Dear Colleague Letter, 2020 Regulations, and new approaches
- 1561 pages total (1504 Preamble and 57 Regulations)
- More flexibility for Recipients in how to structure and staff resolution processes

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2024 Title IX Regulations Litigation

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

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2024 Title IX Regulations Litigation

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

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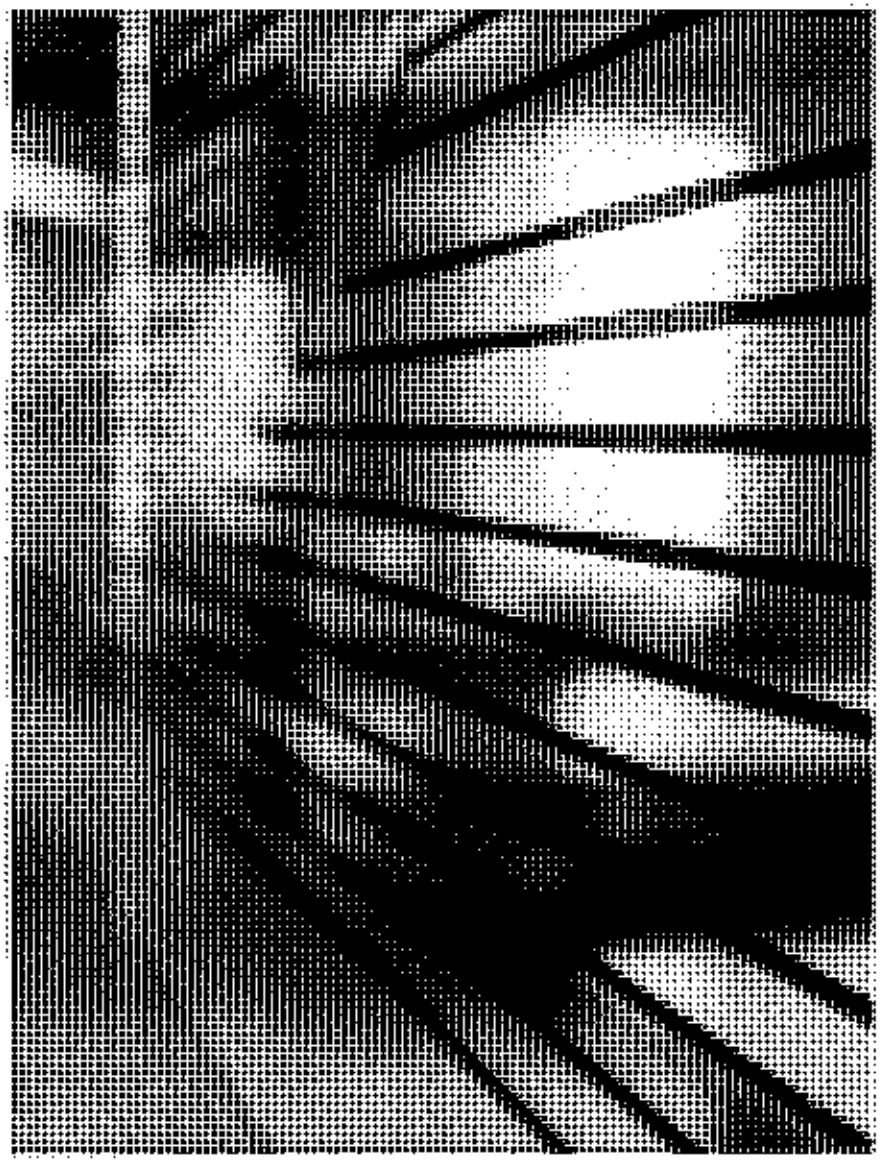
Retroactivity

Retroactivity

- The 2024 Regulations apply **only** to sex discrimination alleged to have occurred **on or after** August 1, 2024
  - For conduct alleged to have occurred prior to August 1, 2024, the regulations in place at the time the alleged behavior occurred will apply
- Institutions will need to maintain/update policies, procedures, and training that are compliant with the **2020** Regulations and **2024** Regulations
  - If the institution is not fully compliant with 2020, now is the time



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Decision Point: Retroactivity

How will the institution train on and maintain its ability to apply the 2020 and 2024 Regulations?

What resources/options are available to meet this need?

How will the institution communicate to its community about this issue?

How will the institution keep two sets of policies and procedures "alive" at once?

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Terminology & Definitions

Selected Terminology

- Complainant
- Complaint
- Confidential Employee
- Evaluation
- Parental Status
- Peer Retaliation/Retaliation
- Pregnancy or Related Conditions
- Relevant Evidence
- Respondent
- Student

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Sex Discrimination

Sex discrimination includes:

- Discrimination on the basis of:
  - Sex Stereotypes
  - Sex Characteristics
  - Pregnancy or Related Conditions
  - Sexual Orientation
  - Gender Identity
- "More than *de minimis* harm"
- Sex-Based Harassment
  - "Big Six Offenses*"

*Big Six Offenses: quid pro quo, hostile environment, sexual assault, dating violence, domestic violence, and stalking

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De Minimis Harm

- In limited circumstances where Title IX permits different treatment or separation based on sex, a Recipient **must not** implement differential treatment by means that subjects a person to **more than *de minimis* harm**
- Adopting a policy or practice preventing someone from participating in a program/activity **consistent with their gender identity** violates the *de minimis* harm provision
- Notable exceptions:
  - Religious exemptions
  - Fraternities and sororities
  - Housing
  - Athletics

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Decision Point: Sex Discrimination

How will the institution approach the expanded definition of sex discrimination to include sexual orientation and gender identity?

- States with restrictive sex/gender laws

How can the institution expand its capacity to respond to increased reports from the broadened scope?

How will the institution approach the *de minimis* harm provision?

- Bathroom use
- Locker room use

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Sex-Based Harassment

- Subset of sex discrimination
- Includes (the "Big Six" offenses):
  - Quid Pro Quo (QPQ)
  - Hostile Environment Harassment
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking
- No consent definition provided
  - ATIXA recommends adopting a definition in institutional policy

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Quid Pro Quo

- "An employee, agent, or **other person authorized by the Recipient** to provide an aid, benefit, or service under the Recipient's education program or activity…"
  - Explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct"
- If a **student** occupied a position as some "other person authorized by the Recipient…" then Quid Pro Quo **could** apply to student Respondents
- Definition encompasses:
  - Extracurriculars and academics
  - Detriment or threat thereof
  - If an individual purports to have authority to provide some aid, benefit, or service, even if they are unable to do so

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Hostile Environment Harassment

- Definition:
  - Unwelcome sex-based conduct that
  - 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 education program or activity
- Lesser and broader standard than 2020 Regulations with First Amendment implications

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Hostile Environment Harassment

- The definition provides factors for evaluating whether a hostile environment exists
  - Complainant's ability to access the education program or activity
  - Type, frequency, and duration of the conduct
  - Parties' ages, roles, and previous interactions
  - Location and context of the conduct
  - Control the school/district has over the Respondent
- These are **factors**, not requirements
  - There could also be other factors to consider

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Retaliation

Defined as:

- Intimidation, threats, coercion, or discrimination against any person
- By the Recipient, a student, or an employee, or other person…
  - "For the purpose of interfering with any right or privilege under Title IX," **OR**
  - "Because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing in the Title IX grievance process"

- **May require** employees to support the Resolution Process as witnesses
- Still cannot require students to participate
- Retaliation allegations should be resolved under Title IX Resolution Process

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Clery Act Definitions

- May use the Clery Act definitions, rather than the FBI UCR definitions
  - Four, instead of six, subparts to Sexual Assault definition
    - Rape
    - Incest
    - Statutory Rape
    - Fondling
  - Dating Violence
  - Domestic Violence
  - Stalking
- Sexual Assault with an Object and Sodomy do not have Clery Act definitions
  - Do not need to include these in Title IX policy if using the Clery definitions

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Decision Point:
Sex-Based Harassment Definitions

How will the institution define consent?

How will the institution navigate the new hostile environment standard and its intersection with the First Amendment?

Will the institution require its employees to participate in the Resolution Process as witnesses?

Will the institution use Clery Act definitions?

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Title IX Jurisdiction

Jurisdiction Refresher

- Title IX Coordinator (TIXC) is responsible for evaluating Title IX jurisdiction:
  - Is the conduct of a nature that "may reasonably constitute sex discrimination?"
  - Who is the Complainant?
    - Student or employee at the time of the incident
    - Non-student or employee subject to participate or attempting to participate (P/ATP) standard
  - Who is the Respondent?
  - Is the incident part of the institution's education program or activity?

