



Association of  
Title IX Administrators

# Title IX Hearing Panel Training

Bryn Mawr College

June 9, 2025

Kim Pacelli, Interim Title IX Coordinator, Bryn Mawr College  
Partner, TNG Consulting; Member, ATIXA Advisory Board



Strategic Risk  
Management Solutions



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 sexual 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.

# **Title IX Scope & Definition Review**

# 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 educational program or activity receiving federal financial assistance.”





# Essential Compliance Elements

The requirement to **Stop, Prevent, and Remedy** guides institutions in their equity and compliance work

**1**

**STOP** discriminatory conduct

**2**

**PREVENT** recurrence, on both individual and institutional levels

**3**

**REMEDY** the effects of discrimination, on both individual and institutional levels

# Bryn Mawr College: Title IX and PA Law

## Discrimination and Harassment

- Inequitable Treatment
- Exclusion from participation
- State law covers gender expression, gender identity, pregnancy, sex, sexual orientation
- Other sexual harassment that does not fall under IX

## Title IX Sexual Harassment

- Quid Pro Quo
- Hostile Environment
- Sexual Assault
  - Rape
  - Fondling
  - Incest
- Statutory Rape
- Dating Violence
- Domestic Violence
- Stalking

## Retaliation

# Title IX Sexual Harassment: Quid Pro Quo

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





# Title IX Sexual Harassment: Hostile Environment Sexual Harassment

- 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



# **Title IX Sexual Harassment: Sexual Assault: Rape**

- Penetration by the Respondent, no matter how slight,
- Of the vagina or anus of the Complainant,
  - With any body part or object, or
- Oral penetration by the Respondent of a sex organ of the Complainant, or
- Oral penetration of the Complainant by the Respondent's sex organ
- Without the consent of the Complainant

# **Title IX Sexual Harassment: Sexual Assault: Fondling**

- The touching of the private body parts of the Complainant (breasts, groin, buttocks) by the Respondent,
  - For the purpose of sexual gratification,
  - Without the consent of the Complainant,
  - Including instances where the Complainant is incapable of giving consent because of their age or because of temporary or permanent mental incapacity

# **Title IX Sexual Harassment: Sexual Assault: Incest & Statutory Rape**

- Incest
  - Sexual intercourse between persons 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
  - In CT: 16 years old, with three year close-in-age exception

# Title IX Sexual Harassment: Dating Violence

- Violence, on the basis of sex,
- Committed by a person
  - 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 interactions between the persons in the relationship.
- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse
  - Does not include acts covered under the domestic violence definition



# Title IX Sexual Harassment: Domestic Violence

- Violence, on the basis of sex,
- Committed by a current or former spouse or intimate partner of the Complainant
  - 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

# Title IX Sexual Harassment: Stalking

- Engaging in a course of conduct,
- On the basis of sex,
- 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

# **BMC Policy: Other Gender-Based Misconduct (see policy for all provisions)**

- Unwelcome conduct of a sexual nature, including but not limited to unwelcome sexual advances, requests for sexual favors, or other verbal or nonverbal conduct of a sexual nature that is sufficiently serious, pervasive, or persistent as to create an intimidating, hostile, humiliating, demeaning, or sexually offensive working, academic, residential, or social environment under both an objective and subjective standard.

# Retaliation Definition

- No person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations. No person may intimidate, threaten, coerce, or discriminate against any individual because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an Investigation, proceeding or Hearing under this Sexual Misconduct Policy.

# Consent

- Understandable exchange of affirmative and clear words or actions, which indicate a willingness to voluntarily participate in mutually agreed upon sexual activity.
- Must be informed, freely and actively given.
- It is the responsibility of the initiator to obtain clear and affirmative responses at each stage of sexual involvement.
- Consent to one form of sexual activity does not imply consent to other forms of sexual activity.
- The lack of a negative response is not consent.
- An individual who is incapacitated by alcohol and/or other drugs both voluntarily or involuntarily consumed may not give consent.
- Past consent to sexual activity does not imply ongoing future consent.
- Consent can also be withdrawn once given, if the withdrawal is reasonably and clearly communicated. If consent is withdrawn, sexual activity should cease within a reasonably immediate time.



