ATIXA Association of Title IX Administrators

Title IX Coordinator Foundations Level One: Sexual Harassment Foundations for Higher Education

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

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The content and discussion in this course will necessarily engage with sexual harassment, sex 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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Introduction

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The primary focus of this course is responding to reports or complaints of sexual harassment, including reporting, the Formal Grievance Process, policy development, and other similar topics

Title IX practitioners must ensure their institutional response to reports of sexual harassment is not deliberately indifferent

Our goal is to provide a comprehensive framework to structure institutional response to sexual harassment reports and formal complaints

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Title IX Compliance Oversight

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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 and 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

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Essential Compliance Elements

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The requirements to **Stop, Prevent,** and **Remedy** guide Title IX Coordinators (TIXCs) in their compliance work

1

STOP discriminatory conduct

2

PREVENT recurrence, on both individual and institutional levels

3

REMEDY the effects of discrimination for individuals, for the community, and on an institutional level

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Title IX Coordinator (TIXC) Role

- Mandated by Title IX regulations
- Oversees institutional Title IX compliance
- Responsibilities fall into two categories:
  - Responding to reports or complaints of sex discrimination and sexual harassment
  - Leading efforts to ensure sex equality across the entire institution

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Title IX Compliance Oversight: Responsibilities

- Manage policy and procedures prohibiting sex discrimination and sexual harassment
- Ensure institution acts reasonably to **stop, prevent, and remedy**
- Provide notification of nondiscrimination and Title IX information to current and prospective students and employees, including union/contract employees
- Develop and maintain accurate web and print-based Title IX publications
- Train institutional employees on Title IX compliance
- Recruit, supervise, and train Title IX Team
- Serve as point person for all reports and complaints

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Title IX Compliance Responsibilities (Cont.)

- Oversee Title IX Grievance Process and institution-wide programs
- Track systemic issues or patterns
  - Take remedial action to prevent recurrence
- Assess compliance efforts and program effectiveness
  - Create and disseminate annual compliance report (best practice)
- Update institutional leadership on Title IX issues
- Liaise with institutional legal counsel
- Create/maintain records
- Respond to government inquiries/investigations

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Compliance Considerations

- State law
- Appetite for litigation
- Institutional and community values
- Physical layout of buildings and capacity for capital improvements
- Athletic conference rules

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Review:
Title IX Scope and Definitions

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Applicability

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

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Scope

Title IX

Sex Discrimination

- Disparate Treatment
- Program Access and Equity

Retaliation

Sexual Harassment

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

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Definitions

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Quid Pro Quo

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Title IX Regulations and ATIXA Model Definition

- An **employee** of the Recipient
- Conditioning the provision of an aid, benefit, or service of the Recipient
- On an individual's participation in unwelcome sexual conduct

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Hostile Environment Sexual Harassment

Title IX Regulations and ATIXA Model Definition

- Unwelcome conduct
- determined by a reasonable person
- to be so **severe**, **pervasive**, and **objectively offensive (SPOO)**
- that it effectively denies a person equal access to the Recipient's education program or activity

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Sexual Assault – Rape

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- Penetration, no matter how slight,
  - of the vagina or anus of a person,
  - with any body part or object, OR
- oral penetration
  - of a sex organ of the Complainant, or
  - by the Respondent's sex organ, or
  - by a sex-related object
- without the consent of the Complainant,
- including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental or physical incapacity

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Sexual Assault – Fondling

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ATIXA Model Definition

- The intentional touching of the clothed or unclothed genitals, buttocks, groin, breasts, or other body parts of the Complainant by the Respondent
  - without the consent of the Complainant
  - for the purpose of sexual degradation, sexual gratification, or sexual humiliation
- Or the Respondent caused or directed the Complainant's intentional touching of the Respondent's clothed or unclothed genitals, buttocks, groin, breasts, or other body parts
  - without consent of the Complainant
  - for the purpose of sexual degradation, sexual gratification, or sexual humiliation
- including instances where the Complainant is incapable of giving consent because of their age or incapacity due to temporary or permanent mental or physical impairment or intoxication for the purpose of sexual degradation, sexual gratification, or sexual humiliation

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Sexual Assault – Incest and Statutory Rape

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ATIXA Model Definitions

Incest

- Sexual intercourse,
- between persons who are related to each other,
- within the degrees wherein marriage is prohibited by <<state>> law

Statutory Rape

- Sexual intercourse,
- with a person who is under the statutory age of consent of << age>> years old

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Dating Violence

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ATIXA Model Definition

- Violence,
- committed by a Respondent,
- who is in or has been in a social relationship of a romantic or intimate nature with the Complainant
  - The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship
- For the purposes of this definition:
  - Dating Violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse
  - Dating Violence does not include acts covered under the definition of Domestic Violence

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Domestic Violence (Cont.)

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ATIXA Model Definition

- Violence,
- Committed by a Respondent who is a current or former spouse or intimate partner of the Complainant, or
- by a person with whom the Complainant shares a child in common, or
- by a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner, or
- by a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of the state, or
- by any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of the state

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Definition of Violence

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ATIXA Model Definition:

- Violence includes situations where the Respondent **intentionally or recklessly** causes the Complainant serious physical, emotional, or psychological harm
  - Intent is evidenced when a reasonable person would be more likely to act with the purpose of causing serious harm rather than for any other reason
  - Recklessness is evidenced by a disregard of obvious risk to the safety of the Complainant
  - Violence in self-defense is not chargeable under the Policy if the purpose is **safety**, not harm
  - Consensual use of violence, such as in kink relationships, would not meet this definition
  - Threats to seriously harm the Complainant or people they care about may be chargeable under this definition if doing so causes serious emotional or psychological harm
  - Threats to harm oneself, even if made to cause emotional or psychological harm, are not considered violence under this definition (but may be addressable under a threat policy)
- **Note:** There is no definition of violence in the Title IX Regulations

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Stalking

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ATIXA Model Definition

- A Respondent engaging in a course of conduct,
- Directed at the Complainant, that
  - would cause a reasonable person to fear for that person's safety, or the safety of others, or
  - suffer substantial emotional distress

For the purposes of this definition:

- Course of conduct means two or more acts, including, but not limited to acts in which the Respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property
- Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling

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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 Model 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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Retaliation (Cont.)

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- Any member of Recipient's community,
  - Taking or attempting take 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

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Additional Definitions

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

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Activity: Does Title IX Apply?

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Blake and Tamika

- Tamika is a graduate student serving as a graduate teaching assistant for a first-year chemistry course
- Blake, a student in the course, has visited Tamika's office hours each week to ask questions and seek help with the course materials
- With the midterm coming up, Tamika offered Blake her phone number so he could message her with questions and allow her to respond more quickly than email
- After the midterm, Tamika continued texting Blake, and they often talked about personal things
- Tamika started flirting with Blake and he flirted back
- After a few weeks, Tamika asked Blake to get a drink with her after class
- Blake declined

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Blake and Tamika: Title IX Implications

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- Over the following few weeks, Tamika sent Blake several sexually explicit text messages, including a few partially nude pictures of herself
- Blake tried to tell Tamika he wasn't interested, but then gave up on responding
- Eventually, Blake blocked Tamika
- Tamika then resorted to winking at Blake during class and making thinly veiled sexual comments in front of Blake's classmates
- Tamika then used her school email account to ask Blake to come to her office hours for a surprise, implying his grade would suffer otherwise

What Title IX definitions does this case study implicate, if any?

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Amina and Darius

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- Amina and Darius are two first-year students who met during their institution's Welcome Week festivities
- In October, Amina invited Darius to come with her to a play on campus
- During the show, Darius tried to grab Amina's hand, which was resting on her leg
- Amina pulled her hand away, but Darius left his hand on her thigh for awhile
- Amina froze and did not remove Darius's hand
- At one point during the play, Darius leaned over to try and kiss Amina, but Amina moved so Darius could not reach her mouth
- He kissed Amina on the cheek instead

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Amina and Darius: Title IX Implications

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- Then Darius put his arm around Amina and squeezed her shoulder, pulling her into him
- After the play, Amina and Darius walked back to Amina's residence hall
- Darius put his arm around Amina's waist during their walk, again pulling her in closer to him
- When they reached Amina's residence hall, Darius pulled Amina closer to try and kiss her again
- Amina pulled him in for a quick hug, said goodbye, and bolted for the door

What Title IX definitions does this case study implicate, if any?