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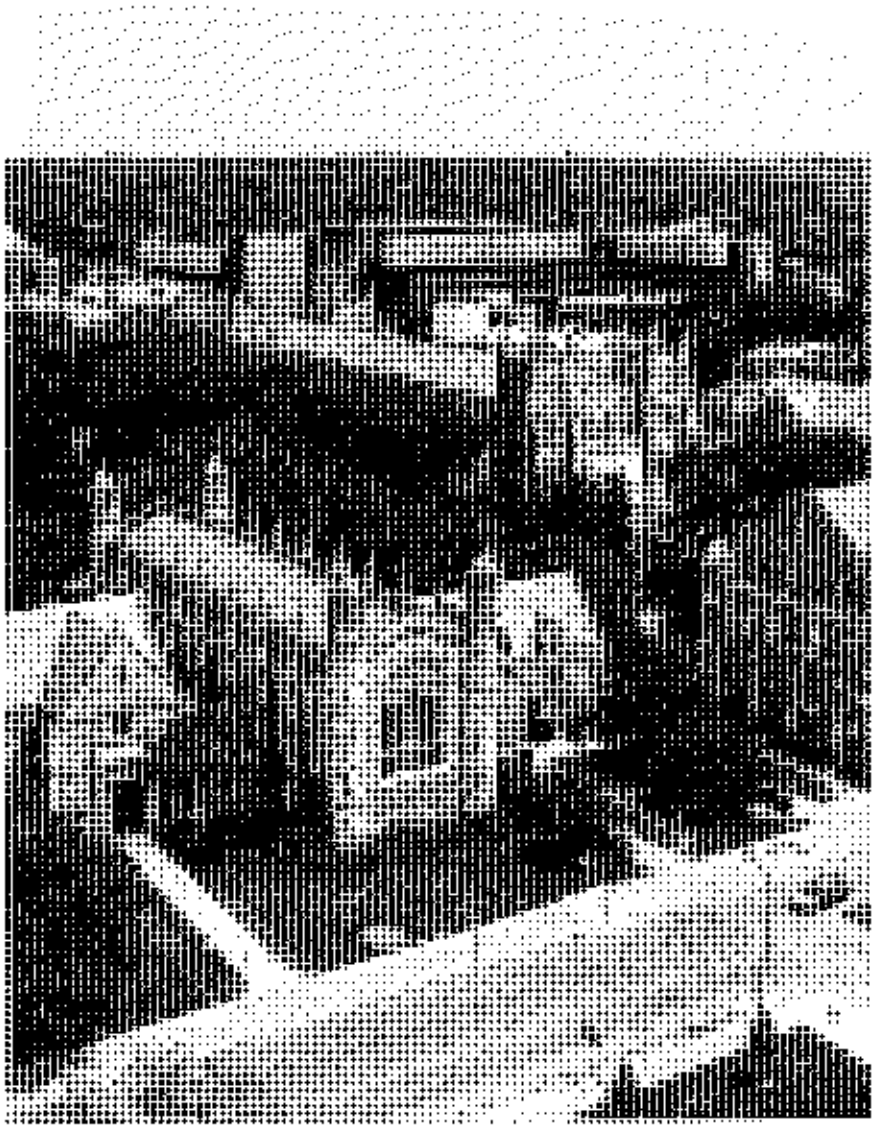
Education Program or Activity

- Within education program or activity
  - Conduct subject to Recipient's **disciplinary authority**
  - Conduct in a building **owned or controlled by a student organization** officially recognized by a postsecondary institution
- Downstream (in-program) effects
  - Including off-campus and outside the United States
  - Brings the effect, not the underlying conduct, within jurisdiction



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Disciplinary Authority

- "Conduct that is subject to Recipient's disciplinary authority"
  - Fact-specific analysis
  - "To the extent a Recipient addresses other student misconduct…a Recipient may not disclaim responsibility for addressing sex discrimination that occurs in a **similar context**"
- Similar context
  - Ex: Theft, non-sexual assault, other forms of discrimination
- The institution's obligation to **investigate** conduct under its disciplinary authority is governed by a **reasonableness standard**

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Downstream Effects

- "Obligation to address sex-based hostile environment under its education program or activity…
  - Even when **some conduct** alleged to be contributing to the hostile environment occurred **outside** the Recipient's education program or activity"
- Do **not** need to determine whether the conduct occurring outside the program/activity is itself sex-based harassment
  - Alleged conduct outside the program/activity may be relevant to investigation or Recipient response
  - But no need to independently respond to alleged underlying conduct
    - Practically speaking, addressing effects may not fully resolve the issue

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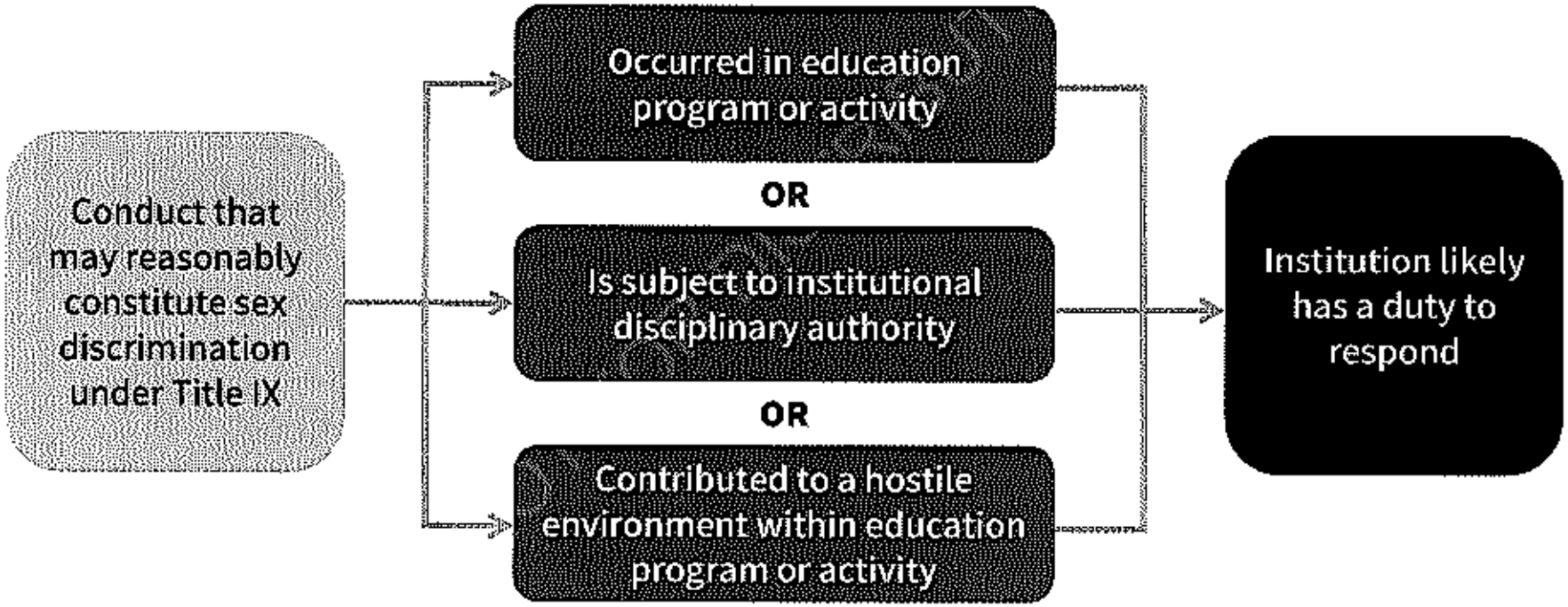
Visualizing Jurisdiction



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Decision Point: Jurisdiction

How does the institution officially recognize student organizations?

Will the institution maintain or revisit off-campus jurisdiction for non-Title IX conduct?

How can the institution increase its capacity to respond to increased reports from off-campus allegations?

What process adjustments does the institution need to make to identify and respond to downstream effects?

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Reporting Requirements

Reporting and Notification

EMPLOYEE ROLE	NOTIFY TIXC	PROVIDE TIXC CONTACT INFO
Confidential Employees	NO	YES
Employees with the **authority to institute corrective measures**	YES	YES
Employees with responsibility for **administrative leadership, teaching, and advising**	YES	YES
All other employees who are not confidential employees	CHOOSE ONE OR THE OTHER	

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Confidential Employees

- Employee whose communications are privileged or confidential (at the time of disclosure) under Federal or State law
- Employee whom the institution has **designated** as confidential for providing services related to sex discrimination
- Institutional Review Board-approved human-subjects research study, designed to gather information about sex discrimination

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Reporting Exceptions

- Disclosures at post-secondary public awareness events require reporting but they are **not** disclosures obligating an institutional response
  - **Unless** there is an immediate and serious threat
    - Employees attending event must report any disclosures to TIXC for safety analysis
  - TIXC must incorporate information or trends into prevention and remedial efforts
  - Institution does not have to require TIXC presence at event
  - Exception **does not** extend to classroom assignments or discussions
    - Such disclosures constitute reportable knowledge and require follow up
- No self-reporting requirements for **Complainants**

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Decision Point: Reporting

What reporting and notification structure will the institution adopt?

How will the institution train community members to understand and implement their responsibilities?

- How will the institution approach dual role employees?
- How will the Institution monitor employees' changing roles?

How will the institution define "administrative leadership," "teaching," and "advising" roles for purposes of reporting?

Who will be confidential employees?

Who will be mandated reporters and how should they prove they fulfilled their duties?