# The Consent Construct

1. **Force:** Did the Respondent use force to obtain sexual or intimate access?
2. **Incapacity:** Was the Complainant incapacitated?
  - a. If so, did the Respondent know, or
  - b. Should the Respondent have known that the Complainant was incapacitated
3. **Consent:** 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?

# **Formal Resolution Process for Title IX Sexual Harassment**

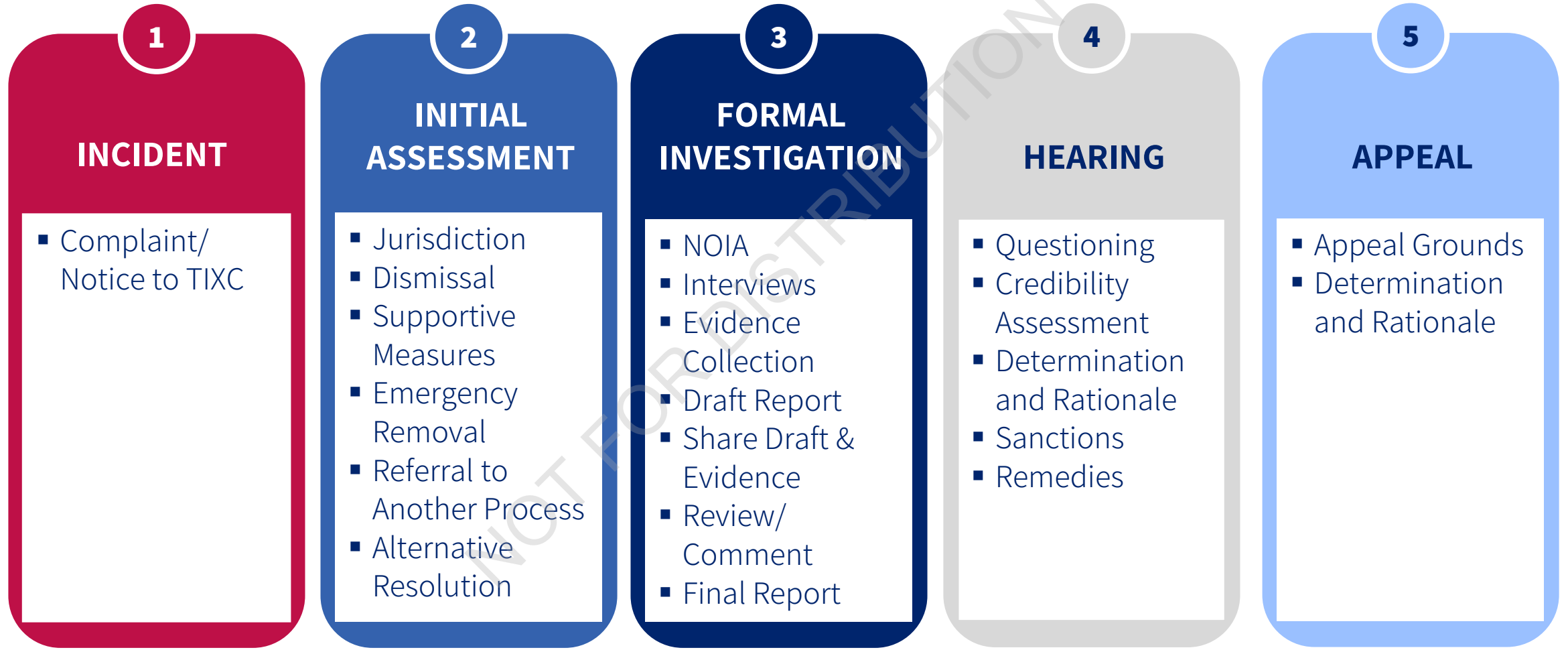
Bryn Mawr College Sexual Misconduct Policy

# Responding to Title IX Sexual Harassment

## The institution has obligations and tools to respond to sexual harassment:

- Notification and Responsible Employee reporting requirements
- Supportive measures:
  - Individualized measures that are non-punitive and non-disciplinary
  - May not unreasonably burden the other party
  - Restore or preserve equal access, protect safety, or deter harassment
- Emergency Removal:
  - Individualized safety and risk analysis to measure **immediate** threat to physical health/safety
- Informal Resolution
- Formal Resolution Process