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Daveed and Calvin

- Daveed reported an incident involving a former partner, Calvin, to his Resident Assistant
- Daveed reported that he and Calvin had been dating on-and-off for a few months but broke things off a few months ago
- Since then, Calvin has been spreading rumors that Daveed has an STI and is very promiscuous
- Daveed has been working with the Title IX office to try and resolve the situation since the RA followed their mandatory reporting obligations and submitted a report

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Daveed and Calvin: Title IX Implications

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- Calvin's friend Kristina is on the student programming board's executive team and runs the club's elections
- Daveed is a club member and wants to be on the executive board next year
- Daveed is now reporting that Kristina has been talking to the executive board about his Title IX report and that Daveed is not trustworthy enough to be on the executive board
- Daveed feels like he can't file a formal complaint, or he won't get a fair shot at being elected

What Title IX definitions does this case study implicate, if any?

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Formal Grievance Process Overview

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Title IX Grievance Process Overview

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INCIDENT

- Formal Complaint/ Notice to TIXC

INITIAL ASSESSMENT

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

FORMAL INVESTIGATION

- Notice of Investigation and Allegations
- Interviews
- Evidence Collection
- Draft Report
- Party Review/ Comment
- Follow Up
- Final Report

HEARING

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

APPEAL

- Appeal Grounds
- Determination and Rationale

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Prompt Resolution

- Complete without undue delay
- Title IX Regulations do not define “prompt”
  - 60 business days is a good guide, perhaps longer for moderately complex allegations
- Grievance process may take longer than expected
  - Anticipate, mitigate, and document delays
  - Communicate with parties regarding delays
- Must provide anticipated timelines for each proceeding

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Fair Resolution

- 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
- Ensures that all parties have opportunity to fully participate in the grievance process
- Make certain that all Title IX team members operate without bias and/or conflict of interest

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Parties' Rights

- Be accompanied by Advisor of their choice
- Discuss the allegations under investigation without restriction
- Gather and present relevant evidence without restriction
- Inspect and review directly related evidence and investigation report
- Present inculpatory and exculpatory evidence
- Present witnesses
- Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Review all relevant and directly related evidence before the investigation report is finalized

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Reports, Complaints, and Notice to the Institution

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When is the Institution "On Notice"?

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INCIDENT	INITIAL ASSESSMENT	FORMAL INVESTIGATION	HEARING	APPEAL
▪ Complaint/ Notice to TIXC	▪ Jurisdiction ▪ Dismissal ▪ Supportive Measures ▪ Emergency Removal ▪ Referral to Another Process ▪ Informal/ Formal Resolution	▪ Notice of Investigation and Allegations ▪ Interviews ▪ Evidence Collection ▪ Draft Report ▪ Party Review/ Comment ▪ Follow Up ▪ Final Report	▪ Questioning ▪ Credibility Assessment ▪ Determination and Rationale ▪ Sanctions ▪ Remedies	▪ Appeal Grounds ▪ Determination and Rationale

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Point Person for Reports and Complaints

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- TIXC (or designee) receives all reports or complaints regarding sexual harassment, misconduct, and sex discrimination
  - The TIXC oversees institutional Title IX efforts
  - Recipient may designate multiple entry points for information or reports
    - Deputy Title IX Coordinator(s)
- TIXC contact information must be included within:
  - The institution's website
  - All handbooks or catalogs provided to applicants, students, employees, and unions

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What is “On Notice?”

- The institution is **“on notice”** of sexual harassment when a report is made to:
  - **TIXC**, or
  - An **Official with Authority (OWA)**: any official who has authority to institute corrective measures on behalf of the Recipient
    - **ATIXA recommends** including OWAs by role in policy

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Mandatory Reporting

- ATIXA recommends that **all employees** are **mandated reporters** (except for **confidential resources**) under Title IX
  - Ensures information gets to those trained to respond
  - Enables institution to best support individuals
  - Supports tracking patterns
  - Provides for simpler, uniform, and universal training and reporting
- Many employees will also have reporting responsibilities under other state and federal laws or institutional policy

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Party and Witness Privacy Concerns

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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 protected 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

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Report vs. Complaint

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A **report** is different than a **formal complaint**:

- **Report**
  - Notifies the TIXC of an incident and
  - Obligates the TIXC to offer supportive measures and explain the process
- **Formal Complaint**
  - Written request to initiate an investigation
  - Physical document or electronic submission from Complainant
    - OR signed by TIXC
  - Alleging sexual harassment
  - Complainant must be **participating or attempting to participate** (P/ATP)

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Report vs. Complaint Considerations

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- Online reporting form
- Anonymous reports
- Requests for confidentiality
- Take all reasonable steps to follow the Complainant's wishes
  - Institution must respond effectively and prevent harassment of other students or Complainant
- If TIXC takes no formal action in response to a report, document rationale

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Signing a Formal Complaint: PPTVWM

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In limited circumstances, a TIXC should sign a formal complaint even if the Complainant declines to do so

Factors that likely indicate an ongoing risk of harm include:

- **P**attern
- **P**redation
- **T**hreat
- **V**iolence
- **W**eapons
- **M**inors

Other Considerations for TIXC Signing a Formal Complaint

- Employee Respondent
- Complainant who is not P/ATP

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Interacting with Law Enforcement

- TIXC must assist Complainants who wish to report to law enforcement
- State laws, local practices, and MOUs may facilitate information sharing with law enforcement
  - Law enforcement may not be aware of federal requirements under Title IX
  - Develop a reporting and information-sharing protocol
- VAWA requirements may also apply

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Initial Assessment

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Initial Assessment Overview

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Jurisdiction

TIXC is responsible for conducting an initial assessment to determine Title IX jurisdiction:

- Does the alleged conduct, if proven, meet one of the definitions of Title IX sexual harassment?
- Who is the Complainant?
- Who is the Respondent?
- Does the institution have control over the context of the alleged harassment?

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Jurisdiction: Yes/No

- **Yes, or Arguable:** move forward with Title IX Grievance Process
- **No:** determine whether an alternate policy or process applies
  - Dismiss the complaint under Title IX
  - Document the rationale
  - Refer to other process

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Outreach

- After receiving a report, TIXC (or designee), should always reach out to the Complainant
  - Best practice and regulatory requirement
- **Outreach** includes:
  - Introduction to Title IX and staff
  - Reason for the outreach
  - Offer to meet/speak over the phone; include right to Advisor
  - Available resources and resolution options, including how to file formal complaint
  - Discuss supportive measures and resources
  - Explain options to report to law enforcement
  - Follow up in writing with resources and information

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Intake

- **Intake** includes:
  - Setting the table
  - Determine territorial jurisdiction
  - Having written materials to reference and for parties to take with them
    - Follow up with an email containing these materials, too
    - Include access to medical care, including evidence preservation
  - Exploring facts, but not interviewing
    - Needed for initial assessment and Clery timely warning
  - Discussing Supportive Measures
  - Discussing Complainant's options
  - Answering questions
    - **DO NOT** answer the question "What should I do?"