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Evaluation

Complaints

- **Complaint: Verbal** or **written** request to the institution that **objectively** can be understood as a request for the institution to investigate and make a determination about alleged discrimination
  - No more formal complaint requirement
- **Complainant:**
  - A student or employee alleged to have been subjected to conduct that could constitution sex discrimination, or
  - A person other than a student or employee alleged to have been subjected to conduct that could constitute sex discrimination and who was participating or attempting to participation in the institution's education program or activity at the time of the alleged sex discrimination

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Complaints

- Individuals who may make a complaint depends on the **nature** of the complaint:
  - **Sex-Based Harassment:**
    - A Complainant, or parent/guardian
    - Title IX Coordinator
  - **Sex Discrimination:**
    - A Complainant, or parent/guardian
    - Title IX Coordinator
    - Any student or employee
    - Any other person participating or attempting to participate in the institution's education program or activity at the time of the alleged sex discrimination

For purposes of having Complainant process rights, there is an important distinction between being a **Complainant** and being **able to initiate** a complaint

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Evaluation

- Identified as a **major stage** of the Resolution Process
  - Described as "the Recipient's decision whether to dismiss or investigate a complaint of sex discrimination"
- Notice of Investigation and Allegations (NOIA) no longer required immediately after complaint
- Provides TIXC with opportunity to clarify allegations
- May reduce dismissals

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Dismissals

All dismissals involving conduct occurring after August 1, 2024, are **discretionary**, and may be used under the following circumstances:

- Unable to identify Respondent after **reasonable** steps to do so
- Respondent no longer participating in education program or employed by Recipient
- Complainant withdraws all or a portion of complaint and any remaining conduct would not be sex discrimination under Title IX
- Alleged conduct, if proven, would not be sex discrimination under Title IX
  - Recipient must make reasonable efforts to clarify allegations before dismissal

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Dismissals

Upon dismissal of a complaint, institution must:

- Notify Complainant
  - Notify Respondent only if Respondent has already been notified of complaint
  - Offer supportive measures, as appropriate
- Inform Complainant of their right to appeal
  - Also inform Respondent, if they have been notified of the complaint
- Take other appropriate, prompt, and effective steps to ensure that sex discrimination does not continue or recur

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Dismissal Appeal

- Implement appeal procedures equally
- Only Complainant has right to appeal dismissal if Respondent is not notified of the complaint
- If Respondent knows of complaint, parties have equal right to appeal
- Appeal Decision-Maker must be trained and **not** have taken part in investigation of allegations or dismissal of complaint
- Provide parties a reasonable and equal opportunity to make a statement
- Notify parties of the appeal result and rationale
  - No requirement of a **written** notification of outcome

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Decision Point: Dismissals

What, if any, timeframes will the institution establish for the major stages of the process?

Who will hear dismissal appeals?

How will the institution structure the dismissal appeal?

- Timeframe for appeal
- Timeframe for rendering a decision
- Appeal grounds available
- Will the institution add grounds beyond the three in the regulations?

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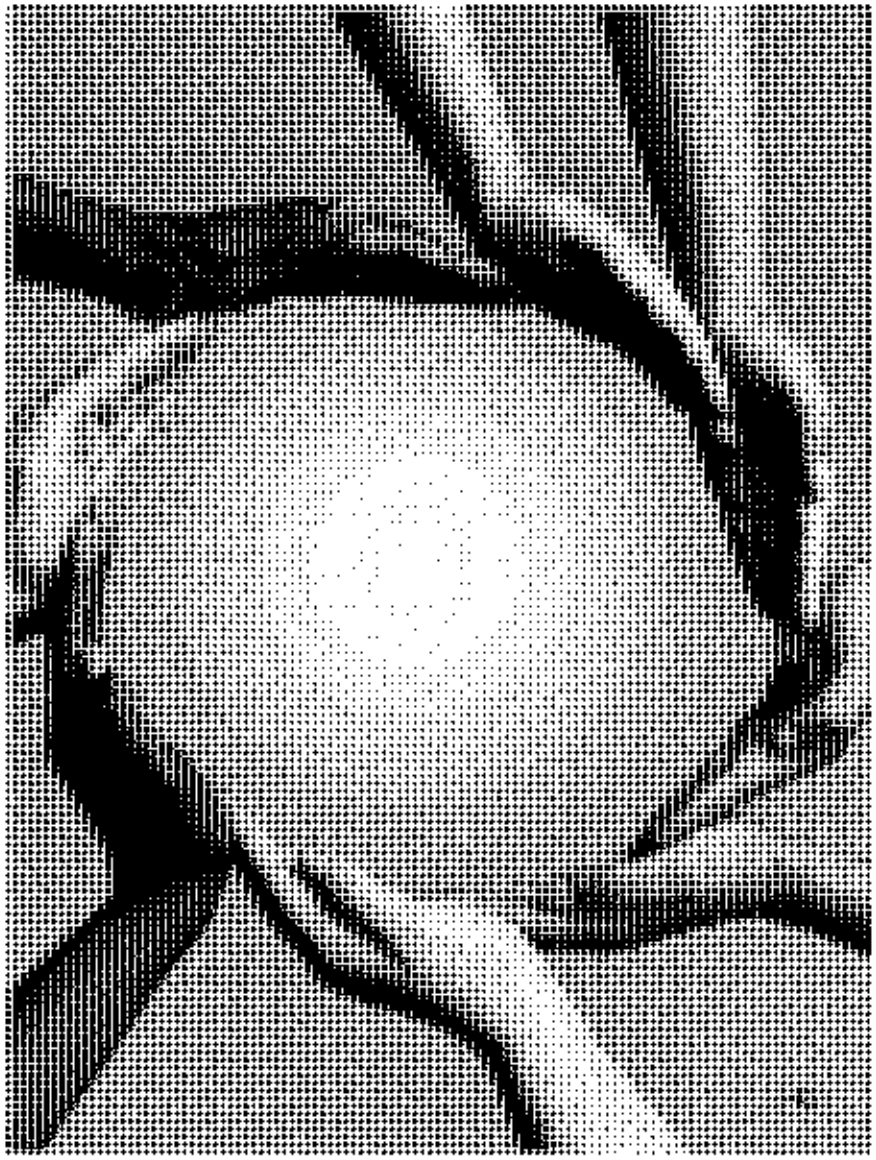
Supportive Measures

- Individualized measures designed to:
  - Restore or preserve access
  - Protect safety of parties or educational environment
  - Provide support during Resolution Process
- May **not unreasonably** burden a party
- May **not** be for **punitive** or **disciplinary** reasons
- Must be **without** fee or charge
- Available to all parties



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Supportive Measures

- Institution may deem which supportive measures are **reasonably available**
  - Must provide a **timely opportunity** to seek modification, reversal, or denial
    - An impartial employee, uninvolved in initial decision, must have authority to modify or reverse
      - This is a challenge, not an appeal
    - Review considers whether the original decision was **inconsistent** with the definition of supportive measures
  - Permit additional opportunity to contest if circumstances change materially
  - Disclosure about supportive measures is need-to-know
- Measures may be continued, modified, or ended at conclusion of the Title IX Resolution Process

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Decision Point: Supportive Measures

What supportive measures is the institution able to offer parties?

Who will hear challenges of supportive measures decisions?

How will the institution structure the challenge?

- Timeframe for challenge
- Timeframe for rendering a decision

How will the institution maintain privacy?

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Emergency Removals

- May remove a Respondent after an individualized safety and risk analysis
  - An **imminent and serious threat** to the health or safety of the Complainant, any students, employees, or other persons must exist
  - Threat must arise from sex discrimination allegations
- Provide the Respondent an opportunity to challenge the decision **immediately**

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Supportive Measures & Partial Removals

- In some instances, a partial removal from the education/program may be appropriate as a supportive measure
  - The partial removal must be consistent with the definition of supportive measures
    - May **not** be for disciplinary or punitive purposes
    - May be for preserving access, protecting safety, or providing support during the Resolution Process
- If a TIXC determines that a partial removal is disciplinary or punitive, the emergency removal provision applies

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Administrative Leave

- Substantially the same as the 2020 Regulations
- May place employees on administrative leave during **pendency** of the Resolution Process
  - With pay and benefits if used as a supportive measure
  - Otherwise, if unreasonably burdensome, use removal provision
- Student employees
  - May be placed on leave from employment responsibilities if doing so would not violate other regulatory provisions
  - Must comply with Resolution Process before any disciplinary sanctions are imposed

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Decision Point: Emergency Removal

How will the institution structure its emergency removal process?

Who will conduct the safety and risk analysis?

Who will hear challenges to the removal?

Will the institution consider partial removals as a supportive measure?

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Informal Resolution

- Requires consent of TIXC and voluntary consent of the parties
- Available without a complaint
- Must provide Notice of Allegations and Informal Resolution Process
- Available any time prior to determination
- Parties may withdraw from Informal Resolution (IR) at any time prior to agreement
- May offer for complaints between an employee and student
- Parties precluded from initiating or resuming investigation and Resolution Process if agreement is reached, unless parties do not adhere to agreement terms

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Informal Resolution

- Forms of IR not defined (e.g., facilitated dialogue, shuttle negotiation, restorative practices, etc.)
- Resolution may include restrictions the institution could have imposed as disciplinary sanctions or remedies
  - Binding only on the parties
- IR Facilitator:
  - May **not** serve as Investigator or Decision-Maker (DM)
  - Must be trained
  - Must be free of bias or conflicts of interest
- Expanding IR options may help with anticipated increase in reporting

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Decision Point: Informal Resolution

Will the institution offer IR options?

- If yes, what types of IR will be offered?

Who will the institution designate as its IR Facilitator(s)?

What training will be provided?