# Title IX Resolution Process Overview



# Parties' Rights in the Resolution Process

- Receive detailed, written Notice of Investigation and Allegations (NOIA), including information about the Resolution Process
  - Provide with sufficient time to prepare for any initial interview
  - Must include information about the Resolution Process
- Be informed of and receive appropriate and available supportive measures
- Be accompanied by Advisor of their choice
- Gather and present relevant evidence and witnesses
- Written notice of the date, time, location, participants, and purpose of all meetings or proceedings with sufficient time to prepare
- Respondent presumed not responsible until a determination is made



# Parties' Rights in the Resolution Process

- Inspect, review, and respond to relevant evidence and investigation report
- Equal opportunity to be accompanied by persons other than an Advisor, if any
- Reasonable extension of timeframes for good cause
- Reasonable expectation of privacy
- Opportunity to propose questions for other parties and witnesses
  - Access to recording or transcript and opportunity for follow-up questions
- Written outcome notification
- Opportunity to appeal the determination

# Decision-making Phase

# Decision-Making Under Title IX

- Decision-maker (DM) could be a single person or a panel (typically three)
  - Institutional community members (typically faculty or staff) or external contractors
- All institutions must hold a live hearing
  - Panel can ask relevant questions
  - Advisors can ask relevant questions on behalf of parties
- TIXC and Investigator may not serve as Decision-maker

# Live Hearings

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# Who Will Typically Be Present at the Hearing?

- Parties (no requirement to participate)
- Witnesses (no requirement to participate)
- Advisors
- Investigator(s)
- Decision-maker(s)
- Hearing Facilitator





# Advisors

- Required under Title IX regulations for purposes of cross-examination at the live hearing
- No training mandate
- Can be an attorney, but attorney not required
- May regulate Advisor participation, so long as applied equally to all parties



# Managing Advisors Generally

- Advisors approach the role differently, depending on training and background
  - All Advisors need management, not just attorney Advisors
- Be firm, but flexible
- De-escalate conflicts
- Advisor may be removed if disruptive, after warning
- Decorum expectations
  - Generally, parties should speak for themselves
  - Hearings are not court processes

# Responsibilities in the Hearing Process

	Pre-Hearing	Hearing	Deliberation
Panelists	<ul style="list-style-type: none"><li>▪ Review investigation report and evidence file</li><li>▪ Ensure no conflict of interest</li><li>▪ Prepare questions</li></ul>	<ul style="list-style-type: none"><li>▪ Listen actively</li><li>▪ Ask/pose questions</li><li>▪ Assess credibility</li></ul>	<ul style="list-style-type: none"><li>▪ Analyze relevant evidence</li><li>▪ Balance credibility and reliability</li><li>▪ Determine outcome, sanctions, remedies</li></ul>
Chair/DM	<p><b>Panelists' tasks plus:</b></p> <ul style="list-style-type: none"><li>▪ Pre-hearing meeting(s)</li><li>▪ Technology training</li><li>▪ Witness list</li><li>▪ Evidence review and redaction (if applicable)</li></ul>	<p><b>Panelists' tasks plus:</b></p> <ul style="list-style-type: none"><li>▪ Follow procedures</li><li>▪ Manage questioning, including relevance determinations</li><li>▪ Consult w/counsel/TIXC</li></ul>	<p><b>Panelists' tasks plus:</b></p> <ul style="list-style-type: none"><li>▪ Lead discussion</li><li>▪ Take notes</li><li>▪ Draft rationale/outcome letter</li></ul>

