#### Sexual Misconduct Case Management Introduction (Part 1)

Krista Anderson, Systemwide Title IX Coordinator Sean Flammer, Assistant General Counsel Fall 2021



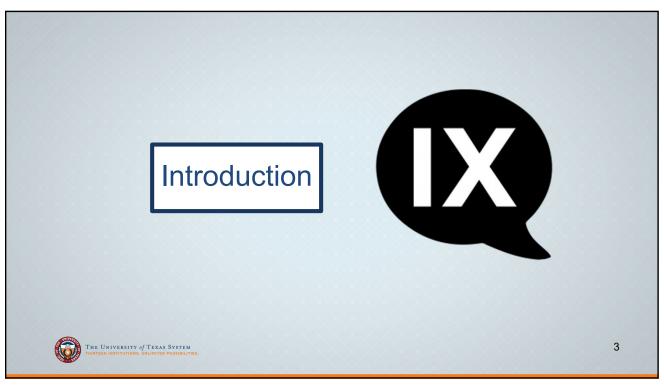
1

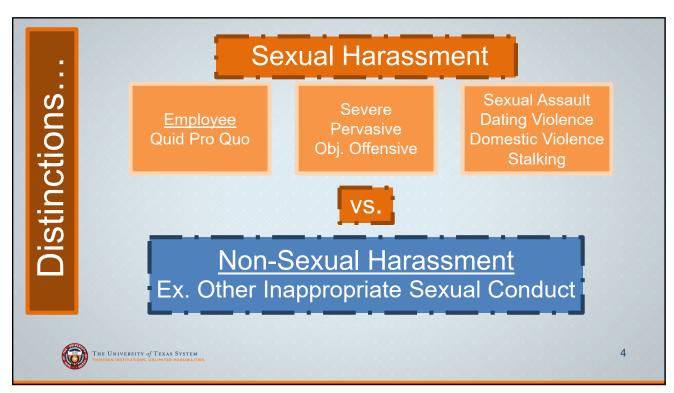
#### Agenda

- 1. Title IX Introduction
- 2. Triage & Case Management:
  - Reports v. Formal Complaints
  - Decision Points
- 3. Resolution Options:
  - Formal Complaint Dismissals
  - Informal Resolutions
  - Formal Grievance Process

- Threat Assessment
   Overview & Emergency
   Removals
- 5. Adjudication Stage
  - Transition Steps
  - Logistics & Coordination
- Documentation & Record Keeping







#### Definition of "Sexual Harassment" under Title IX

#### Conduct on the basis of sex that satisfies one or more of the following:

- An <u>employee</u> of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual's participation in unwelcome sexual conduct (Quid Pro Quo);
- Unwelcome conduct determined by a reasonable person to be <u>so severe, pervasive,</u> <u>and objectively offensive</u> that it effectively denies a person equal access to the institution's education program or activity; or
- "Sexual assault," "dating violence," "domestic violence," or "stalking" as defined under Clery/VAWA.



Source: Title IX Regulations (2020)

5

5

#### #2 Element Examples



- "Severe": Physically threatening or humiliating; effects of the alleged conduct to a reasonable person (using a "reasonable person" standard)
- "Pervasive": Frequency, duration of the alleged conduct
- "Objectively offensive": To a reasonable person (using a "reasonable person" standard)
- "Reasonable person" standard: An <u>objective test</u> to denote a hypothetical person who exercises average care, skill, and judgment in conduct <u>under similar circumstances</u> as a comparative standard.
- "Effectively denies...equal access": Totality of the circumstances

Examples: the degree of the alleged conduct's interference with the CP or effects in an educational or work setting, type of alleged conduct, frequency and duration of the conduct, knowingly unwelcome in nature

6

## "Education program or activity" under Title IX

Includes <u>locations</u>, <u>events</u>, <u>or</u> <u>circumstances</u> over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes <u>any building owned or controlled by a student organization</u> that is officially recognized by the institution.

Example of a "building owned or controlled by a student organization": Fraternity or sorority house that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



Source: Title IX Regulations (2020)

7

7

#### Definition of "Other Inappropriate Sexual Conduct"

Conduct on the basis of sex that does not meet the definition of "sexual harassment" (under the Model Policy), but is

- 1. Verbal conduct (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so <a href="mailto:severe or pervasive">severe or pervasive</a> that it created a Hostile Environment, as defined in the Model Policy.
- 2. Physical conduct...



Source:

UT System Model Policy for Sexual Misconduct (2021)

8

# Definition of "Other Inappropriate Sexual Conduct" (Cont.)

#### Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual's sexual activities or speculation about an individual's sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- o Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.



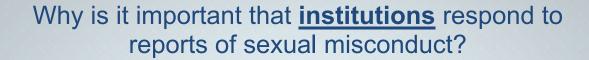
Source:

UT System Model Policy for Sexual Misconduct (2021)

9

9





Stop

**Prevent** 

Remedy

#### **Institutions** provide:

- Campus remedies & supportive measures (with or without filing a formal complaint)
- Prompt, fair, & equitable grievance processes (by filing a formal complaint)
- Preponderance of the evidence standard (in the formal grievance process)
- An informal resolution option (in some circumstances, if available)



11

11

#### Key Pillars: Title IX Process

**Impartiality** 

Respect

For all of the participants in the process:

Complainants
Respondents
Witnesses
Third-party Reporters

**Fairness** 

**Equity** 

THE UNIVERSITY OF TEXAS SYSTEM
THIRTEEN INSTITUTIONS, UNLIMITED POSSIBILITIES

12

#### Serving Impartially in Your Role

- Must avoid prejudgment of the facts at issue
- Must avoid conflicts of interest
- Must avoid bias





Source: Title IX Regulations (2020)

13

13

#### Principles for Title IX Process



- Must maintain complete neutrality & impartiality at all times in investigating alleged conduct violations of institutional policies.
- Understanding bias & whether it exists: Need to take an "objective, common sense approach to evaluating whether a person serving in a role is biased." (Title IX Preamble (2020))...