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Resolution Process

Two-Track Resolution Process

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

§ 106.45	§ 106.46
▪ Sex discrimination complaints that are **not** sex-based harassment ▪ Sex-based harassment complaints that do **not** involve a post-secondary student	▪ Sex-based harassment complaints involving a post-secondary **student** Complainant and/or Respondent

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Types of Evidence

Relevant

Impermissible
(regardless of relevance)

Not Relevant

Decision Point: Resolution Process

How will the institution structure its policies and procedures?

Will the institution opt for one policy to govern all sex/gender discrimination complaints?

Will the institution opt for one policy to govern all discrimination complaints?

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§ 106.45 Grievance Procedures

§ 106.45: Basic Requirements

- Treat parties equitably
- Requires TIXCs, Investigators, Decision-Makers have **no** conflict of interest or bias
  - DMs may be the same person as the TIXC or Investigator
- Presume that Respondent is not responsible for sex discrimination
- Establish reasonably prompt timeframes for "major stages" of the process
  - E.g., Evaluation, Investigation, Determination, Appeal
- Advisors not required
  - Note VAWA § 304 requirements or state laws

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§ 106.45: Basic Requirements

- Take reasonable steps to protect the privacy of the parties and witnesses
  - Cannot restrict ability of parties to:
    - Obtain and present evidence
    - Consult with family members, confidential resources, or Advisors
    - Otherwise prepare for or participate in the Resolution Process
- Require an objective evaluation of relevant (and not otherwise inadmissible) evidence
- Respondent requirements apply **only** to individuals
  - Recipients are **not** Respondents in policy or practice complaints
    - Though an official acting at institutional direction/policy may be

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§ 106.45: Notice of Investigation and Allegations

- Does **not** need to be in writing
- **Must include**:
  - Recipient's Resolution Process, including Informal Resolution (if available)
  - Sufficient available information to permit parties to respond to the allegations, such as identities (who), allegations (what), date (when), location (where)
  - Statement that retaliation is prohibited
  - Statement that parties have opportunity to access relevant evidence or description of the evidence

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§ 106.45: Investigations

§ 106.45
▪ **Adequate**, **reliable**, and **impartial**
▪ Gather evidence
▪ Permit parties to present fact witnesses and inculpatory and exculpatory evidence
▪ Recipient must review all evidence gathered through the investigation and determine relevance
▪ Provide parties opportunity to access relevant evidence or accurate description of such evidence
▪ Provide parties reasonable opportunity to respond to evidence
▪ Investigation report not required
▪ Take reasonable steps to prevent and address parties' unauthorized disclosure of information and evidence obtained through process

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§ 106.45: Decision-Making

- Provide a process enabling DM to question parties and witnesses to assess credibility
  - DM may be the same person as the TIXC or Investigator
- Use **preponderance of the evidence** standard
  - Unless clear and convincing is used for all "comparable proceedings"
  - "Comparable proceedings"
    - Proceedings for other discrimination complaints involving the same **category of Respondents** (students vs. employees)
    - Similar types of "person-to-person offenses" that are physical in nature but do not pertain to sex

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DM Models: Separation of Roles

ATIXA recommends:

- Investigators make non-binding recommended findings and recommended final determinations
- A separate Decision-maker
  - Meets with parties in individual meetings to ask questions and assess credibility
  - May meet with investigators or witnesses as needed
  - Makes findings and policy violation determinations
  - Determines sanctions and remedies
- Offer a robust appeal opportunity

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Decision Point: § 106.45 Investigations and Decision-Making

What will the investigation model be?

- Will there be separation between investigation and decision-making functions?
- How will the Institution control for quality?

Will the institution's § 106.45 process permit Advisors?

Will the process include a comprehensive, written investigation report?

What opportunity will the institution's process provide to review the relevant evidence and respond?

Who will serve as Investigator? Decision-Maker?

Which standard of evidence will apply?

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10 Delivery Principles

§ 106.46 Notice of Investigation Allegations

- Incorporates elements of NOIA from § 106.45, with alterations
- Notice must be in writing, with time for parties to prepare before any initial interview
- Right to an Advisor
- Parties will have an opportunity to present relevant evidence to a DM
- Presumption of non-responsibility
- Statement that parties will be able to access relevant evidence or an investigation report
- Any prohibition against false statements

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Investigations § 106.46

§ 106.46 | + non-conflicting elements of § 106.45

- Same process
- Provide written notice of all meetings or proceedings with time to prepare
- Allow parties and their advisors/support persons to participate
- Provide equal opportunity to review relevant evidence or an investigation report
- Provide opportunity to provide response to the investigation report
  - Time to review, respond, response prior to hearing
- May equitably permit expert witnesses

§ 106.46: Decision-Making

- Incorporates non-conflicting elements of § 106.45
- Institution must provide opportunity for proposing and asking relevant questions
- In all cases, the DM must make relevance determinations of all questions prior to a party or witness answering
  - May not permit questions that are unclear or harassing, but may rephrase
- A DM may place **less or no weight** on statements by a party or witness who refuses to respond to relevant questions
- A DM may **not** draw an inference about whether sex-based harassment occurred **solely** on a party or witness's refusal to respond to relevant questions

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§ 106.46: Individual Meetings

Institution may use individual meetings rather than conducting a live hearing

- The Investigator or DM asks relevant and follow-up questions during individual meetings
  - Each party may propose questions to be asked of any party or witness, **AND**
  - Has the right to have those relevant questions asked by the investigator or DM during individual meetings, **AND**
- Each party has the right to a recording or transcript of the meetings with a reasonable opportunity to propose follow-up questions
- DM must have the ability to ask more questions, if needed

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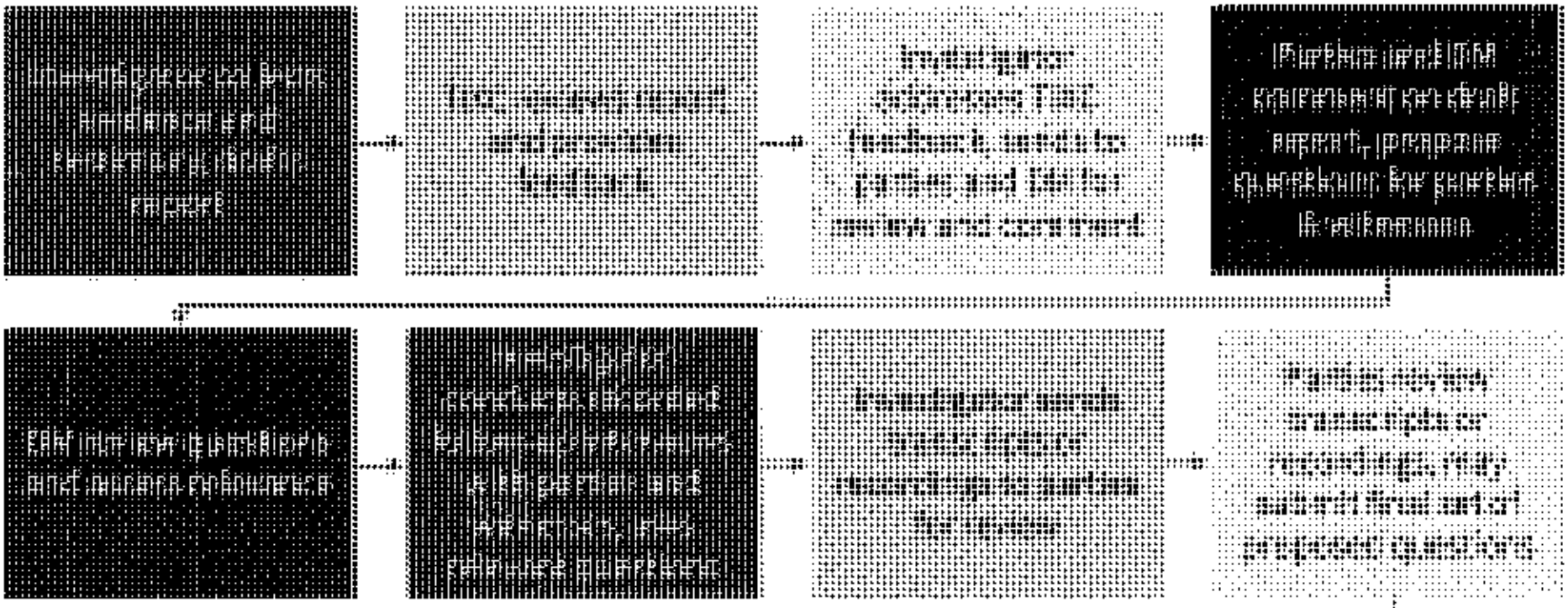
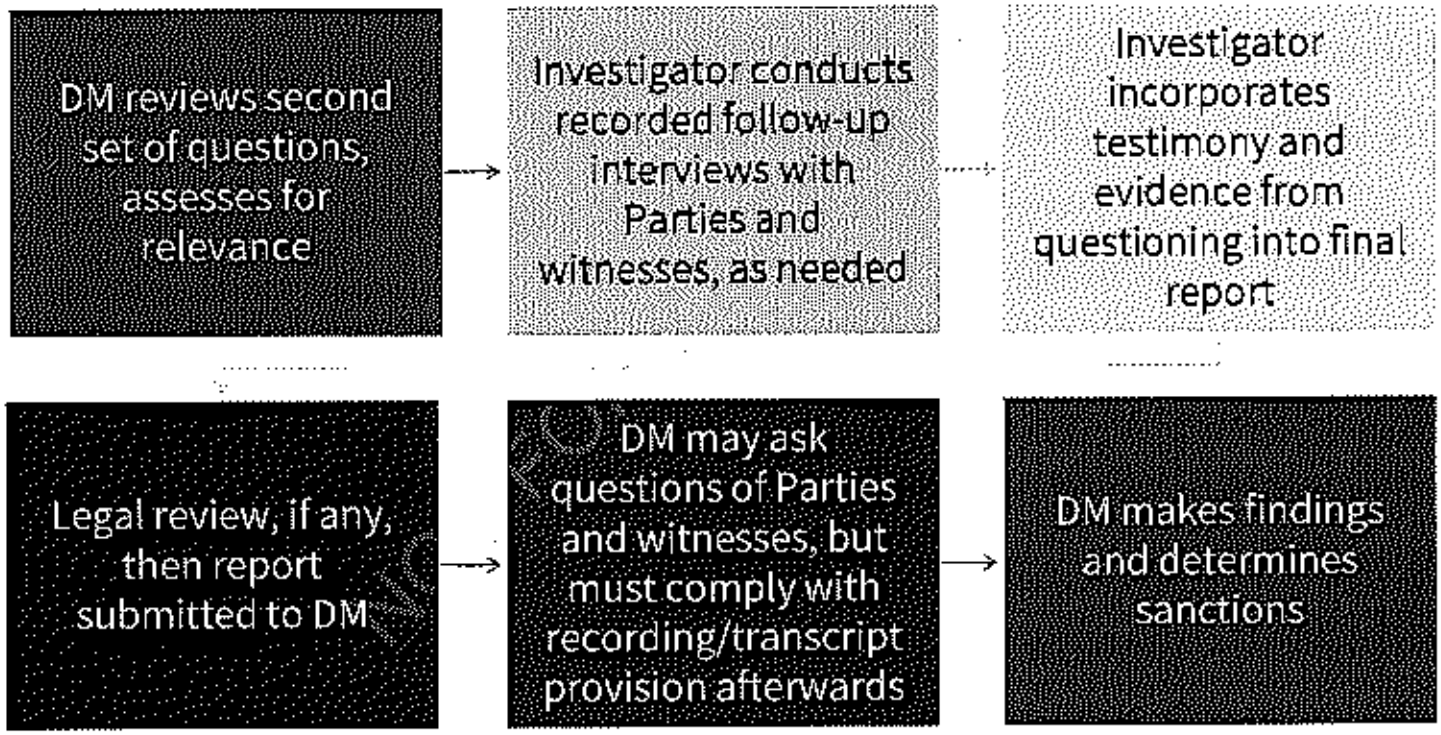
DM Models: The ATIXA Model