# Hearing Preparation

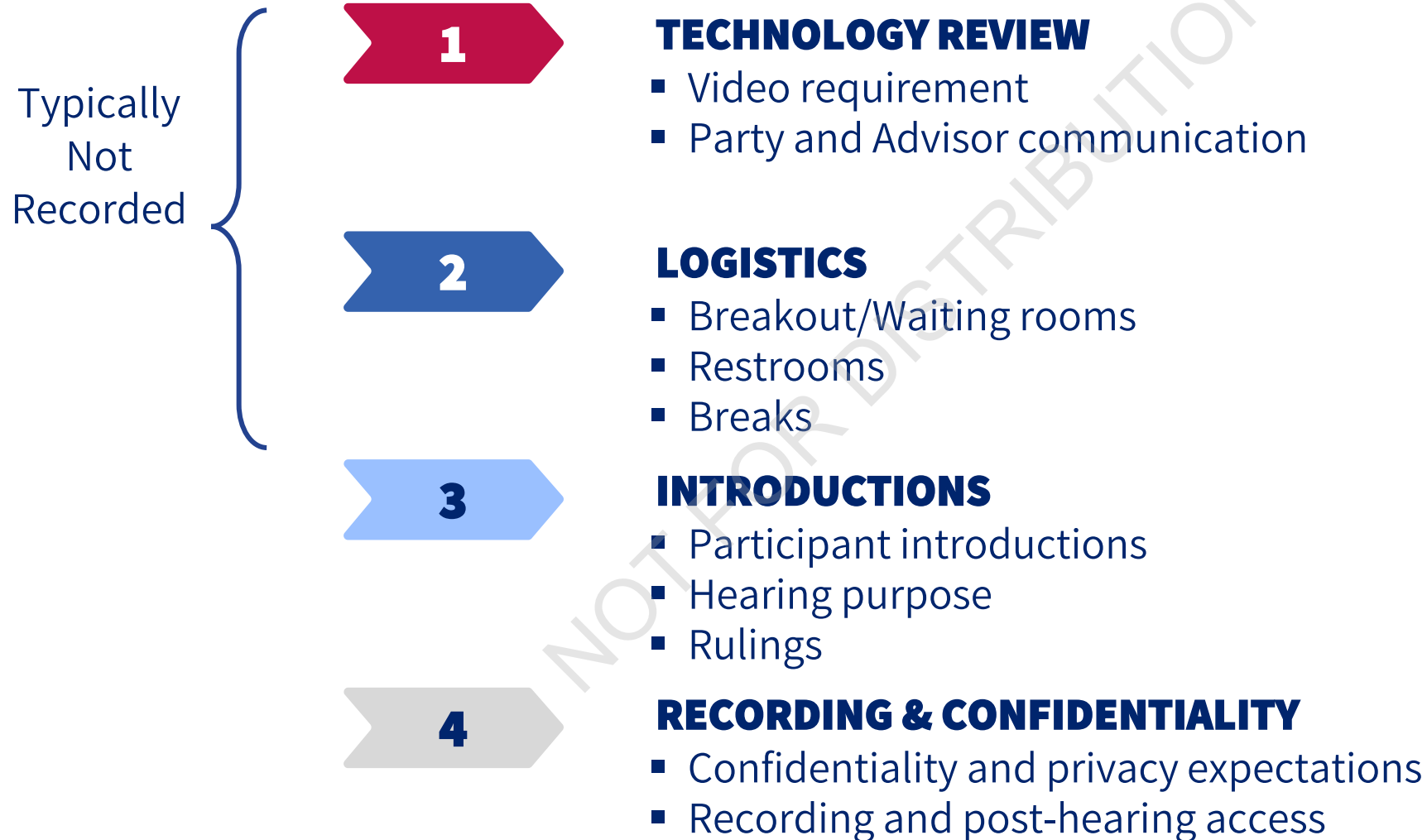
## Prior to the hearing, DMs must review:

- Notice of Investigation and Allegations (NOIA) (including any updates)
- Policies alleged to have been violated and their policy elements
- Applicable procedures
- Investigation report and evidence file
  - Review more than once, as needed
  - Identify facts in dispute and not in dispute
  - **Note:** DM annotations or notes may be subject to FERPA or otherwise discoverable

# Hearing Preparation

- Prepare questions in advance of hearing
  - Helps DMs structure their questions in a logical, organized way
  - Ensures no significant disputed fact or inconsistency is missed
  - Helps DMs understand and analyze the evidence in the report
- Meet as a panel (if applicable)
  - Discuss investigation report and evidence file
  - Review questions for parties and witnesses
  - Determine questioning order