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After Outreach and Intake

- Consider if new information affects jurisdictional assessment
- Implement any requested supportive measures and/or remedies

If formal complaint is filed:

- Determine whether to dismiss or proceed with formal investigation
- Consider whether **emergency removal** is warranted
- Evaluate whether complaint is appropriate for potential **Informal Resolution**

If no formal complaint is filed:

- Determine whether TIXC needs to sign a formal complaint
- Consider whether **emergency removal** is warranted

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Supportive Measures

- Provided to parties throughout the process:
  - At no cost to the party
  - Individualized
  - Non-disciplinary, non-punitive
  - Protect safety of parties or environment, or deter sexual harassment
  - Restore or preserve equal access
  - Without unreasonably burdening other party
- Publish the range of supportive measures
- Avoid unnecessary disclosures about supportive measures
- Consult with accessibility/disability services when appropriate
- If not provided, document the rationale for refusal

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Supportive Measure Examples

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- Counseling/ Health Services
- Employee Assistance Program
- Visa and Immigration Assistance
- Community Education
- Alternate Housing
- Alternate Work Arrangements
- Safety Planning
- Safety Escorts
- Transportation Assistance
- Contact Limitations
- Academic Support
- Trespass Orders
- Emergency Notifications
- Increased Security

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Emergency Removal

- Imposed upon Respondents on an emergency basis only
- Individualized safety and risk analysis
  - Immediate threat exists to the physical health or safety of any student or other individual
  - The threat arises from the allegations of sexual harassment
- Respondent entitled to immediate notice and opportunity to challenge

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Administrative Leave

- May remove an employee Respondent using existing administrative leave procedures
- A lower bar than emergency removal

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Mandatory Dismissal

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TIXC must dismiss the complaint at any time prior to a determination, if:

1. The conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX Regulations even if proved, and/or
2. The conduct did not occur in the Recipient's education program or activity, or
   - No control over the context
3. The conduct did not occur against a person in the United States, or
4. At the time of filing a formal complaint, a Complainant is not P/ATP
   - **AND** the TIXC determines they do not need to sign a formal complaint

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Discretionary Dismissal

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The TIXC may dismiss the complaint (or a portion of it) at any time prior to a determination, if:

- Complainant notifies the TIXC in writing that they would like to withdraw the formal complaint or any portion thereof
- Recipient no longer employs or enrolls Respondent
- Specific circumstances prevent the Recipient from gathering sufficient evidence for a determination

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Dismissals

- Must promptly notify parties of the dismissal
- Notify parties that a dismissal may be appealed and include appeal information
  - Appeal Decision-maker(s) must be trained; must not have been involved in the complaint so far
- Institution may, and often will, address reported behavior under some other applicable policy

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Informal Resolution

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- Title IX permits **voluntary** Informal Resolution (IR)
- Not available for employee-on-student harassment
- IR is not defined by regulations
- At TIXC's discretion any time prior to a final determination
  - Likelihood of resolution
  - Power dynamics
  - Goals and motivation of the parties to participate
  - Complexity and timing of the complaint
- IR Facilitators must receive training, be free of bias or conflicts
  - ATIXA recommends IR Facilitators not serve in any other roles

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Informal Resolution (Cont.)

- Procedural requirements:
  - Formal complaint
  - Parties must receive written notice of the allegations, IR procedures, records created, and potential consequences
  - Parties' voluntary, written consent
  - Must still stop, prevent, remedy
- May withdraw from IR to start or resume Formal Grievance Process at any time

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Investigation

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Investigation Overview

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Who Should Investigate?

- 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

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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. Formal Comprehensive Investigation
7. Draft Investigation Report
8. TIXC Reviews Draft Report and Evidence
9. Parties Review Draft Report and Evidence
10. Final Investigation Report

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Determining a Basis for Investigation

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There are three bases for investigations:

- **Incident:** a specific incident or period
  - May involve one or multiple alleged violations
- **Pattern:** repetitive or similar behaviors or targets chosen by the same Respondent over a period
  - Tend to involve multiple Complainants
- **Climate/Culture:** discriminatory policies, processes, and environments
  - May have no identifiable Respondent
  - May cue up a subsequent incident or pattern investigation based on information gathered during climate/culture investigation

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Investigation Scope

Scope refers to the allegations, timeframes, and parties subject to the investigation

- TIXC determines the scope of the investigation
- Considerations:
  - Allegations outside of jurisdiction
  - Individual vs. group
  - Multiple complainants or Respondents
  - Counter-complaints
- May need to adjust scope during process

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Notice of Investigation and Allegations

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- Notice of Investigation and Allegations (NOIA) letter
  - Sent to all parties, simultaneously
  - Must be sent prior to interviewing any party
- **The NOIA includes:**
  - Parties' Rights
  - Notice of the allegations and known details, such as identities of the parties
  - A description of the alleged conduct and relevant policy provisions
  - The date and location of the alleged conduct
  - Information about grievance procedures
  - Any Informal Resolution options

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NOIA Inclusions

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The NOIA must also include:

- Presumption that Respondent is not responsible
- A statement that retaliation is not permitted
- Reference to any code of conduct provisions (student or employee) regarding consequences for knowingly providing false statements
- The NOIA must be updated if additional allegations arise during the course of the investigation
- Include or reference current policy and procedures

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Investigation Strategy

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

- Review elements of the specific policy provision(s) alleged to have been violated
- Develop initial witnesses and tentative interview order
- Discuss challenges with the type of complaint and the parties involved
  - Anticipate allegiances
  - Disrupt possible collusion
  - Predict obstacles and obstructions
- Assess relevant pattern considerations
- Identify preliminary undisputed and disputed facts and their significance
- Consider types of possible evidence and the plan to acquire such evidence
- Establish preliminary investigation timeline

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Formal Investigation

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G.A.S. Framework

Gather
Evidence

Assess
Credibility and Evidence

Synthesize
Areas of Dispute and Agreement

The burden to gather evidence is on the **institution**, not the parties

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Understanding Evidence

- Duty to collect **relevant** evidence
  - Evidence is any kind of information presented to help determine what occurred
  - Relevant evidence is evidence that tends to prove or disprove the underlying allegations
    - Inculpatory and exculpatory evidence
  - Some evidence may only be relevant to assessing credibility
- Collect **all** relevant and reasonably available evidence
- Relevant evidence forms the basis of the investigation report

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Directly Related Evidence

- Connected to the complaint but neither inculpatory nor exculpatory and will not be relied upon by the Decision-maker (DM)
- Must be provided to the parties and their Advisors for review
  - ATIXA recommends providing an organized directly related evidence file
- DMs ultimately determine what is relevant, directly related, or neither

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Privileged and Medical Information

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

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

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Specific Evidence Issues

- 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
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or predisposition

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Evidence and the Consent Construct

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1. Was **force** used by the Respondent 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?

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Credibility

- **Credibility** is largely a function of corroboration and consistency
- **Credibility Assessment** involves evaluating the extent to which evidence is accurate and reliable
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Note:** Memory errors alone do not necessarily diminish witness credibility, nor does some evasion

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Drafting, Reviewing, and Finalizing the Investigation Report

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Draft Investigation Report

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TIXC/Legal Counsel Review Draft Report and Evidence

↓

Parties and Advisors Review Draft Report and Evidence

↓

Final Investigation Report

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Parties' and Advisors' Review of Report and Evidence File

- Draft report and directly related evidence must:
  - 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:
  - Allow 10 days for written response
  - Consider parties' feedback and incorporate where appropriate
- Investigator sends the final investigation report to the parties and Advisors for review 10 days prior to the hearing

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Decision-Making

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Decision-Making Overview

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INCIDENT	INITIAL ASSESSMENT	FORMAL INVESTIGATION	HEARING	APPEAL
▪ Formal Complaint/ Notice to TIXC	▪ Jurisdiction ▪ Dismissal ▪ Supportive Measures ▪ Emergency Removal ▪ Referral to Another Process ▪ Informal/ Formal Resolution	▪ Notice of Investigation and Allegations ▪ Interviews ▪ Evidence Collection ▪ Draft Report ▪ Party Review/ Comment ▪ Follow Up ▪ Final Report	▪ Questioning ▪ Credibility Assessment ▪ Determination and Rationale ▪ Sanctions ▪ Remedies	▪ Appeal Grounds ▪ Determination and Rationale

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Decision-Making Phase

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All complaints **must** be resolved through a decision-making phase unless an Informal Resolution is reached, or the complaint is dismissed

Title IX Coordinator

- Oversees process
- Facilitates scheduling and communication
- Ensures sanction compliance
- Implements remedies
- Provides institutional memory and precedent information
- Trains DMs
- Maintains institutional records

Decision-Maker(s)

- Is not TIXC or Investigator
- Facilitates decision-making process, including questioning
- Determines relevance
- Assesses credibility
- Makes a finding of fact
- Determines whether policy was violated
- Assigns sanctions (if applicable)
- Writes determination rationale