14

#### Must not treat a party differently: On the basis of the person's sex; o On stereotypes about how men or women behave with respect to sexual violence; and/or **Avoiding** o On the basis of the person's Bias characteristics: sex, race, ethnicity, sexual orientation, gender identity, disability, immigration status, financial ability, socioeconomic status, or other characteristic. THE UNIVERSITY of TEXAS SYSTEM 15 Source: Title IX Preamble (2020)

15



#### Institutional Sexual Misconduct Policy (Example)

Prohibits sex discrimination, sexual harassment, retaliation, and other prohibited conduct under the policy, including:

- Sex Discrimination
- Sexual Harassment
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking

- Retaliation
- Sexual Exploitation
- Other Inappropriate Sexual Conduct
- False Information & False Complaints
- Interference with the Grievance Process
- Failure to Report (for Responsible Employees)

**Policy Differences Note**: For the purposes of this training, the UTS Model Policy for Sexual Misconduct will be the primary policy reference. UT Institutional policies may have some differences.



Source:

UT System Model Policy for Sexual Misconduct (2021)

17

17



#### First Amendment Rights: Free Speech & Academic Freedom

Constitutionally protected expression cannot be considered Sexual Misconduct (e.g. "sexual harassment," "other inappropriate sexual conduct") under the institution's Sexual Misconduct policy.

**Note**: Neither party may be restricted from discussing allegations or from gathering evidence in a grievance process.



#### Possible questions and/or issues to consider further:

- a. Is there a sufficient pedagogical nexus to the curriculum and expression at issue?
- b. Does the expression at issue conflict with policies or standards of conduct?
- c. Is the expression at issue being addressed (e.g. investigated, examined) because of its <u>disruptive</u> <u>effect</u>?
- d. Is the expression at issue being addressed (e.g. investigated, examined) because of the <u>content of the speech</u>?
- e. Any mitigating action by the faculty, such as giving trigger/content warnings of the possibly provocative content?

19

19



#### Retaliation Prohibited under Title IX

No institution or other 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 *because* an individual has made a report or formal complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.

20

#### Definition of "Retaliation"

Any **adverse action** (including, but is not limited to, intimidation, threats, coercion, harassment, or discrimination) taken against someone <u>because</u> the individual has made a report or filed a Formal Complaint; or who has supported or provided information in connection with a report or a Formal Complaint; participated or refused to participate in a Grievance Process under this Policy; or engaged in other legally protected activities.

**Note**: Any person who retaliates against (a) anyone filing a report of Sexual Misconduct or Formal Complaint, (b) the parties or any other participants (including any witnesses or any University employee) in a Grievance Process relating to a Formal Complaint, (c) any person who refuses to participate in a Grievance Process, or (d) any person who under this Policy opposed any unlawful practice, is subject to disciplinary action up to and including dismissal or separation from the University.



Source:

UT System Model Policy for Sexual Misconduct (2021)

21

21



#### Retaliation Analysis



#### Possible questions and/or issues to consider further:

- a) Did the complaining party experience adverse action?
- b) If yes to (A), was the adverse action taken BECAUSE OF protected activity in which the complaining party was engaged in?
- c) Did the person of concern offer a non-retaliatory or non-discriminatory **reason** for the action taken?
- d) If yes to (C):
  - · Was this reason legitimate; or
  - Was this reason <u>pretext</u> for retaliation or discrimination?

#### Responsible Employee Reporting Requirements

Under the institution's Sexual Misconduct Policy, **Responsible Employees** have a duty to report incidents and information reasonably believed to be sexual misconduct (prohibited conduct defined) under the Policy.

All employees are Responsible Employees (except Confidential Employees or police officers when a victim uses a pseudonym form). Responsible Employees include <u>all</u> administrators, faculty, and staff.

Responsible Employees must report all known information concerning an alleged incident of sexual misconduct to the **Title IX Coordinator**.



Source:

UT System Model Policy for Sexual Misconduct (2021)

23

23

Definition of "Failure to Report" for Responsible Employees If a Responsible Employee knowingly fails to report all information concerning an incident the employee reasonably believes constitutes stalking, dating violence, sexual assault, or sexual harassment committed by or against a student or employee at the time of the incident, the employee is subject to disciplinary action, including termination.