# Hearing Script and Flow



# Hearing Script and Flow

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## **HEARING PROCEDURES**

- Decorum expectations
- Roles
- Order of testimony

6

## **ALLEGATIONS**

- Formal charges
- Confirmation of acceptance/non-acceptance of responsibility

7

## **INVESTIGATOR STATEMENT**

- Complaint introduction
- Questions from Panel then Advisors

8

## **PARTY STATEMENTS**

- Complainant then Respondent
- Statement then Panel and Advisor Cross/Direct



# Hearing Script and Flow

**9**

## **WITNESS QUESTIONING**

- Expectation of truthfulness/Honor Code
- Questions from Panel then Advisors

**10**

## **ADDITIONAL QUESTIONS**

- Panel
- Advisors

**11**

## **CLOSING STATEMENTS**

- Complainant then Respondent
- Hearing closure

Not  
Recorded



**12**

## **DELIBERATION**

- Deliberation guidelines and process
- Determine rationale and evidence relied upon

# Asking Questions

- May ask questions to ensure a **comprehensive** understanding of information and evidence gathered during the investigation:
  - Including asking additional questions about relevant evidence regarding what happened during the incident(s)
  - Panel does not have to ask questions but must have the opportunity to do so if they wish
    - If necessary to assess credibility, Panel should ask
- **Panel should use questions to:**
  - Resolve conflicting information as it relates to the policy elements
  - Elicit details, eliminate vagueness, fill in gaps

# Questioning Strategies & Pitfalls

## DO

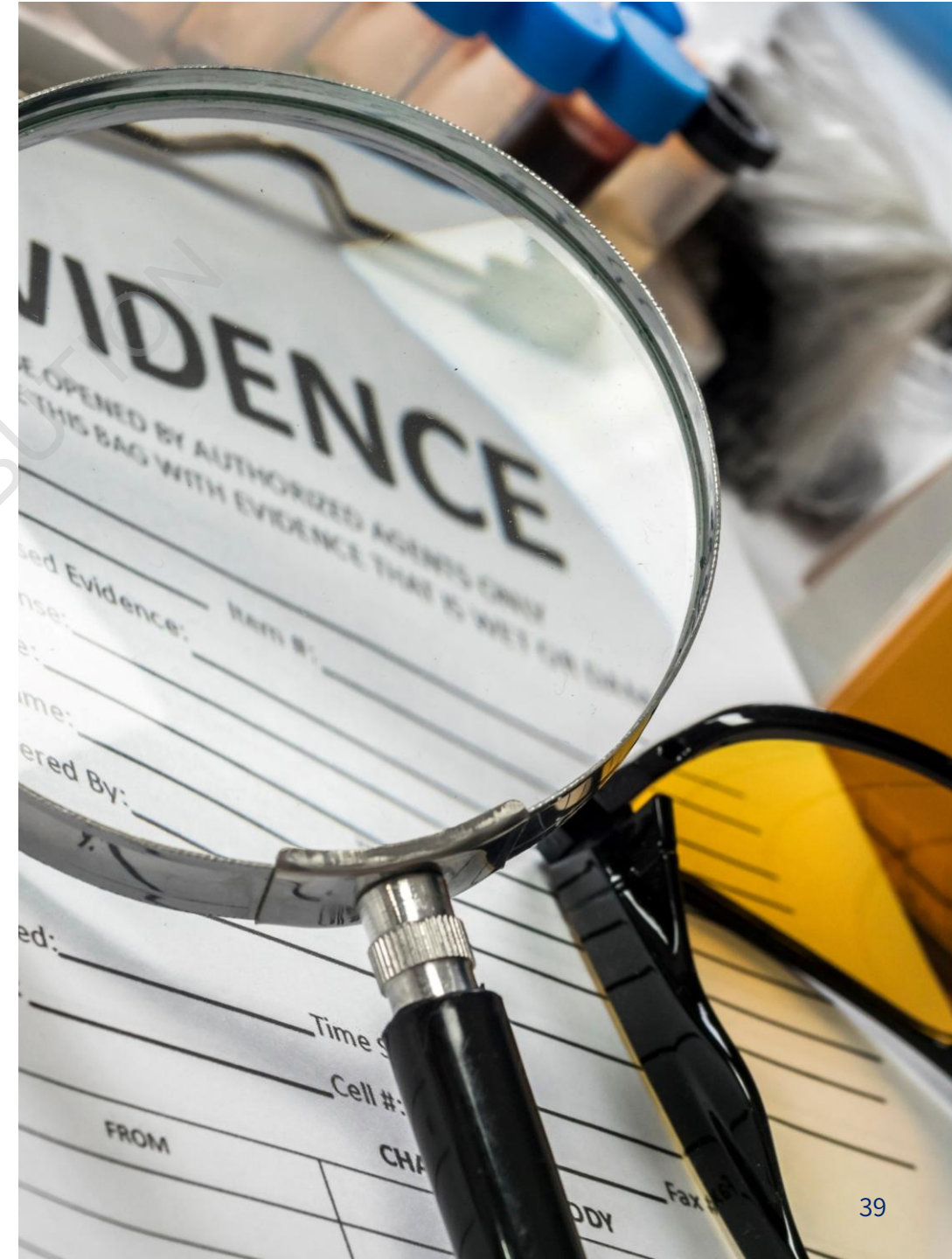
- Ask short, precise questions
- Use open-ended questions
- Repeat and clarify the language the parties and witnesses use
- Prepare questions from policy definitions
- Listen carefully, ask related follow-ups
- Look for cued or rehearsed answers