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Live Hearings

- May impose reasonable decorum rules
- Questions must be asked by the parties' Advisors and/or DMs
  - If the party does not have an Advisor, the institution must provide an Advisor for the purpose of asking questions during the hearing, if the party wishes to ask questions
  - DM must determine whether a proposed question is relevant and permissible
- Hearing can be in one location or virtually through technology
  - DM and parties must be able to simultaneously see a party or witness when they are speaking/communicating
- Must create an audio or video recording or transcript and make it available to parties to inspect and review

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Finding and Final Determination

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- Making a Finding
  - DMs determine what occurred based on the standard of evidence
- Making a Final Determination
  - DMs determine whether what occurred is a policy violation applying the standard of evidence
  - Consider each allegation individually for each Respondent
- **Standard of Evidence**
  - Apply either the **preponderance of the evidence** standard or the **clear and convincing evidence standard**
  - Standard of evidence must be consistent for all formal complaints of sexual harassment

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Standard of Evidence

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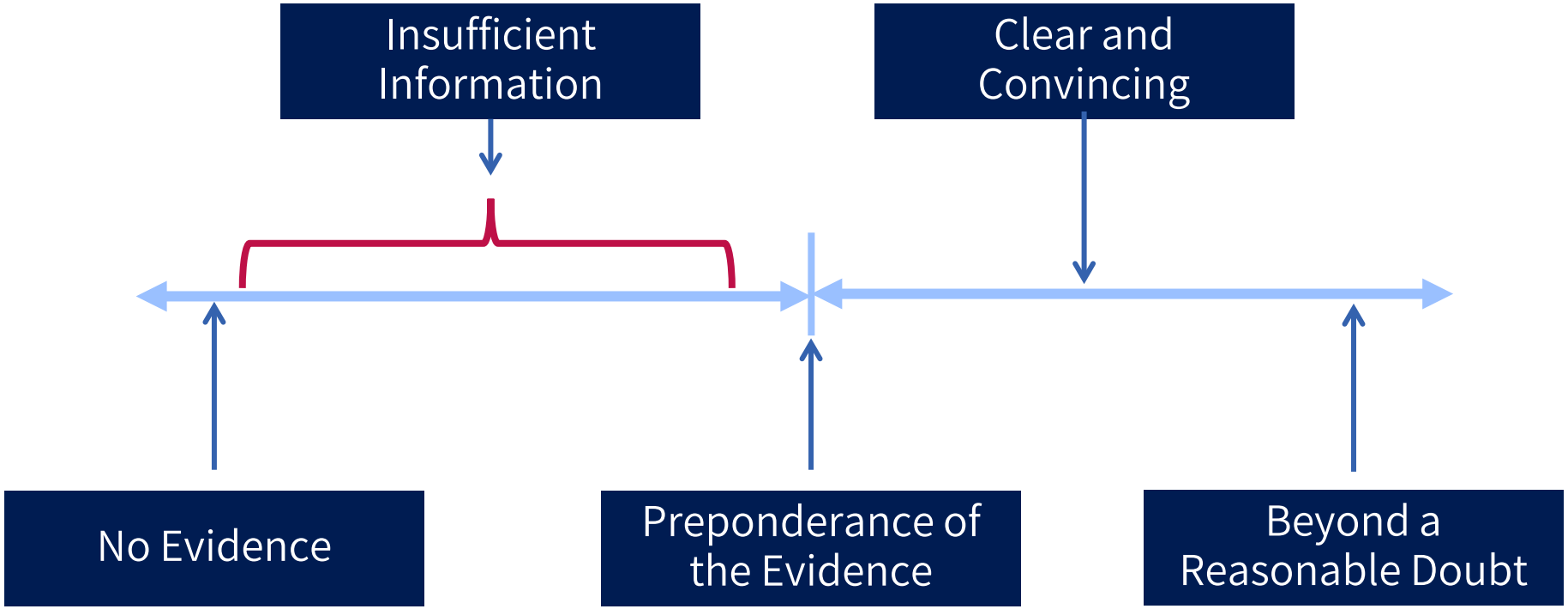

- **Preponderance of the Evidence** is the most common industry standard
- Standard of Evidence must be consistent for **all** formal complaints of sexual harassment

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Sanctions and Remedies

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Sanctions

- Only implemented after a determination of responsibility
- Nexus between sanctions and misconduct
- Goal: stop, prevent, and remedy
- TIXC does not issue sanctions but oversees the process
- TIXC assures sanction compliance
  - Failure to comply could lead to discipline

Remedies

- May be implemented before or after a determination
- TIXC determines remedies that are fair and not clearly unreasonable given the circumstances
- Goal: preserve or restore access to education program and activity
- TIXC ensures remedies are implemented

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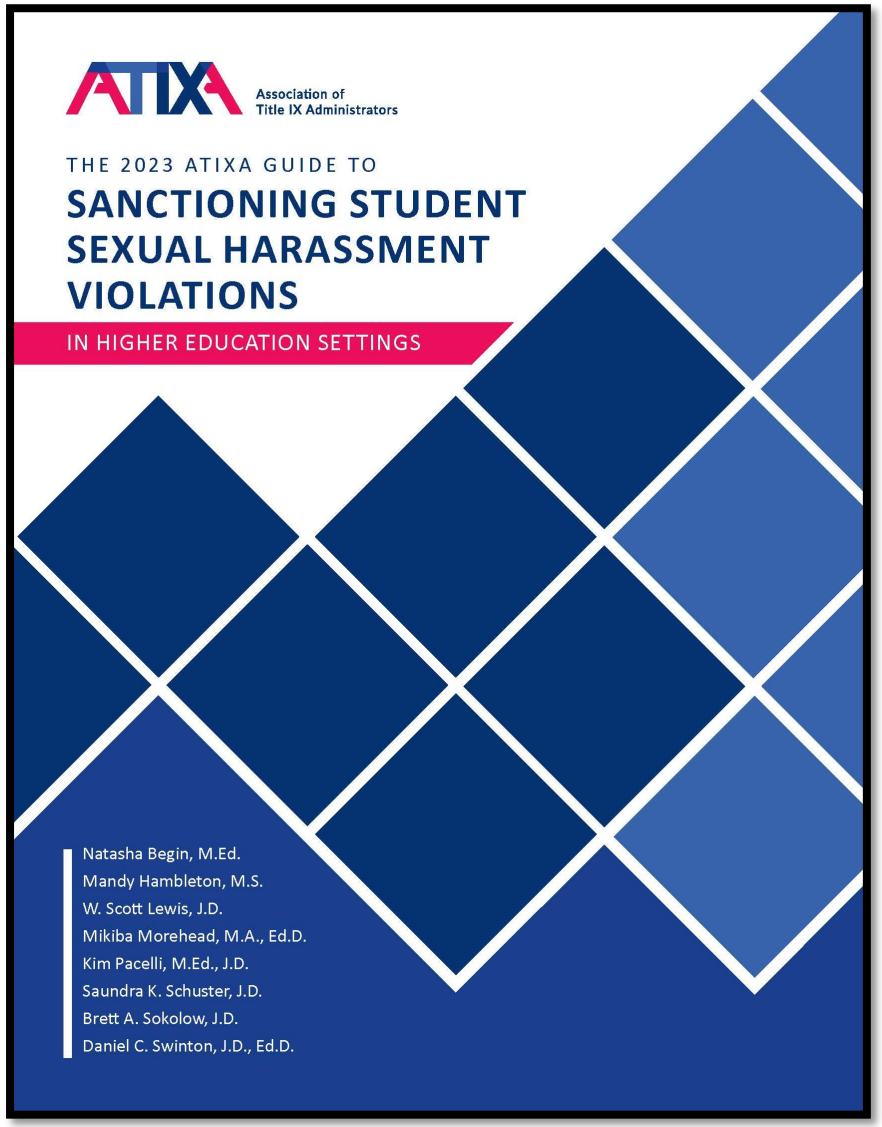
Sanctions

- Nature of Title IX sanctions
- May consider prior misconduct, precedent, acceptance of responsibility, and collateral or multiple violations
- Sanctioning Pitfalls
  - Conflating the finding, determination, and sanctioning
  - Failure to stop, prevent, and remedy
    - Unwillingness to expel, suspend, or terminate
    - Prescribed sanctioning
    - Inconsistent or disparate sanctions
  - Impact or mitigation statements influencing findings
  - Failure to consider aggravating or mitigating circumstances