Source:

UT System Model Policy for Sexual Misconduct (2021)

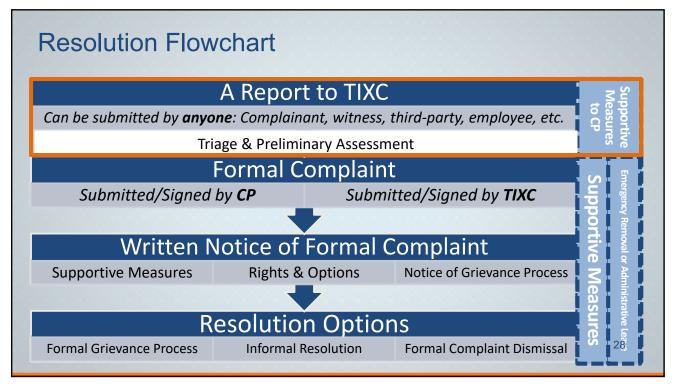
24

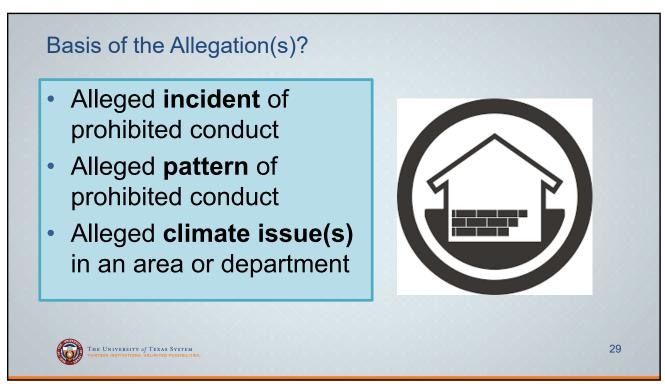


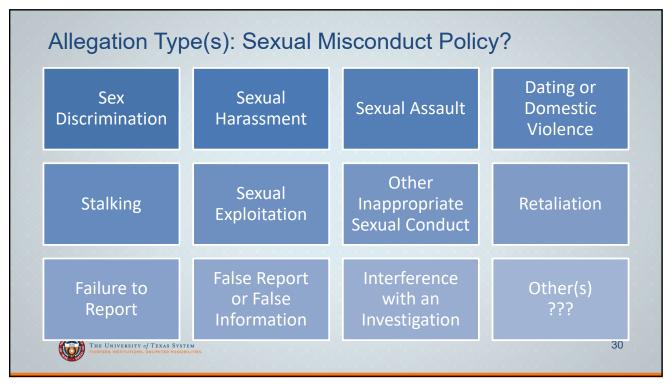


# Documentation & Record Keeping Documentation Checklists & Forms Intake & Initial Assessments Case Management Timelines & Decisions Contact & Communications Notices, Letters, Dismissals, & Reports Written Determinations Appeals Data Systems for Electronic & Hard Copy Records Exercise Contact & Contact & Contact & Contact & Copy Records

27







#### Other Triage Analysis & Considerations

CP & RP Affiliation to the Institution?

Incident Location(s)

Date/Time of Incident

Time of Alleged Incident: Institutional Nexus or Jurisdiction?

Institutional Action?
Preventative
Action?
Remedies?

Level of Concern?
Threat Level?

31

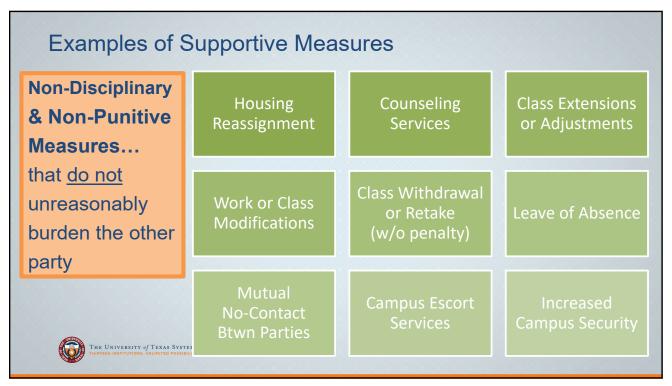
31

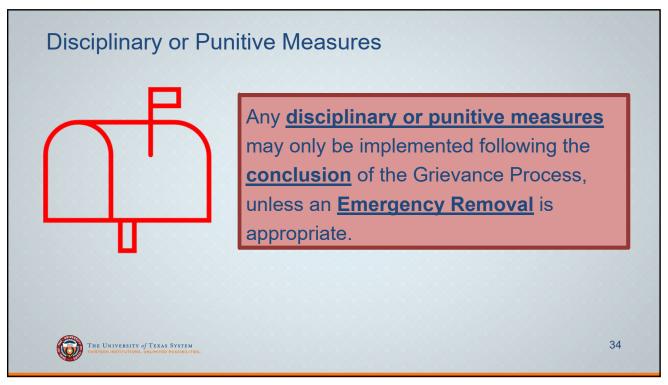
#### A **Report** to the Title IX Coordinator (TIXC)

TIXC must promptly contact the complainant to discuss the availability of supportive measures (with or without a formal complaint), consider the wishes of the complainant, and explain the process for filing a formal complaint.









#### Party's Rights (Summary)

A **Complainant** and **Respondent** have the following rights during a grievance process:

- To be informed of and have access to counseling, medical, academic, and other applicable **support services**, including **confidential resources**.
- To be informed of the importance of a victim going to a hospital for treatment and the preservation of evidence, if applicable, as soon as practicable after an alleged incident.
- To be informed of a notice of formal complaint to the University, whether filed by a CP or the TIXC.
- To receive a prompt, fair, equitable, and impartial grievance process.
- To receive information and ask questions about the formal and informal processes.



35

35

#### Party's Rights (Cont.)

- To be given equal chance to participate in a grievance process, including the opportunity to identify witnesses and other relevant evidence.
- To choose <u>not</u> to actively participate in the grievance process, if desired.
- To have an advisor of choice present during all meetings and grievance proceedings.
- To have an advisor provided for a party at a hearing under the Title IX/SH grievance process, if an advisor of choice is not present.