DM Models: The ATIXA Model



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DM Models: Investigator as Decision-maker

- One person serves as Investigator and Decision-maker
  - This could be the Title IX Coordinator
- ATIXA does **not** recommend this model, but recognizes institutions may feel as though this is the best option for them
- If institutions decide to use this model, ATIXA recommends institutions offer a robust appeal opportunity
  - Expand upon the three appeal grounds in the regulations
  - Permit substantive appeals of findings and sanctions (for separation-level offenses)
- Could use in § 106.45 proceedings

Section 106.46: Live Hearings

- Questioning
  - DM asks questions directly of the Parties and witnesses
  - Questioning by Parties can be through DM **or** directly by Advisors
    - **DM-Facilitated Questioning:** The institution may permit each party to propose questions to the DM to be asked of another party and witnesses; **OR**
    - **Advisor-Led Questioning:** Advisors ask questions directly of another party and witnesses on behalf of their advisee, subject to rulings by the DM on relevance and permissibility

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Section 106.46: Live Hearings

- If an institution uses Advisor-led questioning, the institution must provide an Advisor for the purpose of questioning if a party does not have an Advisor, and wishes to conduct questioning
  - Institution-appointed Advisor may **not** be a confidential employee
- Hearings via technology (e.g., Zoom or Teams) are permitted
  - DM and parties **must** be able to simultaneously see and hear the party or witness while they are speaking
- Institution must create recording or transcript of hearing
- **Note:** Some colleges and universities may be obligated to use some sort of hearing based on:
  - Case law
  - State law
  - Governing body policy

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Decision Point:
§ 106.46 Investigations and Decision-Making

Who will serve as Decision-Maker?

Will the institution's process use individual meetings or live hearings?

If the process uses individual meetings, how will the process manage creating transcripts and follow up questions?

If the process uses hearings, who will ask questions?

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Written Determination

§ 106.45

- Rationale
- Appeal procedures (if applicable)
- TIXC to implement remedies and disciplinary sanctions as appropriate

§ 106.46

- Simultaneous to the parties
- Description of allegations
- Applicable policy and procedures
- Evaluation of relevant evidence
- Determination
- Sanctions and remedies
- Appeal procedures

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Appeals

- Under § 106.45, offer an appeal process mirroring those in **comparable proceedings**
  - If there is no appeal in comparable proceedings, none is required
    - Institutions may exceed this requirement
  - Comparable proceedings may include those used to resolve other discrimination complaints
- Under § 106.46, Recipients **must** offer an appeal
  - Required grounds:
    - Procedural irregularity that would **change the outcome**
    - New evidence that would **change the outcome** and not reasonably available when determination was made
    - Conflict of interest or bias that would **change the outcome**
  - May offer additional grounds for appeal, must be equally available to parties

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Decision Point: Appeals

Who will serve as the Appeal Decision-Maker?

What appeal, if any, will the institution's process offer for § 106.45 determinations?

Will the process offer additional appeal grounds?

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Diagnostic Procedures

Pregnancy or Related Conditions

Includes the full spectrum of processes and events connected with pregnancy

- Pregnancy, childbirth, termination of pregnancy, or lactation
- Related medical conditions
- Recovery therefrom

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Institutional Obligations

- Institution may not discriminate in its program/activity against any **student or employee** based on their current, potential, or past pregnancy or related conditions
- When a pregnant student informs any employee of their pregnancy or related conditions, the employee must inform the student of:
  - The TIXC's contact information
  - Information about the support available through the TIXC
- TIXC coordinates actions to ensure equal access

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Institutional Obligations

- Must permit student or employee to **voluntarily** take a leave of absence
  - Student or employee must be reinstated to the same status held prior to leave
- Must ensure access to lactation space and time
  - Cannot be a bathroom
  - Must be clean, shielded from view, and free from intrusion
- Treat pregnancy or related conditions in the "same manner" and under the same policies as other temporary medical conditions

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Reasonable Modifications

- Reasonable modifications to **policies**, **practices**, or **procedures**
  - Based on individualized needs
  - Consult with student
- Student has discretion to accept or decline a reasonable modification
- Examples:
  - Breaks during class or work to express breast milk, breastfeed, eat, or drink
  - Intermittent absences to attend medical appointments
  - Changes to academic or work schedule
  - Access to online education
  - Extensions for coursework or rescheduling of tests

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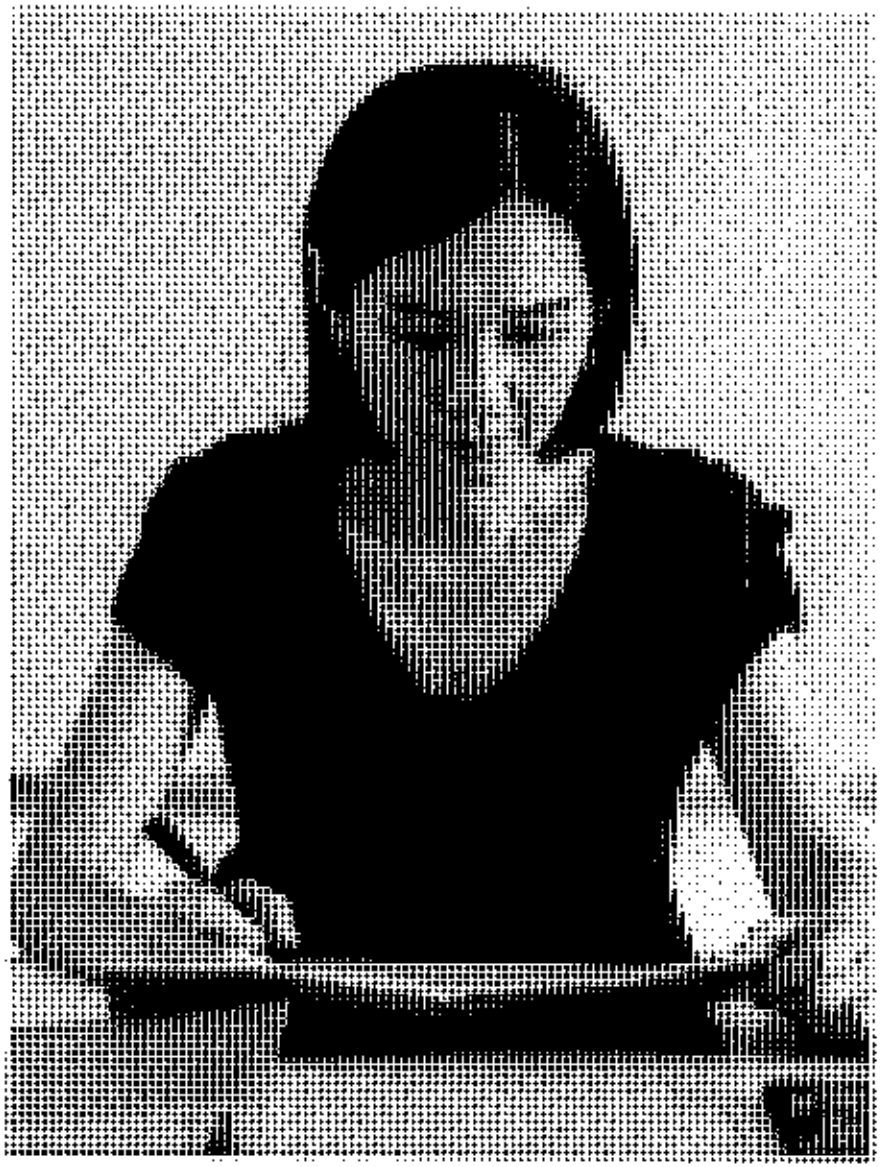
Pregnancy and Documentation

- May **not** require certification from a medical provider or other individual that the student is able to participate in class or activity
  - Unless certification required of all students in the class or activity, **or**
  - A certified level of physical ability or health is necessary, **or**
  - The information obtained is not used for discriminatory purposes
- Cannot require documentation, generally, unless necessary for reasonable modifications



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Decision Point: Pregnancy

How will the institution train its community about pregnancy discrimination, reasonable modifications, and obligations to share information?