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Written Determinations

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- **Written Determination**
  - Authored by DMs
  - TIXC/Legal counsel reviews
  - TIXC communicates to the parties simultaneously in writing
- **Finality**
  - On the date the institution provides a written appeal determination
    - OR the date when an appeal would no longer be timely

Written Determination Elements

- Applicable policy
- Procedural steps from complaint through determination
- Statement of and rationale for the result of each specific allegation
- Sanctions imposed (if any) and rationale for chosen sanctions or deviation from precedent
- Whether remedies will be provided to Complainant
- Procedures and bases for appeal

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Appeals

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Appeal Overview

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INCIDENT	INITIAL ASSESSMENT	FORMAL INVESTIGATION	HEARING	APPEAL
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Appeal Grounds

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Must offer appeals on the following grounds:

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

Institutions have the discretion to add additional appeal grounds

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Appeal Process

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Institution must offer a fair appeal process

- Institutional policy must include grounds and process for appeal
- Institutions must provide information about the appeal process in writing to parties and Advisors
- One level of appeal is best practice
- Typically, document-based review for error only; not a new consideration
- Discretion of panel vs. single Appeal DM
- Deference is given to the original DM

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Appeal Decision-Maker

- Cannot be TIXC or serve another role in the same complaint resolution
- Makes determination on a party's request for an appeal
- Reviews written submissions from parties
- May review investigation report or evidence gathered during investigation/decision-making phase
- May speak with Investigator, DM, parties, and/or witnesses
- **Review of complaint should be limited to the grounds noted in the appeal request**
- Draft a written determination that outlines the rationale for the outcome

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Appeal Outcomes

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Determinations may include:

- **Upholding** the original determination and sanctions (if any)
- **Remanding** the complaint back to the DM for reconsideration or to the Investigator for further investigation
- **Modifying** the original determination and/or sanctions (if any)
- **Overturning** the determination (not recommended)

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Recordkeeping

- Recipient must maintain records for a minimum of **seven** years:
  - Sexual Harassment formal complaints, including determination and discipline/remedies
  - Appeals and results
  - Rationales for all determinations
  - Informal Resolution
  - Supportive measures
  - Measures taken to preserve/restore access
  - All training materials
- Document how response was **not** deliberately indifferent

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Clery Act/VAWA Section 304

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Clery/VAWA Section 304 Intersections

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Clery Act

- Designed to improve reporting and transparency of campus crime statistics
- Clery Geography and Title IX jurisdiction are separate and overlapping
  - Timely Warning requirement
  - Clery Annual Security Report (ASR)

Violence Against Women Act (VAWA)

- Intended to improve community-based responses to domestic violence, dating violence, sexual assault, and stalking
- VAWA § 304 Amended the Clery Act
  - Added new awareness, training, and procedural requirements
  - Officials conducting disciplinary proceedings must be trained annually

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Clery/VAWA Section 304 Intersections (Cont.)

- Inform Complainants about:
  - Importance of preserving evidence
  - Institutional reporting
  - Law enforcement reporting
- Complainants should receive written information regarding:
  - Common action items or resources victims should consider
  - Supportive Measures
  - Services available on- and off-campus
  - Reporting options
  - Protection options

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Prevention and VAWA

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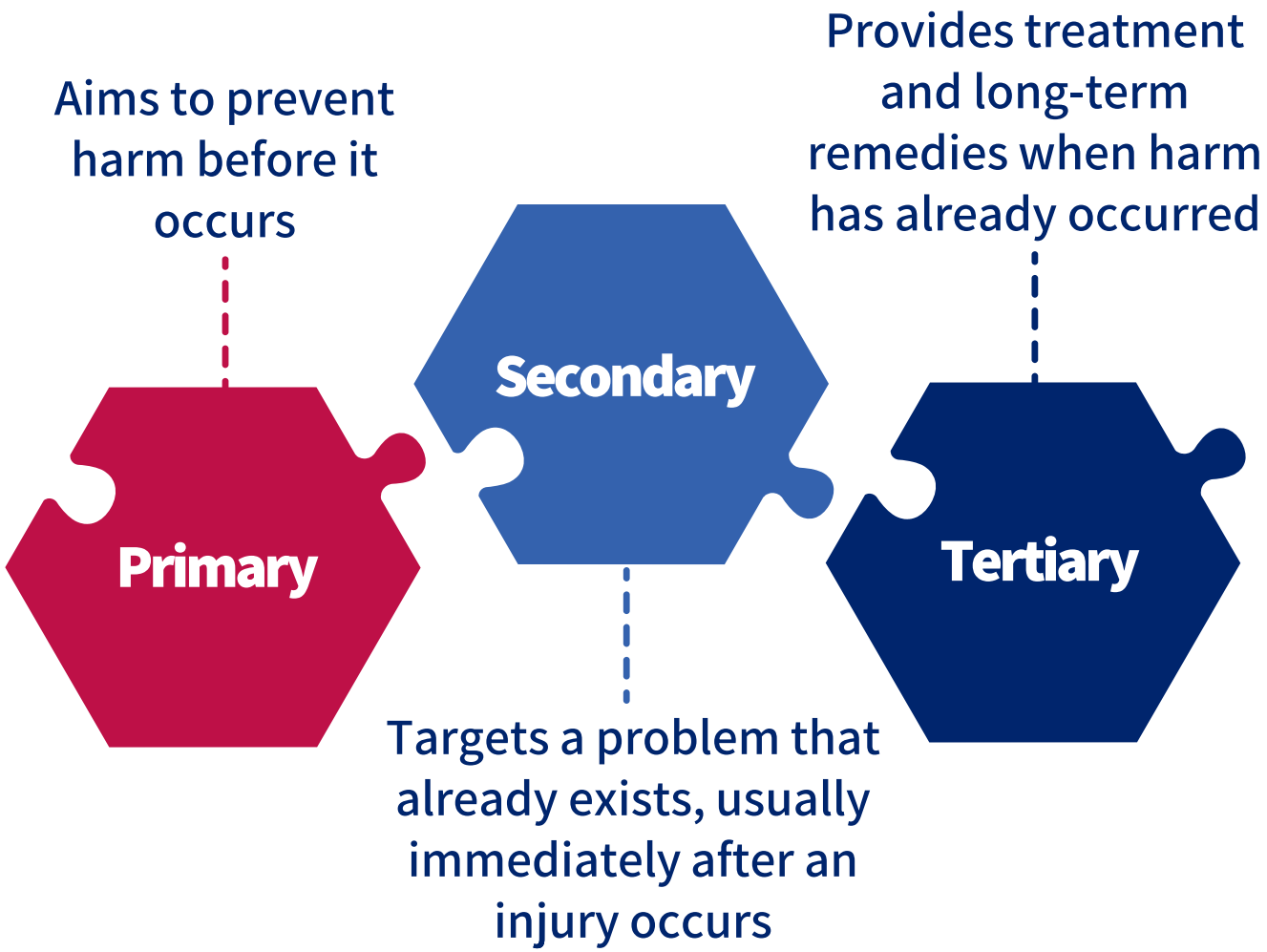
What is Prevention?

An integrated and collaborative approach to addressing multiple areas of wellness that is:

- Evidence-based
- Multi-layered
- Directed at individual, community, and environmental levels



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What is Prevention?