#### Party's Rights (Cont.)

- To have access and equal opportunity to inspect and review any evidence obtained as part of the investigation, and to receive a copy of the completed investigation report.
- To be equally informed of any determinations regarding responsibility, dismissals of formal complaints, and/or a party's filing of an appeal.
- To appeal a <u>determination</u> regarding responsibility and/or <u>dismissals</u> of formal complaints.
- To file a report with local and/or campus law enforcement authorities.



37

37

#### Complainant's Rights

(related to the Grievance Process)

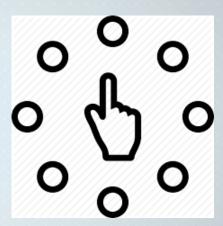
- To report an incident and/or file a formal complaint with the University.
- To request in writing that the University not investigate a reported incident and be informed of the University's decision whether or not to investigate.
- To request in writing a dismissal of a formal complaint (e.g. withdraws the formal complaint or any allegations therein).



Other Required Action		
Type of Concern	Action	
Non-emergency behavioral or wellness issues(s)	Refer to Behavior Intervention Team (BIT) or campus equivalent	
Immediate safety concerns (emergencies) or welfare check required	Report immediately to 911	
Clery reportable crimes that meet Clery geography requirements and/or timely warning requirements	<u>Timely Warnings</u> : Report immediately to campus law enforcement <u>Clery Crime Reporting</u> : Report to the campus Clery Manager	
Alleged abuse and/or neglect of minors	Report immediately to Dept. of Family & Protective Services (DFPS): 800-252-5400	
Alleged conduct could violate other institutional policies	Refer to the appropriate office(s) who oversees the applicable policies	

#### **TIXC: Options for Next Steps**

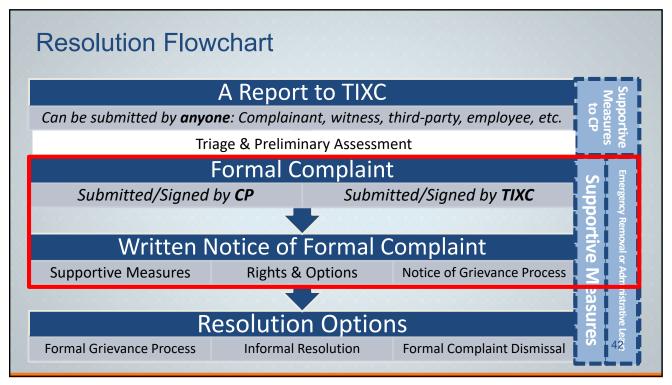
- Supportive Measures for the CP
- CP's right to file a formal complaint
- TIXC files a formal complaint, in lieu of a Reluctant Complainant and/or compelling reasons to investigate further...

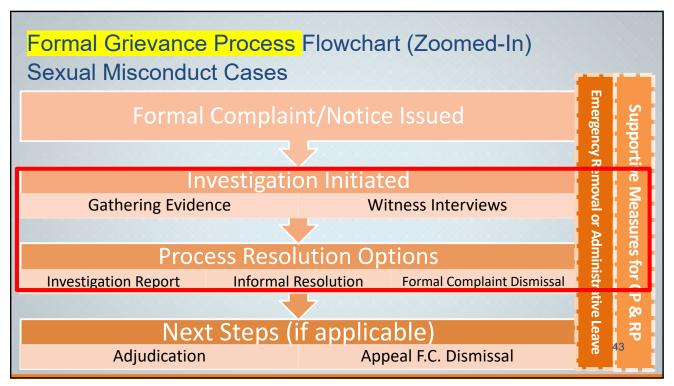


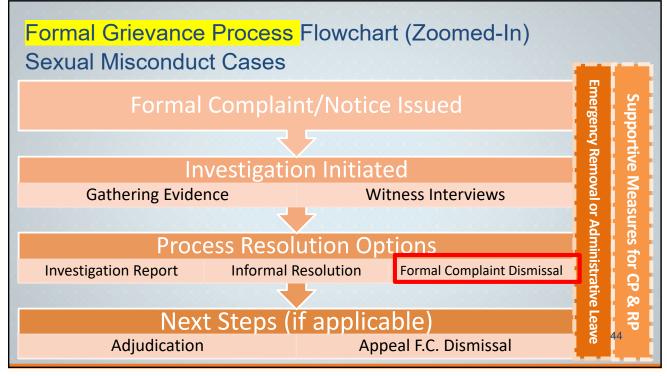


40









## Mandatory Formal Complaint Dismissals under Title IX

Mandatory Dismissals are required when the definitional <u>or</u> any element of the jurisdictional framework under Title IX is not met:

- Conduct alleged constitutes "sexual harassment" under the regulations;
- Conduct alleged occurs in the institution's "education program or activity";
- Conduct alleged occurs against a person "in the United States"; or
- Complainant is participating in or attempting to participate in the "education program or activity" of the institution.



45

45

If **Mandatory Dismissal** is required, then are additional <u>discretionary reasons</u> for a dismissal applicable to the specific circumstances?