- Who needs training?

What will be the protocol to determine and implement reasonable modifications?

Where can the institution provide lactation rooms and how many are reasonable?

What changes, if any, need to be made to the institution's leave policy?

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Title IX Potpourri

Training Requirements

- All employees **must** be trained on
  - Recipient's obligation to address sex discrimination in its education program or activity
  - Scope of conduct constituting sex discrimination, including the definition of sex-based harassment
  - All notification and information-sharing requirements
- At time of hire and annually thereafter
- Training methods may be:
  - In-person or online/virtual
  - Synchronous or asynchronous
  - Internal or external
- Employees must complete training, not enough to offer it

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Training Requirements

- Title IX Team – TIXC, deputies, anyone involved in carrying out Title IX duties
  - Recipient's response obligations
  - Resolution Process
  - Serving impartially
  - The meaning and application of "relevant" and impermissible evidence
- IR Facilitators on institutional IR rules and practices
- TIXCs on their specific responsibilities and recordkeeping systems

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Monitoring & Barrier Analysis

- TIXC has ongoing obligation to **monitor** the program/activity for barriers to reporting
  - Take steps reasonably calculated to address such barriers
- Examples:
  - Reporting process accessibility
  - Confusing or delayed procedures
  - Difficulty finding information or contacting Title IX staff
  - Perceptions of bias

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Decision Point: Training & Monitoring Barriers

How will the institution train its community annually?

- How will it track training completion?

What options or resources does the institution have available for training?

How will the institution monitor for barriers?

- What kinds of assessments are available?
- Who should be involved?

What options or resources does the institution have to analyze its data and implement solutions to reduce barriers?

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FERPA*

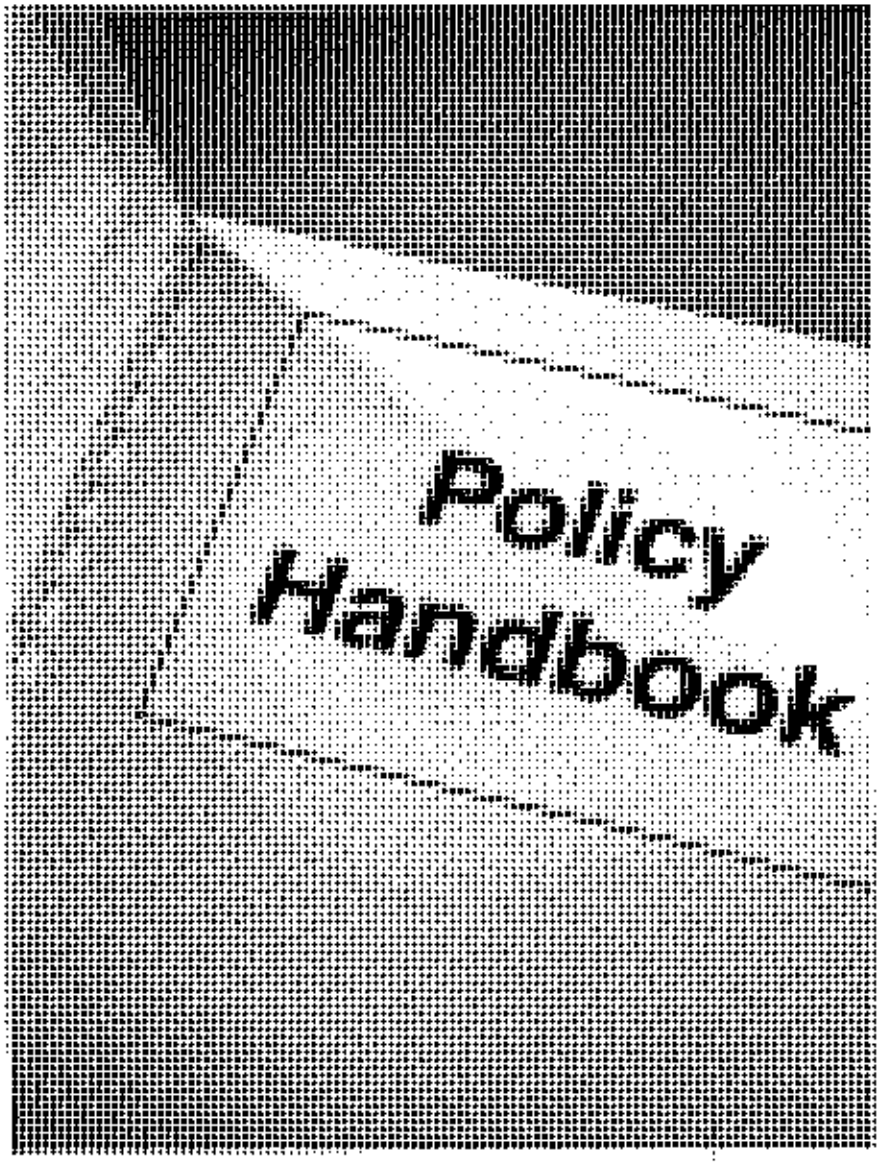
For practitioners:

- Title IX requirements override any conflicting FERPA provisions

For legal counsel:

- OCR asserts that the due process protections in Title IX are **constitutional requirements**
- Not only does Title IX override FERPA where this is a conflict, constitutionally guaranteed due process rights in the Resolution Process add an additional layer of override

*FERPA: Family Educational Rights and Privacy Act



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Recordkeeping and Posting

Must maintain records for seven years

- For each complaint of sex discrimination, record any IR or resolution process documentation and the outcome
- For each notification of sex discrimination, record any documentation re: response
- All materials used to provide training **after** August 1, 2024
  - Make available upon request
  - No requirement to post publicly

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Questions

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Implementing the Title IX Regulations for Higher Education Nuances & Best Practices

Training and Certification Course

Airborne Particulate Matter Collection

Topic Order

1. Jurisdiction
2. Investigations & Decision-making
3. Pregnancy
4. Retroactivity, Scope, & Definitions
5. Training Requirements & Barrier Analysis
6. Reporting Obligations

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Topic Order

7 Supportive Measures & Informal Resolution

8 Dismissals & Emergency Removal

9 Appeals

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Journal

Decision Point: Jurisdiction

How does the institution officially recognize student organizations?

Will the institution maintain or revisit off-campus jurisdiction for non-Title IX conduct?

How can the institution increase its capacity to respond to increased reports from off-campus allegations?

What process adjustments does the institution need to make to identify and respond to downstream effects?

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Jurisdiction

- Title IX jurisdiction expands to same limits/long-arm as other disciplinary policies
- Avoid retracting other disciplinary policies to limit Title IX jurisdiction
  - Consider impact on surrounding community
  - Might adversely impact supportive measures
  - Downstream effects requirements already addressed if institution takes off-campus jurisdiction
- Complexities of downstream effects for hostile environment analysis

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Resolution Process: Investigations and Decision-Making

Decision Point: Resolution Process

How will the institution structure its policies and procedures?

Will the institution opt for one policy to govern all sex/gender discrimination complaints?

Will the institution opt for one policy to govern all discrimination complaints?

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Decision Point: § 106.45 Investigations and Decision-Making

What will the investigation model be?

- Will there be separation between investigation and decision-making functions?
- How will the Institution control for quality?

Will the institution's § 106.45 process permit Advisors?

Will the process include a comprehensive, written investigation report?

What opportunity will the institution's process provide to review the relevant evidence and respond?

Who will serve as Investigator? Decision-Maker?

Which standard of evidence will apply?

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DM Models: Separation of Roles

ATIXA recommends:

- Investigators make non-binding recommended findings and recommended final determinations
- A separate Decision-maker
  - Meets with parties in individual meetings to ask questions and assess credibility
  - May meet with investigators or witnesses as needed
  - Makes findings and policy violation determinations
  - Determines sanctions and remedies
- Offer a robust appeal opportunity

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Decision Point:
§ 106.46 Investigations and Decision-Making

Who will serve as Decision-Maker?

Will the institution's process use individual meetings or live hearings?

If the process uses individual meetings, how will the process manage creating transcripts and follow up questions?