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An integrated and collaborative approach to addressing multiple areas of wellness that is:

- Evidence-based
- Multi-layered
- Directed at individual, community, and environmental levels

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VAWA Prevention Programming

- Programs tailored to each institution and its populations
- Ongoing prevention and awareness campaigns
  - Responsive to community needs
  - Tailored to be culturally relevant and inclusive
- Direct programming to **all** incoming students and new employees
  - Make a **good faith effort** to reach all incoming students and new employees
  - Include a statement that the institution prohibits sexual assault, dating and domestic violence, and stalking
    - Consent definition
  - Provide risk reduction information
    - Increase bystander action
    - Increase empowerment for victims

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VAWA Training

- Annual training for officials involved in investigating and/or resolving complaints:
  - Sexual assault, dating and domestic violence, and stalking
  - Conducting an investigation
  - Conducting a hearing
- Ensure training materials are neutral, follow Title IX regulations in effect

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Policy Management

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Title IX Policy and Procedures

- Title IX requires policies and procedures that facilitate resolution of sexual harassment complaints
- **Policy** clearly defines expectations and prohibited conduct
- **Procedures** govern how to resolve alleged policy violations fairly
- TIXC should have decision-making authority in policy and procedure revision process

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Policy and Procedures Development

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Inventory Existing Policies and Procedures

- Harassment and discrimination policies and procedures
- Student Conduct
- Human Resources
- Collective Bargaining Agreements
- Athletic policies
- State and federal laws
- System-based policies

Create and Implement Policies and Procedures

- TIXC-led effort
- Values and mission alignment
- Reporting mechanisms
- Compliant
- Comprehensive
- Comprehensible
- Accessible
- Coordinate overlap and align with other policies

Avoid Discriminatory Policies and Procedures

- Consistency across all related policies and procedures
- No variations based on parties' identities
- No differential treatment

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Sources of Requirements and Guidance

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- Federal Law and Regulations
- State/Local Law and Regulations
- Relevant Court Decisions
- Federal Agency Agreements
- Insurance Provider Requirements
- Governing Body Policies

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Overlapping Policies

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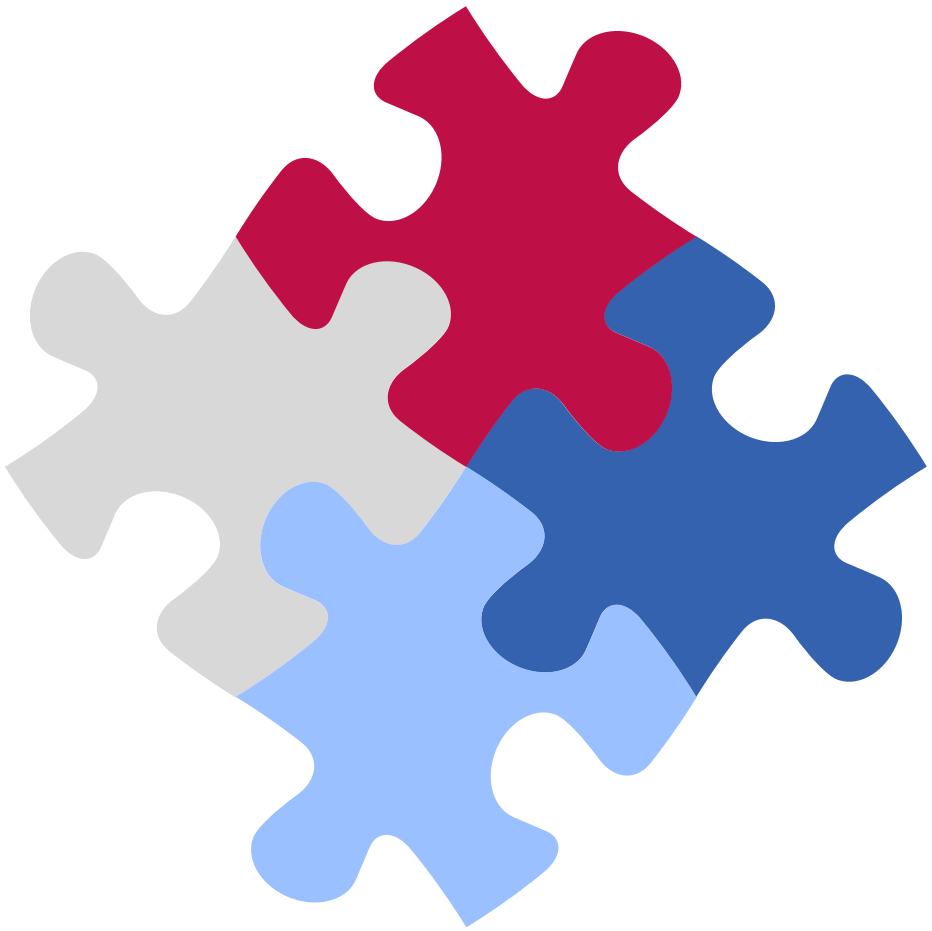

Governing Body

- Board Policy
- Board Administrative Procedures

Employee-Facing Publications and Websites

- Human Resources Policies and Procedures
- Faculty/Staff Handbooks

Student-Facing Publications and Websites

- Student Conduct Code and/or Handbooks
- Student Org. Policies and Procedures

Student and Employee-Facing

- Civil Rights and First Amendment Policies and Procedures
- Acceptable Use Policies
- Athletic Policies

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Publication Requirements

Title IX regulations require Recipients to publish policies, procedures, and non-discrimination notices to:

- Students and applicants
- Employees and employment applicants
- All unions or professional organizations holding collective bargaining or professional agreements with the Recipient

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Mandatory Notice of Non-Discrimination

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- Provide to students, employees, applicants, and all unions or professional organizations with collective bargaining agreements
- Publish **prominently** on institutional website and in handbooks or catalogs
- Required elements:
  - A statement that the institution does not discriminate on the basis of sex and prohibits sex discrimination in any education program or activity
  - TIXC contact information
  - Location of policy and grievance procedures
  - Instructions on how to make a report
  - Information about filing a complaint with Title IX and OCR

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Minors and Title IX

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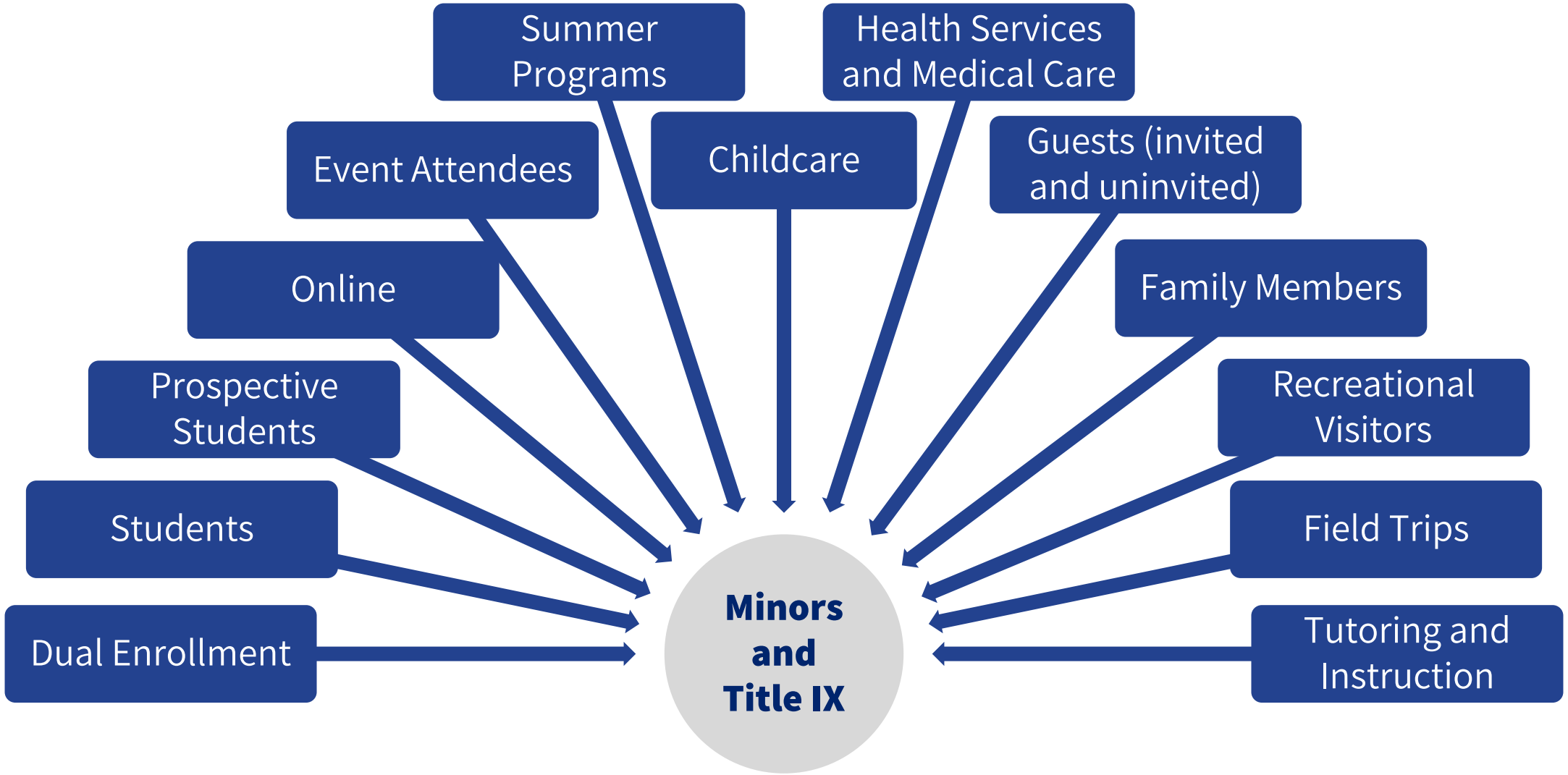
Minors on Campus