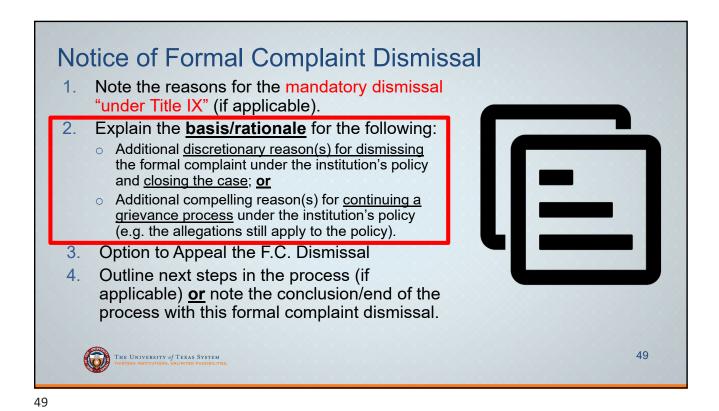
- CP expressly prefers to dismiss the formal complaint or requests to not investigate the matter
- RP was an employee and is no longer employed by the institution at the time the formal complaint is filed.
- Any specific circumstances that prevent the institution from gathering evidence sufficient to reach a determination as to the formal complaint or allegations.
- The conduct alleged <u>does not</u> meet the definition of **any** prohibited conduct under the institution's Sexual Misconduct Policy.

Additional Considerations









Formal Complaint Dismissal (Example #1)

Formal Complaint (Signed by TIXC)/Notice Issued

Grounds (examples): Serious nature of the allegations; Multiple reports/alleged incidents naming same RP

Initiate Formal Grievance Process (Investigation Stage)

Formal Complaint Dismissed (Close Case)

Basis (example): <u>Specific circumstances</u> that prevent... the gathering [of] evidence sufficient to reach a determination...

Specifically (example): Lack of participation from CP

Notice of F. C. Dismissal Issued (Close Case): Option to Appeal

Procedural Irregularity

**New Evidence** 

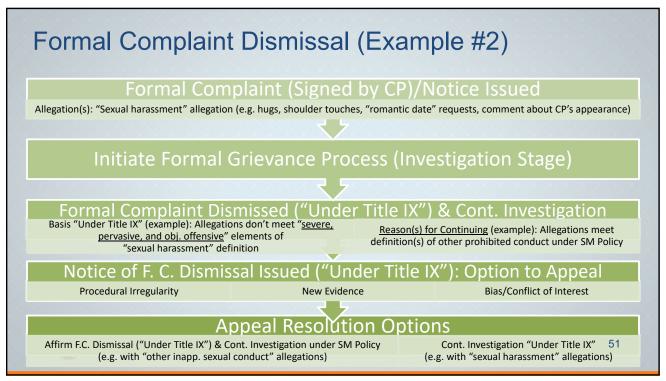
Bias/Conflict of Interest

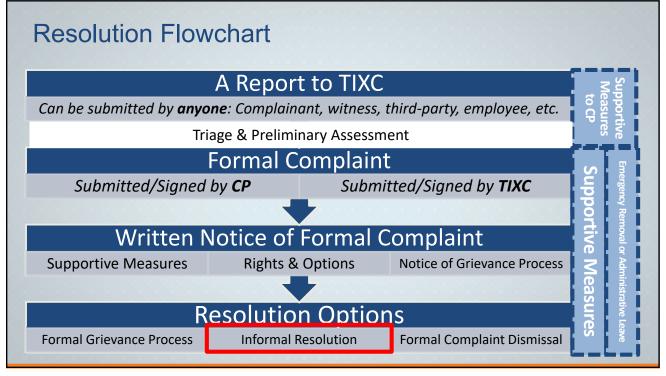
**Appeal Resolution Options** 

Affirm F.C. Dismissal (Close Case)

Remand back to Investigation Stage

50





#### Informal Resolutions

- **1.** It's an alternative resolution option once a formal complaint is filed.
  - Available as an option <u>at any time</u> prior to reaching a determination regarding responsibility.
  - o Doesn't involve a full investigation & adjudication.
  - May be facilitated through mediation (as an example).
  - Informal Resolution Process must include:

     (a) Written notice of allegations, (b) Requirements of the informal process, & (c) Any consequences resulting from participating in an informal process (e.g. record keeping).



53

53

#### Informal Resolutions (Cont.)

- 2. Not permitted as a resolution option "under Title IX" when an **employee respondent** is alleged of "sexual harassment" by a **student complainant**.
- 3. Examples of other non-applicable reasons\* due to seriousness and/or pattern of allegations:
  - Sexual Harassment cases
  - Sexual Violence cases
  - Dating or Domestic Violence cases
  - Stalking cases
  - The same respondent has previous informal resolution agreements

<sup>\*</sup> Check the institution's Sexual Misconduct Policy for specific provisions



54

#### Informal Resolution Timeframe (Example)

Informal Resolutions of a formal complaint will be concluded within <u>45 days</u> of notice to the institution that both parties wish to proceed with the Informal Resolution process

**Note:** Circumstances may require a **temporary delay** in this timeframe & the institution may <u>extend</u> this timeframe for <u>good cause</u>.