If the process uses hearings, who will ask questions?

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Resolution Process

A § 106.46-compliant process for responding to all discrimination complaints:

- Written Notice
- Right to an Advisor of choice
- Comprehensive, written investigation report
- Opportunity for report review and response
- Separation between Investigator and DM (but with collaboration)
- Cross examination through **the Investigator** and/or DM
- Written determination
- One level of appeal

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Investigations

- Permit expert witnesses
- If electing not to separate investigation and DM functions, permit an appeal, at least
  - If using an Investigator-led decision-making process, training **must** be comprehensive, at least **annually**, and TIXC must retain oversight
- Write a comprehensive investigation report
  - This creates a meaningful opportunity for parties to review and respond
  - An investigation report is also going to aid the DM
- Permit a reasonable review and response period before finalizing the report
- Restrict parties from sharing report, except for Advisor, parents/guardian, or attorney

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Decision-Making

- Use **preponderance of evidence** unless obligated to do otherwise
  - If collective bargaining agreements (CBAs) or other agreements prevent use of preponderance of the evidence, seek to change that standard in future agreements
- Individual meetings with parties proposing questions for DM to ask
  - Management of follow-up with recordings of questioning meetings
- Approaches for questioning during live hearings
  - May depend on state law, or state or federal caselaw
  - In-person vs. online
- Recommend a **written** determination

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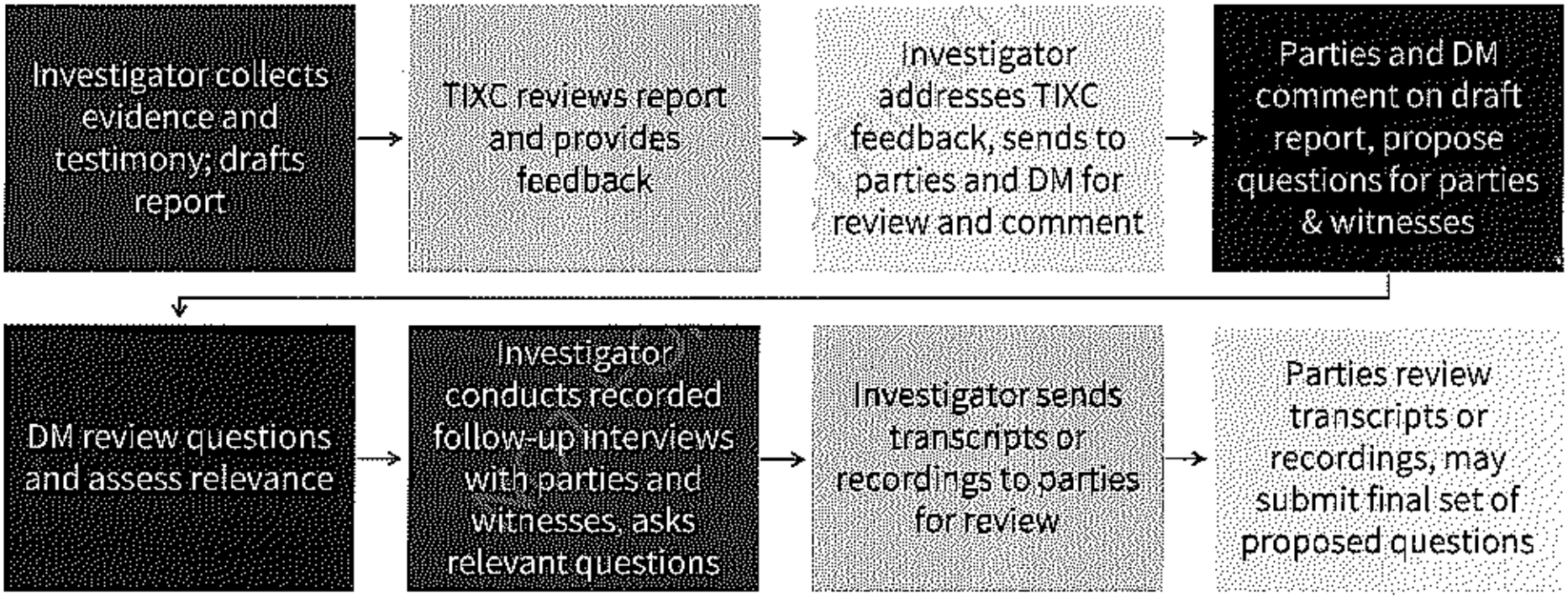
DM Models: The ATIXA Model



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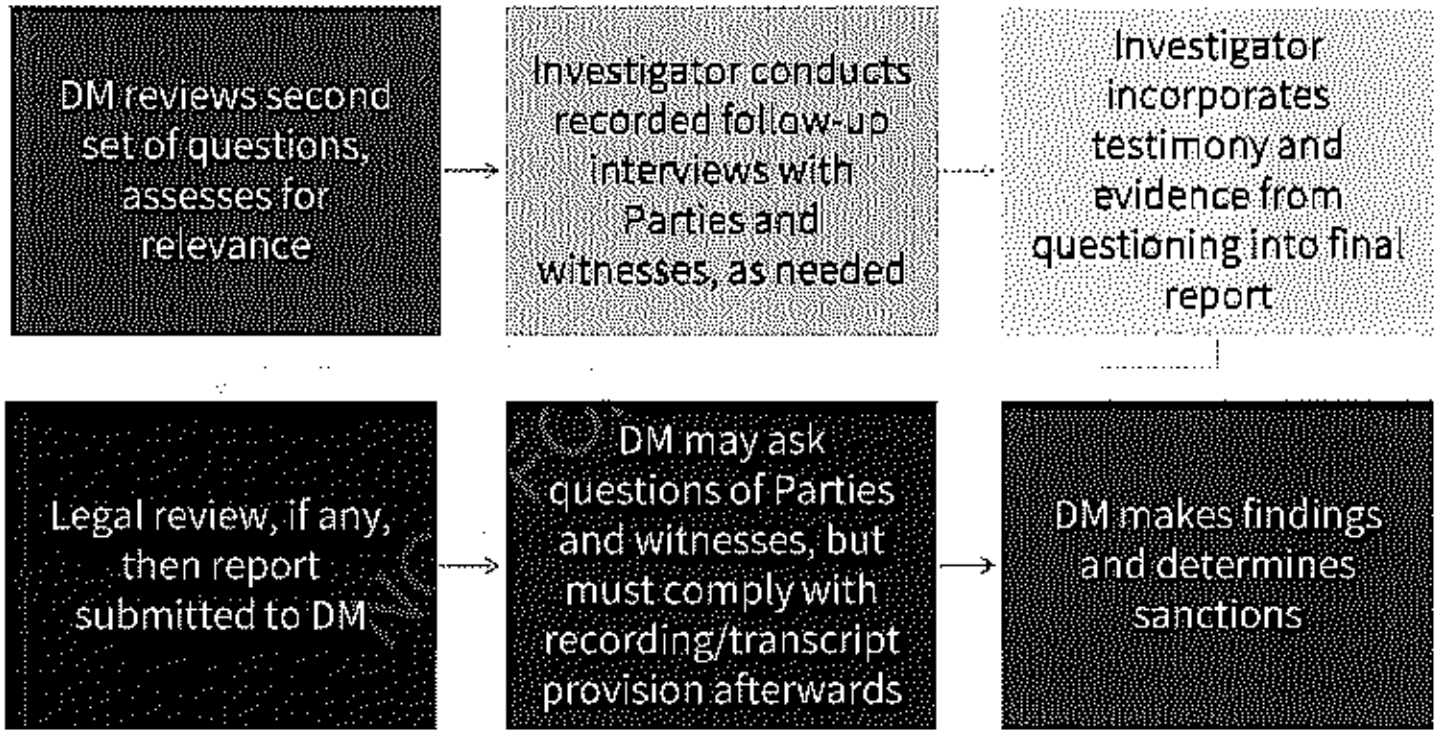
DM Models: The ATIXA Model



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  - Expand upon the three appeal grounds in the regulations
  - Permit substantive appeals of findings and sanctions (for separation-level offenses)
- Could use in § 106.45 proceedings

Retroactivity, Scope, and Definitions

Decision Point: Retroactivity

How will the institution train on and maintain its ability to apply both the 2020 and 2024 Regulations?

What resources/options are available to meet this need?

How will the institution communicate to its community about this issue?

How will the institution keep two sets of policies and procedures "alive" at once?

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Retroactivity

- Write retroactivity into policy and maintain 2020 Policy & Procedures (P&P)
- Title IX Coordinator's (TIXC) jurisdictional assessment needs to start with date of incident
- Publish and explain on website, respect training materials posting requirement
- Discuss at intake
- Train confidential employees, Advisors, other common sources of reporting
- Consider outsourcing 2020 Resolution Process elements
  - Minimize training on two sets of P&P
- 2024 Regulations provide for considerable discretion
  - 2024 processes could be like 2020 processes, depending on decision points
  - Similar processes reduces challenge of maintaining two sets of P&P

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Decision Point: Sex Discrimination

How will the institution approach the expanded definition of sex discrimination to include sexual orientation and gender identity?

- States with restrictive sex/gender laws

How can the institution expand its capacity to respond to increased reports from the broadened scope?

How will the institution approach the *de minimis* harm provision?