## DON'T

- Ask accusatory or argumentative questions
- Use a critical or sarcastic tone
- Develop compound or confusing questions
- Offer evaluative responses
- Sanitize participants' language
- Rely solely on closed-ended questions
- Chase “gotcha” moments

# Understanding Evidence

- **Evidence** is any information presented to help determine what occurred
  - **Inculpatory:** supports a finding of “responsible”
  - **Exculpatory:** supports a finding of “not responsible”
- **Relevant evidence** is evidence that may aid in showing whether the alleged sex discrimination occurred **or** contributes to assessing credibility
- **Impermissible evidence** is evidence that must not be accessed or considered, as outlined in the regulations



# Directly Related Evidence

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



# Privilege and Medical Information

**A party or witness must provide written, voluntary permission to obtain and/or include:**

- Evidence protected under a legally recognized privilege
- Evidence provided to a confidential employee
- Records made or maintained by:
  - Physician
  - Psychiatrist
  - Other recognized professional or paraprofessional in connection with treatment



# Impermissible Evidence

- 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

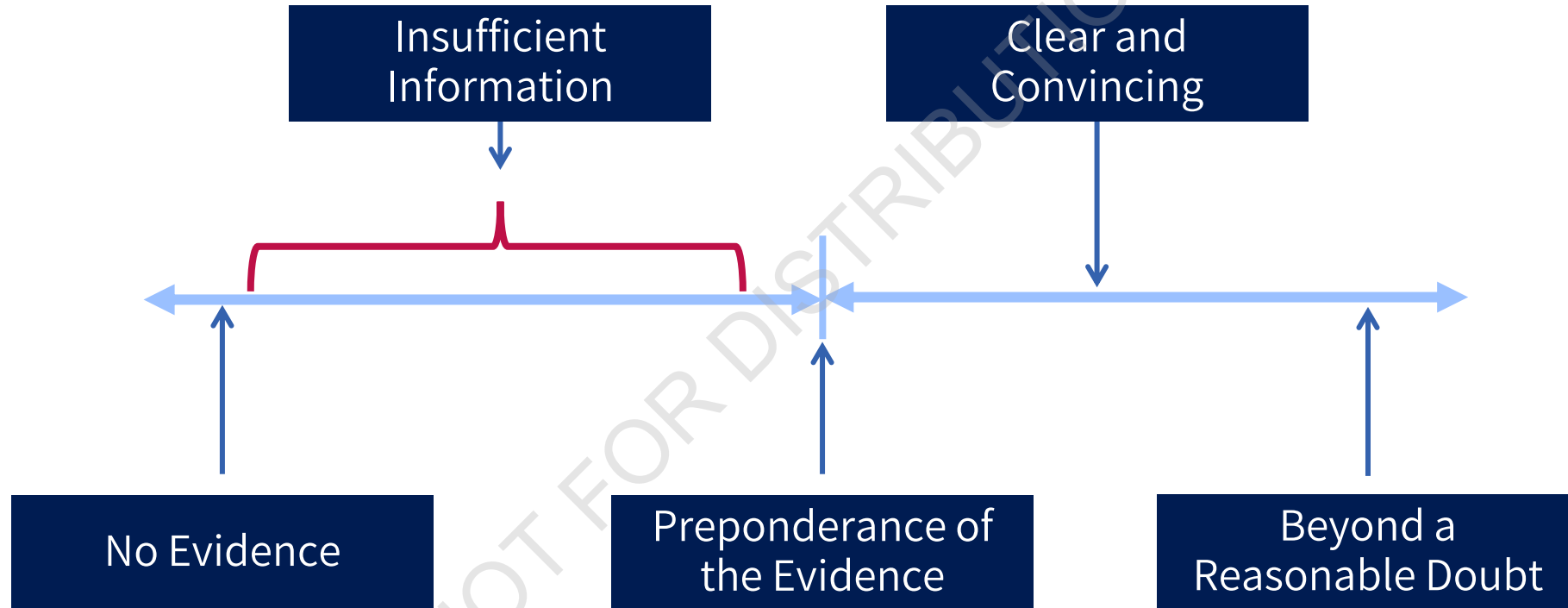


# Party and Witness Credibility

- **Credibility** impacts likeliness:
  - Would a reasonable person do the same?
  - Are there more likely alternatives?
- **Credibility Assessment** involves evaluating whether evidence is believable and reliable
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies
- **Note:** Memory errors alone do not necessarily diminish witness credibility, nor does some evasion



# Standard of Evidence



Bryn Mawr Policy Policy uses the Preponderance of the Evidence.

# Written Determinations

## Written Determination

- Authored by Chair with support of Panel
- TIXC/Legal counsel typically reviews for clarity
- TIXC communicates to the parties simultaneously in writing
  - Permissible under FERPA and personnel laws

## Finality

- On the date the College 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
- Finding and Final Determination
- 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

# Sanctions and Remedies

## 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 equitable and not clearly unreasonable given the circumstances
- Goal: preserve or restore access to education program and activity
- TIXC ensures remedies are implemented

# Determining Sanctions

- Primary purpose should focus on ensuring equity and providing remedies