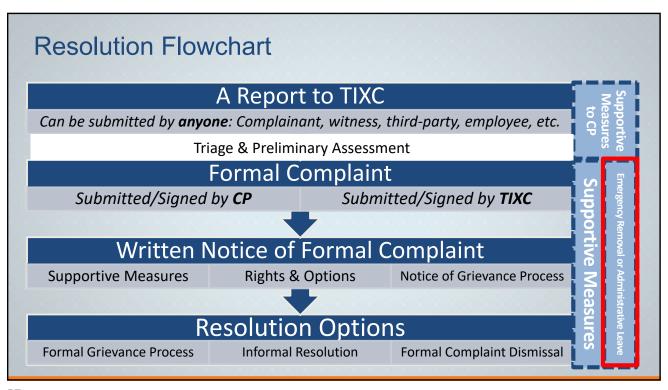
Provide **notice** to the parties for temporary delays or extensions



Source: UT System Model Policy for Sexual Misconduct (2021)

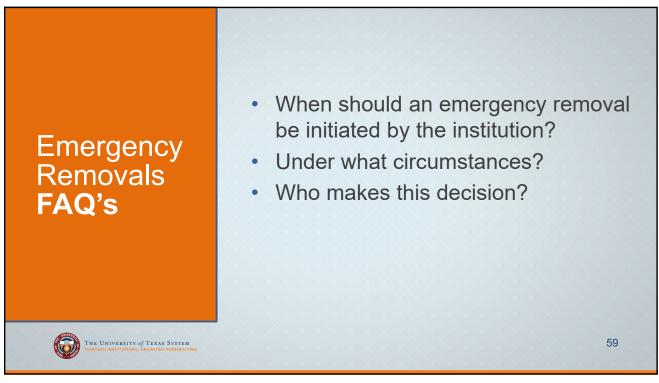
55

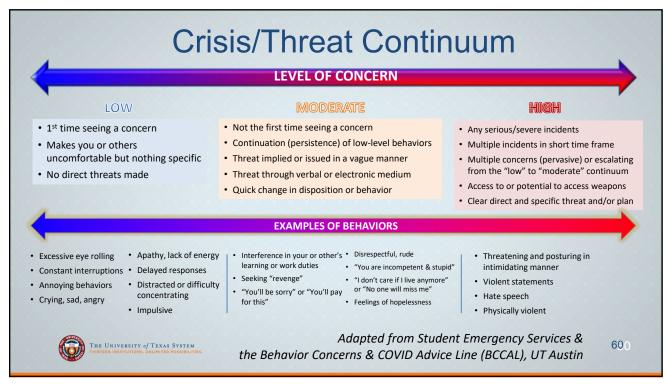


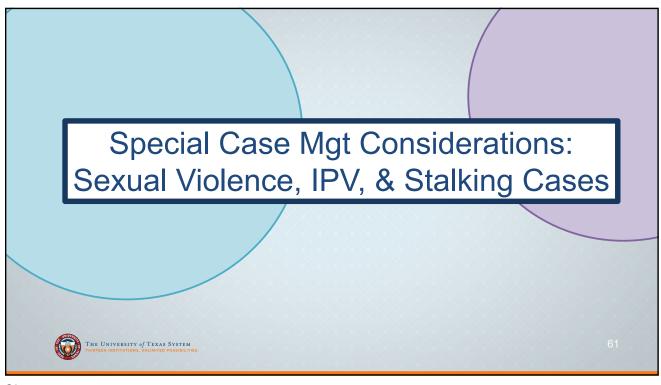


# that immediate threat to the physical health & safety of any student or other individual arising from the allegations justifies the respondent's removal from the education program or activity. Notice & opportunity to challenge the decision immediately following the removal. Rights under ADA & Section 504 still apply. Doesn't preclude an institution from placing nonstudent employee respondents on administrative leave during the pendency of the grievance process.

1. Individualized safety & risk analysis: Determines







## Determining Predominant Aggressors

#### **Common Considerations:**

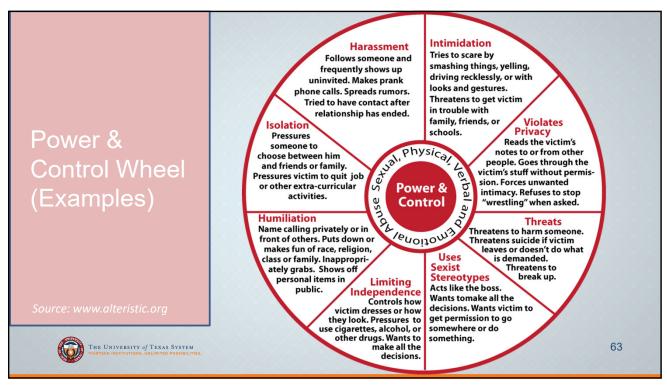
- Indicators of power & control
- Presence or threat of a weapon
- History of dating or domestic violence
- Aggressive or hostile body language
- Pre-existing protective orders or "no contact" directives
- Comparative extent of injury (if both are injured)
- Property damage
- · Elements of fear



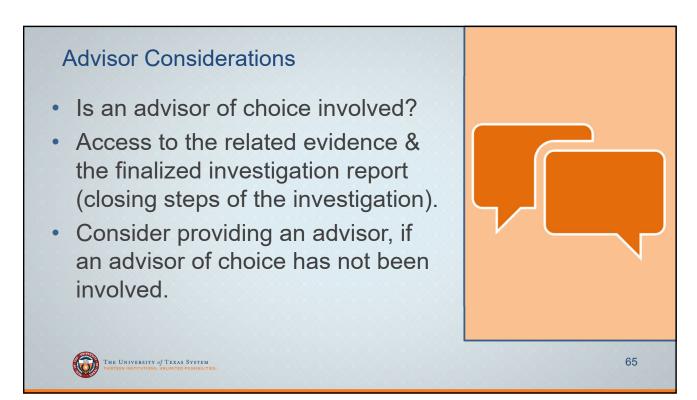
Source:

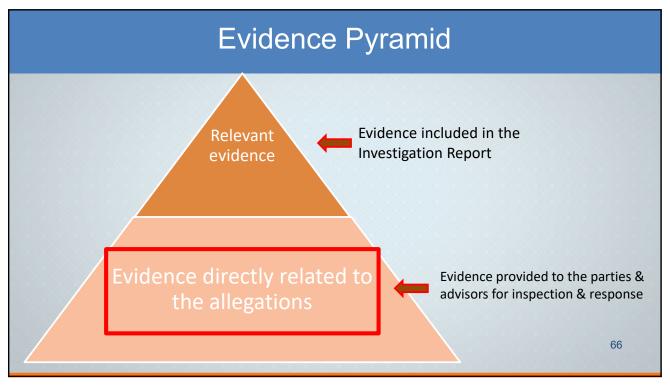
The National Center for Campus Public Safety

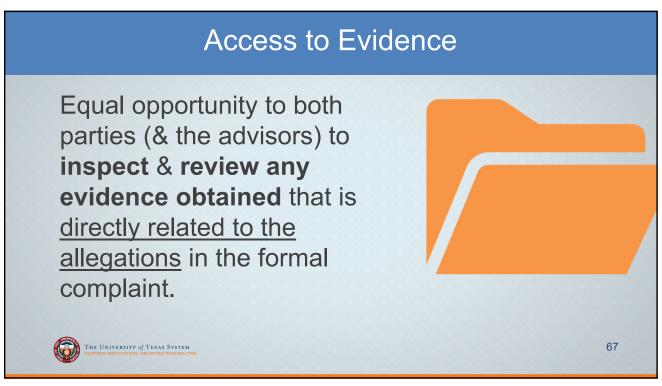
62

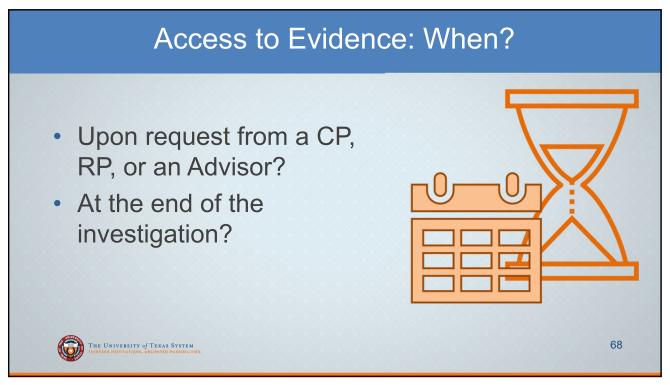












## Access to Evidence (Cont.)

Send each party (& the advisors\*) the applicable evidence:

- In hard copy or electronic format
- At least 10 days to inspect,
   review, & respond to the evidence
- All responses to the evidence must be submitted in writing to the investigator(s)

<sup>\*</sup> Advisor of choice; or the provided advisor by the institution (If applicable)



69

69

### Access to Evidence (Cont.)

The investigators will consider all timely responses submitted by the parties **prior** to completing the investigation report.



70

#### Draft vs. Completed Investigation Report

#### FAQ's:

- When should the investigation report be released to the parties (and the party's advisors)?
- Can the institution provide a draft investigation report first?





71

71

## Access to the Completed Investigation Report

Send each party (& the advisors\*) the completed investigation report:

- At least 10 days prior to the scheduled hearing
  - Why? Opportunity for the parties to inspect, review, & respond to the investigation report (at the hearing)
- A copy of the investigation report to the TIXC and hearing officer assigned.

\* Advisor of choice; or the provided advisor by the institution (If applicable)



72

#### Investigation Timeframe (Example)

The investigation of a formal complaint will be concluded within <u>90 days</u> of the filing of a formal complaint

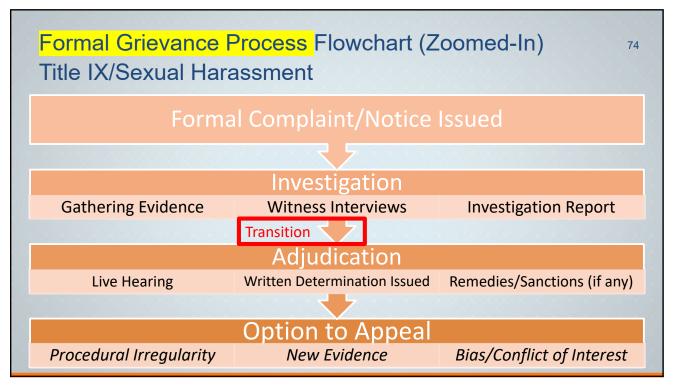
**Note:** Circumstances may require a **temporary delay** in this timeframe & the institution may <u>extend</u> this timeframe for <u>good cause</u>.

Provide <u>notice</u> to the parties for temporary delays or extensions



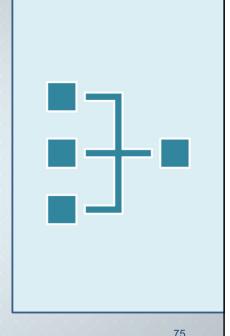
Source: UT System Model Policy for Sexual Misconduct (2021)