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Common Challenges

- Policy provisions for minors on campus
- Consider:
  - Number of minors, location, access
    - Restrooms, locker rooms, residential facilities
  - Training for those with access to minors or supervision of minors
  - Mandatory reporting for child abuse
- Children in classrooms
- Dual Enrollment/Early College

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Dual Enrollment and Title IX Compliance

Dual Enrollment programs present a variety of compliance challenges:

- Training
- Reporting, including child abuse reporting
- Jurisdiction and downstream effects
- Supportive Measures
- Age of Consent
- Remedies
- FERPA and parents' rights
- Collaborative investigations

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Camps and Programs: Significant Assistance

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Not Ours

- Run by a different entity
- Other entity hires the staff
- Institution only rents out space at fair market value

Kind of Ours

- Money comes through a shell or the institution
- Employees are students or temporary hires
- May use institution name
- Preferred pricing/ discounts

Completely Ours

- Money comes into the institution
- Staff are institutional employees
- Uses institution name

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Sample Policy

Abuse of Minors

In addition to having students who are minors enrolled, College/University hosts minors as guests and as participants in youth activities. State law narrowly imposes duties to report certain crimes involving minors and abuse to appropriate officials including mental health professionals, medical providers, school counselors, clergy, and law enforcement officers. Institution's protocol is that in addition to fulfilling the requirements of state law [insert here] **all employees will also promptly report all suspected child abuse, sexual abuse of minors, and criminal acts by minors** to the campus police/security office without delay. Clery Act reporting of offenses for statistical purposes occurs whether victims are minors or adults.

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Trauma-Informed Practices

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Understanding Trauma

- **Trauma** is exposure to an event or events that create a real or perceived threat to life, safety, sense of well-being and bodily integrity
  - Acute, chronic, or complex
  - Neurological, biological, psychological, social, and emotional impacts
  - Developmental, intergenerational, historical, secondary, vicarious, or collective
  - Responses to trauma can vary, depending on a variety of factors
- Provide all persons with support that makes Title IX services and processes accessible, including those who may have experienced trauma

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Trauma-Informed Principles

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- **Key principles of trauma-informed practice:**
  - Safety
  - Trustworthiness and transparency
  - Collaboration and mutuality
  - Empowerment, voice, and choice
  - Cultural and historical context
- **ATIXA Position Statement:** Application of trauma-informed practices in our field has gotten way ahead of the actual science
  - **ATIXA Recommendation:** Incorporate trauma-informed investigation and interviewing methods without compromising gathering credible, relevant evidence
  - Trauma-informed practices should not significantly influence evidence evaluation

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Title IX Team

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Meeting Community Needs

- Institutions must stop, prevent, and remedy sex discrimination and sexual harassment and ensure equitable access to programs
- TIXC cannot accomplish this alone
- Institutions must adequately staff their Title IX teams to ensure compliance and could consider:
  - Adding permanent position(s)
  - Creating new role(s)
  - Identifying paid employees to fulfill roles
  - Reassigning tasks
  - Regional consortia or sharing arrangements
  - Third-party outsourcing

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Title IX Team Roles

Deputy TIXCs

- Designation by location, population, or responsibilities
- Consider broad Title IX compliance needs
- Can step in for TIXC when there is a conflict or the TIXC is otherwise unavailable
- Not required, but a best practice

Title IX Team Members

- Deputy Title IX Coordinators
- Investigators
- DMs
- Informal Resolution Facilitators
- Appeal DMs
- DM for emergency removal challenges
- Dismissal Appeal DMs
- Advisors

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Structuring the Title IX Team

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- The Title IX team must be large enough to fulfill required separation of roles, though the below numbers recognize that some individuals fill more than one role
- To reduce conflicts of interest and bias, and manage attrition/turnover/burnout, TIXCs should overrecruit and train all possible backups

ATIXA Recommends (Moderate Staffing Size):

1	Title IX Coordinator
3-5	Deputy Coordinators
2-4	Investigators
5-10	DMs
1-3	Informal Resolution Facilitators
4-6	Advisors

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Building the Title IX Team

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Title IX Coordinator

- Trained and agile
- Consider title, office location or department, supervisory responsibilities, and supervisor
- ATIXA recommends reporting to President/Cabinet-level
- Must have autonomy and independence

Considerations for Building the Team

- Potential for conflict of interest or bias
- Educational credentials or professional experience
- Individual's workload and availability
- Role at institution
- Social group memberships
- Social media activity
- Volunteer affiliations

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Title IX Team Training

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- TIXC (or designee) has responsibility to ensure the **Title IX Team** also receives **annual training** on:
  - Institutional response obligations to reports of sex discrimination and sexual harassment, including reporting requirements
  - Definition of sexual harassment
  - Title IX Grievance Procedures
  - Serving impartially and without conflicts of interest or bias
  - Meaning and application of relevant questions and evidence
- IR Facilitators must receive training on rules and practices associated with the institution's Informal Resolution process

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Assessing the Title IX Team

TIXC must ensure team members are able to perform their roles

Consider:

- Confidentiality and privacy practices
- Cultural competence
- Decision rationales
- Impartiality/neutrality
- Writing skills
- Training and competence

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Title IX Team Supervision/Oversight

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- Requires ongoing leadership, support, and oversight to ensure compliance obligations and institutional needs are met
- Often not their supervisor of record, but TIXC will oversee part of their work
- **Key strategies include:**
  - Clear expectations and performance metrics for roles and responsibilities
  - Ongoing training and individualized professional development opportunities
  - Professional ethics modeling
  - Prompt and honest work product feedback
  - Resource allocation
  - Regular meetings or check-ins
  - Supervisory availability and support

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Managing Team Member Complaints

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TIXC must manage complaints about a Title IX team member with a sensitive and comprehensive approach, including:

- Prompt response
  - May need to investigate and gather information
- Consultation with legal counsel, human resources, or other supervisory staff (if appliable)
- Supportive Measures (if appropriate)
- Take appropriate action with rationale
  - Determine if there is mishandling, bias, or a conflict of interest
  - Remove the Title IX team member from the current complaint
  - Provide remedial training and education
  - Remove the individual from the Title IX team