  - Each sanction should have a rationale
- DM may consider:
  - Nature and severity of the conduct, including the circumstances surrounding the violation
    - Aggravating or mitigating circumstances
    - Precedent, prior misconduct, proven pattern (if alleged), acceptance of responsibility, collateral violations, or multiple violations
  - The Respondent's disciplinary history
  - The need for sanctions or other responsive actions to stop, prevent, and remedy the discrimination, harassment, and/or retaliation
  - The impact on the parties
  - Any other information deemed relevant by the Final DM

# Appeal Grounds

**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, Decision-Maker that affected the outcome of the matter

# Conflicts of Interest and Bias



# Conflicts of Interest and Bias

- Panelists must **not have a conflict of interest or bias** for or against the following:
  - Complainants, generally
  - Respondents, generally
  - The parties involved in a complaint
  - Subject matter or details of the complaint itself
- Consider a perception of a conflict or bias, even if none in fact exists
  - Not required, but TIXC may choose to substitute a Decision-maker based on perception alone

# What's the Difference?

## Conflict of Interest

- Refers to situations in which:
  - An **actual** (or perceived) clash,
  - Between the DM's role and
    - A current or previous relationship/situation with one of the parties
  - That prevents neutrality or objectivity
  - **Example:** A Director serving as panelist for a complaint filed by one of their direct reports

## Bias

- Refers to prejudice for or against a **person or group**, or an unwillingness/inability to be influenced by factual evidence
- A preference or tendency to like or dislike
- Implicit or explicit
- Can be intentional, but generally unintentional or at least unconscious
- **Example:** A DM who believes Respondents cannot be trusted to tell the truth

# Conflicts of Interest

- Evaluated on a case-by-case basis
- Simply knowing a student or employee is **not** enough to generate a conflict of interest, as long as objectivity is not compromised
  - Previously disciplining a student or employee is likewise **not** enough unless it influences the panel's findings
- Panelists must bring potential conflicts to the TIXC's attention
  - Parties may also alert TIXC
- TIXC will determine whether to recuse the panelist
  - Panelist may also recuse themselves



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# Questions?

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