73



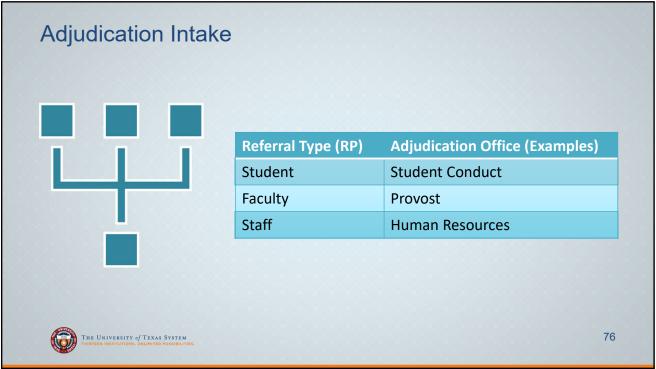
#### **Transition to Adjudication**

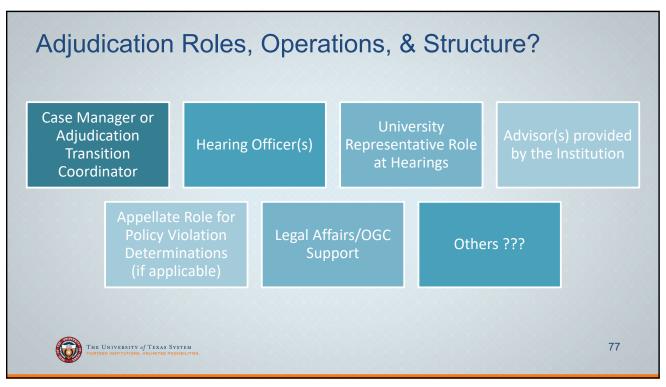
- Transition process to the adjudication office? Referral?
- An administrative coordinator for the adjudication intake, scheduling, organizing, & communicating the next steps (e.g. hearing) to all participants.

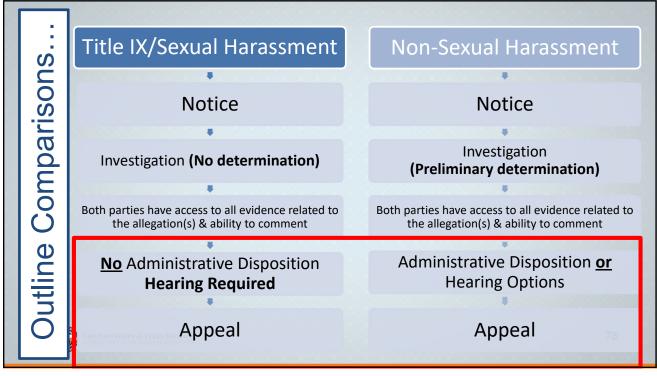


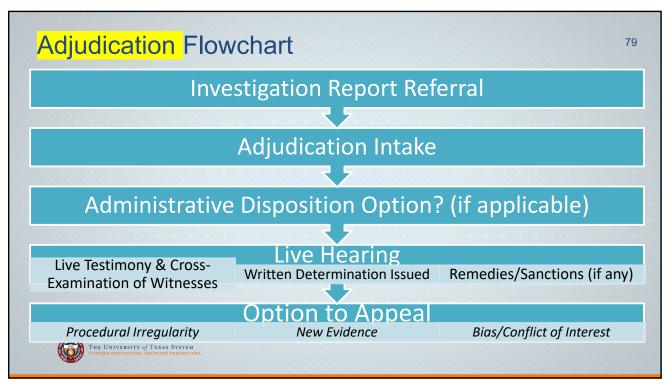
75

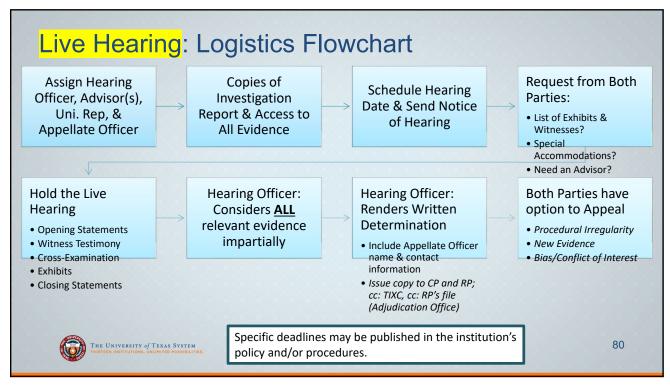
75













If a Party submits an Appeal to the Appellate Officer...

Provide copy of Appealing Party's Appeal to the Non-Appealing Party for opportunity to respond & deadline to respond.

Appellate Officer:
Consider <u>ALL</u> points of view & relevant evidence impartially

Appellate Officer:
Renders Final Determination
Issue copy to CP and RP;
cc: TIXC, cc: RP's file
(Adjudication Office)

Specific deadlines may be published in the institution's policy and/or procedures.



81

81

#### Grievance Process Timeframe (Example)

The entire Grievance Process will be completed in no more than <u>150 days</u> from the filing of the formal complaint

**Note:** Circumstances may require a **temporary delay** in this timeframe & the institution may <u>extend</u> this timeframe for <u>good cause</u>.

Provide <u>notice</u> to the parties for temporary delays or extensions



82

Source: UT System Model Policy for Sexual Misconduct (2021)

#### **Documentation & Record Keeping**

- Documentation Checklists & Forms
- Intake & Initial Assessments
- Case Management Timelines & Decisions
- Contact & Communications
- Notices, Letters, Dismissals, & Reports
- Written Determinations
- Appeals
- Data Systems for Electronic & Hard Copy Records



83



83



#### **Contact Information**

Krista Anderson	Sean Flammer
Systemwide Title IX Coordinator	Assistant General Counsel
Office of Systemwide Compliance UT System (Austin, TX)	Office of General Counsel UT System (Austin, TX)
Phone: 512-664-9050	Phone: 512-579-5106
Email: kranderson@utsystem.edu	Email: sflammer@utsystem.edu



85