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Assessing Title IX Programs

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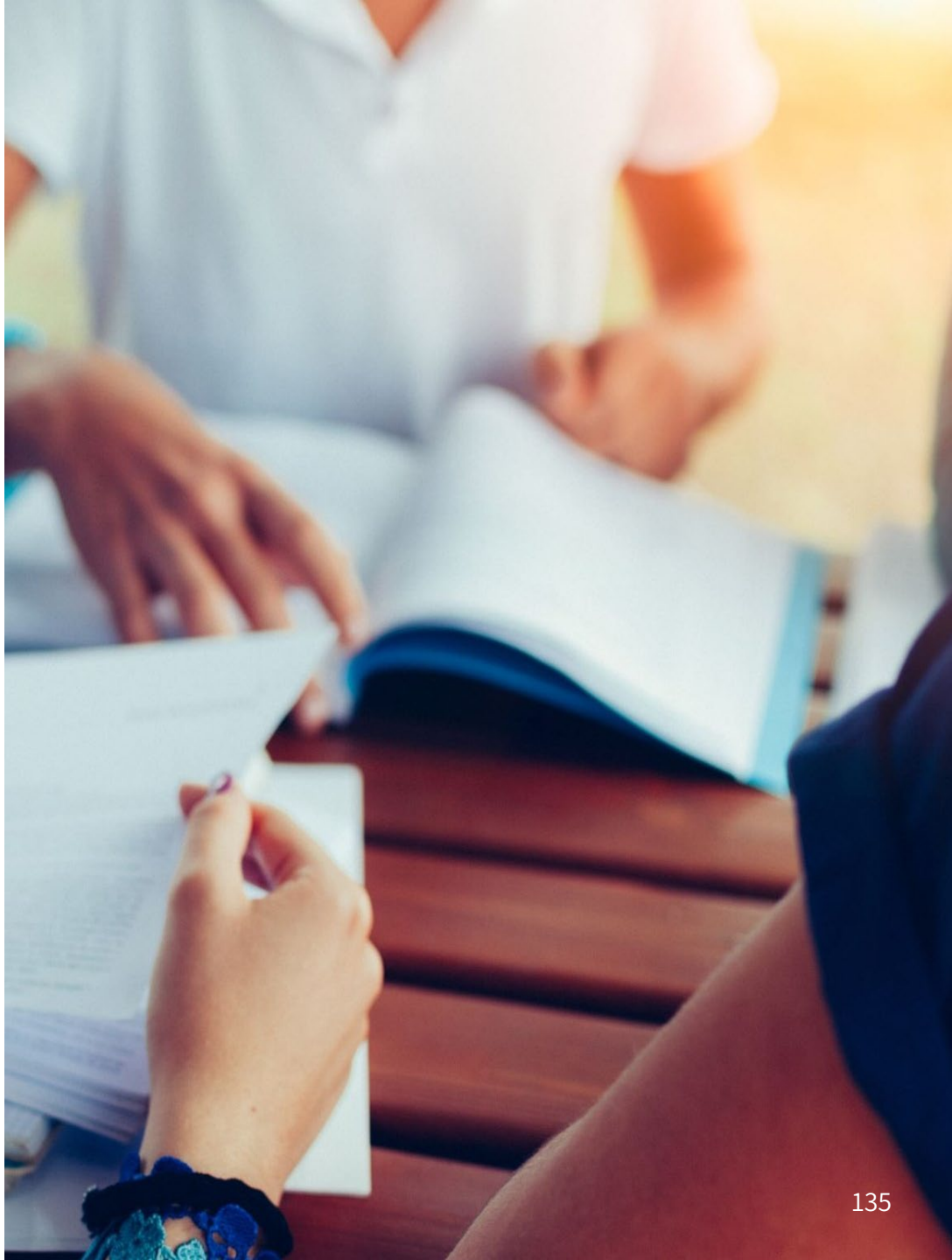
Assessing the Title IX Program

Assessment should be multifaceted:

- Benchmarking
- Climate assessments
- Compliance reporting
- Complaint, investigation, and resolution process debriefing
- Internal reviews/audits/assessments
  - Address areas for improvement
  - Assess Title IX team
  - Conduct barrier analysis
  - Identify strengths, program gaps



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Climate Surveys

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Title IX-Based Climate Survey Objectives

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- Focused on sex discrimination and sexual harassment, including sexual assault, dating and domestic violence, and stalking
  - Assess **prevalence** of sex discrimination and sexual harassment
  - Evaluate awareness of Title IX **policies**, **resources**, and reporting **procedures**
  - Gauge the **perception of** school/campus safety and the effectiveness of district/institutional responses
  - Identify **gaps** in services, support, and education related to Title IX
  - Could lay a foundation/justification for **affirmative action** (though courts hostile)
- Assists TIXC with **monitoring** the education program for barriers to reporting

Climate Survey Stages

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Climate Survey Structure

- Demographic questions
  - Narrow results
  - Basis for comparison
- Experience and perception questions
  - Bulk of the survey
  - Gain a better understanding of the participants' experiences
- ATIXA recommends targeted questions to evaluate how well individuals understand existing policy and procedures

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Climate Survey Report

- Draft a comprehensive overview of the Climate Survey responses
- Compiling a report can feel onerous, some tips to help:
  - Create or follow a template
  - Assign sections to committee members to draft
  - Allocate sufficient time for writing and review
- Consider:
  - Accessible platform for sharing the climate survey results
  - Showcasing both qualitative and quantitative data
  - Sharing a “next steps” plan to address areas needing improvement

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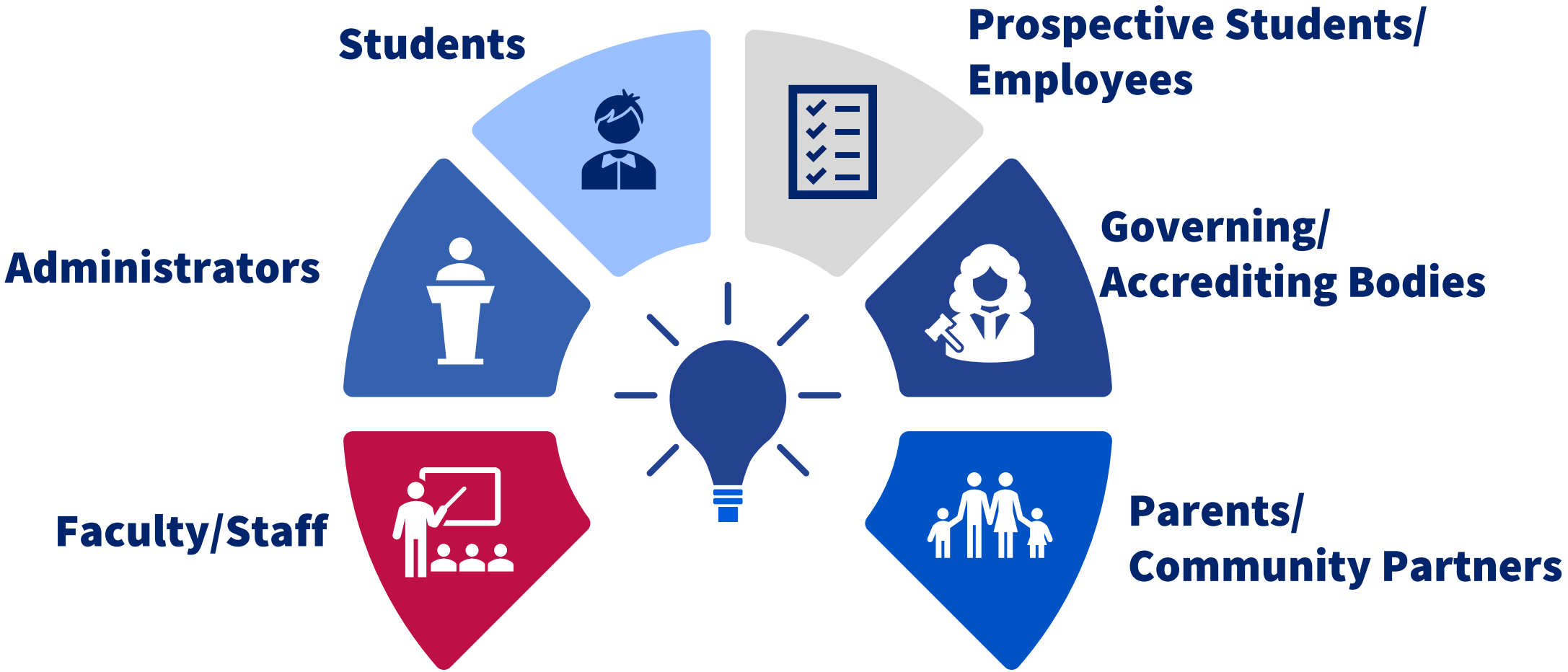
Assessment Outcome Sharing



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Questions?

Stay Connected to ATIXA's Community

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- Exchange ideas through the **ATIXA Listserv**
- Build skills with **20-Minutes-to…Trained** videos
- Get practical guidance at **Time with IX**
- Streamline your work with **TIXKit** templates
- Schedule a **Training and Certification course**
- Expand your network with **Mentor Match** and **Community Connections**
- Explore **Thought Leadership** from ATIXA experts
- Stay informed with **ATIXA's "More Likely Than Not" Podcast**
- Refer Members. Earn **Rewards**.

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