- Bathroom use
- Locker room use

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Sex Discrimination

- If in a state with restrictive state laws, consult with legal counsel to determine risk management strategy
- Staffing increases will likely be required, but staffing needs may vary
  - Expanding Informal Resolution (IR)
    - Existing staff may have expertise, such as Title IX team members, student conduct professionals, faculty members, residence life professionals
  - Disparate treatment investigation experience
  - Deputies to perform case management or oversee supportive measures
  - Case managers, intake specialists
- Resources to outsource some types of complaints or all complaints

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De Minimis Harm

- May still maintain sex-separate facilities like bathrooms or locker rooms
  - Permit all persons to use bathrooms corresponding to their gender identity
- Develop a protocol to respond to complaints about trans individuals using the bathroom according to their gender or to bathroom-based conflicts arising therefrom
- Become involved with capital improvement projects to build or renovate bathrooms, locker rooms, etc. to enhance privacy
- Collaborate directly with impacted individuals to design solutions
  - Document, document, document

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Decision Point:
Sex-Based Harassment Definitions

How will the institution define consent?

How will the institution navigate the new hostile environment standard and its intersection with the First Amendment?

Will the institution require its employees to participate in the Resolution Process as witnesses?

Will the institution use Clery definitions?

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Consent

- Not defined in 2024 Regulations
- 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

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Hostile Environment & Free Speech

Review policies implicating free speech, especially discrimination policies

- Consult legal counsel and other relevant professionals about past practice and experience implementing those policies
- Develop protocol for assessing sex discrimination complaints that implicate free speech
  - Typically involves consulting legal counsel or an external expert
- Document the rationale for assessing First Amendment implications of a sex discrimination report/complaint
- Identify pitfalls with using bias response teams

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Mandating Employee Participation

Require employees to participate in Resolution Processes as witnesses

- Employees may be concerned about being a witness involving a supervisor or colleague, as anonymity is not possible
- Monitor for retaliation concerns
- Collaborate with HR for best practices managing such concerns
- Consequences for non-participation

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Pregnancy & Related Conditions

Decision Point: Pregnancy

How will the institution train its community about pregnancy discrimination, reasonable modifications, and obligations to share information?

- Who needs training?

What will be the protocol to determine and implement reasonable modifications?

Where can the institution provide lactation rooms and how many are reasonable?

What changes, if any, need to be made to the institution's leave policy?

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Pregnancy & Related Conditions

- Explicitly covers both students and employees
- Educate students and employees:
  - Title IX office functions re: pregnancy
  - Reasonable modifications
- Provide information on institutional website
- Outreach to key campus leaders to obtain buy-in
- Develop/update protocol to determine and implement reasonable modifications
  - Involvement of accessibility/disability services offices
  - TIXC must retain oversight over process
- Consider support for non-birthing parents re: medical needs for birthing parent

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Lactation Rooms

- Provide a lactation room accessible to all on-campus students and employees
  - Branch and satellite campuses and locations
  - Availability during nights and weekends
  - Develop access protocol
  - Consider sinks, outlets, refrigerators
  - Meets accessibility standards
- The number of lactation spaces may vary
  - Examine physical size of campus; survey current need
- Add lactation spaces to cleaning schedules
- Provide input to capital construction projects

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Training Requirements and Barrier Analysis

Decision Point: Training & Monitoring Barriers

How will the institution train its community annually?

- How will it track training completion?

What options or resources does the institution have available for training?

How will the institution monitor for barriers?

- What kinds of assessments are available?
- Who should be involved?

What options or resources does the institution have to analyze its data and implement solutions to reduce barriers?

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Training Requirements

- Extensive Title IX team training requirements
- Provide process, policy, and reporting training on an **annual basis**
  - Track completion
  - Design protocol for follow-up, deadlines
  - Determine whether to offer online training, in-person training, or a mix
  - Assess resources and need to determine whether to outsource training
  - Develop enforcement mechanisms
- Offer prevention education for employees and students (required by VAWA)

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Monitoring Requirements

- Determine personnel with skills to design assessment tools and analyze findings
- Assess existing barriers to equity
  - Climate/culture surveys/exit surveys
  - Report/complaint audits
  - Training, education, and marketing
  - Focus groups
  - Outreach to gatekeepers
- Determine available resources to implement solutions (personnel, funding, grants)
- Still waiting on Dept. of Ed. VAWA Survey; may need other options in interim
- Consider how best to present findings to stakeholders and senior leadership

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Decision Point: Reporting

What reporting and notification structure will the institution adopt?

How will the institution train community members to understand and implement their responsibilities?

- How will the institution approach dual role employees?
- How will the Institution monitor employees' changing roles?

How will the institution define "administrative leadership," "teaching," and "advising" roles for purposes of reporting?

Who will be confidential employees?

Who will be mandated reporters and how should they prove they fulfilled their duties?

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Reporting Requirements

- Broad mandatory reporting obligations for non-confidential employees
  - Simplify onboarding and annual training
  - Consider creating two categories: Confidential and Non-Confidential
    - The four-tiered reporting and information-sharing requirements will be challenging to implement consistently and properly
    - Especially considering dual roles and employees changing roles
    - Avoids determining "administrative leadership," "teaching," and "advising" roles
- Train confidential employees to share information about Title IX with individuals making disclosures

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Supportive Measures & Informal Resolution

Decision Point: Supportive Measures

What supportive measures is the institution able to offer parties?

Who will hear challenges of supportive measures decisions?

How will the institution structure the challenge?

- Timeframe for challenge
- Timeframe for rendering a decision

How will the institution maintain privacy?

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Supportive Measures

- Offer a broad array of supportive measures to parties
- Engage in iterative process with parties to develop appropriate supportive measures
  - Reassess with regularity or as needed
- Select an individual without a conflict to promptly hear challenges to supportive measures
  - Train them on the narrow standard of review
  - Not an appeal
- Limit timeframe to submit a challenge
  - Make determinations promptly
    - Document rationale

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Decision Point: Informal Resolution

Will the institution offer IR options?

- If yes, what types of IR will be offered?

Who will the institution designate as its IR Facilitator(s)?

What training will be provided?

DISTRIBUTION

Informal Resolution

- Offer a wide array of IR options
  - Efficient means to resolve anticipated increase in hostile environment complaints
  - Do not need a complaint; potential to resolve quickly to stop, prevent, and remedy
- Choose an IR facilitator with appropriate background and training
  - The IR facilitator's skill set dictates the IR options the institution may offer
- Build up IR capabilities by canvassing the institution for expertise
  - Must be trained on Title IX issues, not just IR
  - institutional faculty, student conduct professionals, or human resources professionals may have expertise and be able to train Title IX team members

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Chapter 3

Equipment Purchase

Decision Point: Dismissals

What, if any, timeframes will the institution establish for the major stages of the process?

Who will hear dismissal appeals?

How will the institution structure the dismissal appeal?

- Timeframe for appeal
- Timeframe for rendering a decision
- Appeal grounds available
- Will the institution add grounds beyond the three in the regulations?

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Dismissals

Develop a protocol for selecting individuals to hear dismissal appeals

- Appeal grounds
- Consider using a "Title IX pool"
  - Depending on staffing, it may make sense to rotate the duty between Investigators or deputies
- Consider designating one individual with no other Title IX process involvement to hear all dismissal appeals to minimize training needs
  - Who could serve in this role?
  - Avoid improper overlap/conflicts of interest

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Dismissals

- Reasonably limit timeframe for submitting dismissal appeal requests
- Implement prompt protocol to review
  - May impact who hears the appeal
- Consider adding an appeal ground speaking to dismissals
- If Respondent has **not** received Notice of Investigation and Allegations (NOIA), then only Complainant may appeal
- If Respondent has received NOIA, then both may appeal equally

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Decision Point: Emergency Removal

How will the institution structure its emergency removal process?

Who will conduct the safety and risk analysis?

Who will hear challenges to the removal?

Will the institution consider partial removals as a supportive measure?

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Emergency Removals

- Refer to the Behavioral Intervention Team (BIT) or Threat Assessment Team (TAT)
  - Have a trained individual/group conduct the assessment/analysis
    - Use objective risk assessment tool, such as the NABITA Risk Rubric
  - TIXC implements the results of the assessment/analysis
- Select an appropriately trained BIT or TAT member to sit out the initial analysis to hear any challenge
- Document rationale behind decision and any challenge determination

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Partial Removals

- Use as a supportive measure
  - Supportive measures **cannot** be disciplinary, punitive, or unreasonably burdensome
    - Likely unable to remove an athlete from their team except in unique circumstances, especially if there are scholarship or Name, Image & Likeness (NIL) considerations
    - May be able to temporarily remove students from clubs, activities, or other extracurriculars
      - If Complainant **safety or access** is demonstrably at risk
    - Housing or academic schedule changes may be appropriate
- Should be rarely used
  - Document rationale, offer chance for appeal

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Appeals

Decision Point: Appeals

Who will serve as the Appeal Decision-Maker?

What appeal, if any, will the institution's process offer for § 106.45 determinations?

Will the process offer additional appeal grounds?

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Appeals

- Choosing Appeal Decision-Maker(s)
- Required for dismissal determination and outcome determination
  - Same appeal grounds
  - Offer the same appeal for all sex and gender discrimination complaints
- Only one layer of review
  - CBA may impact layers of review
- Timeframe for submission of appeal and determination

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Questions?

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