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Association of
Title IX Administrators

September 5, 2024

Time With IX: Investigators as Decision-Makers

W. Scott Lewis, J.D., Managing Partner, TNG; Chair, NABITA Advisory Board

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Alisha Carter Harris, M.S., Senior Consultant, TNG

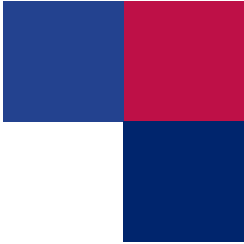


Strategic Risk
Management Solutions



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Today's Presenters



W. Scott Lewis, J.D.,
Managing Partner, TNG;
Chair, NABITA Advisory
Board



Joseph Vincent, M.L.S.,
Partner and Vice
President for
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Alisha Carter Harris, M.S.,
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Can We Implement the Investigator as Decision-Maker Model?

- Higher education institutions in the following jurisdictions are required to have hearings:
 - “Baum” Hearing:
 - 6th Circuit: Kentucky, Michigan, Ohio, Tennessee (public institutions)
 - 3rd Circuit: Pennsylvania (public and private institutions)
 - “Haidak” Hearing:
 - 1st Circuit: Massachusetts, Maine, New Hampshire, Rhode Island, Puerto Rico (public institutions)
 - 5th Circuit: Louisiana, Mississippi, Texas (public institutions)
 - 8th Circuit: Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, South Dakota (public institutions)

“Single Investigator Model”

- Describes a practice by which a single individual investigates allegations of misconduct *and* makes the final determination as to whether a policy was violated
- Widely used in corporate HR-based investigations
- Infrequently used in higher education settings, even prior to the 2020 Title IX regulations
- Process does not permit an appeal
- Criticisms:
 - One person serves as “investigator, judge, and jury”
 - Does not center due process rights or fairness in the process
 - May produce a more biased/less accurate outcome

Investigator as Decision-Maker Model

- Investigator investigates allegations of misconduct *and* makes the final determination as to whether a policy was violated
- Widely used in higher education proceedings prior to the issuance of the 2020 Title IX regulations and for other types of investigations (*e.g.*, Title VI, Title VII, ADA/504, etc.)
- Incorporates an appeal into the process
- Often included a secondary review by General Counsel or Title IX Coordinator
- Typically more due process conscious – incorporates evidentiary review, exchange of questions, full notice of outcome
- Benefits:
 - Efficient/Economic
 - Decision made by the individual most familiar with the facts of the complaint

Decision-Making Requirements: § 106.45

- Section 106.45 requires institutions to provide a process enabling the Decision-maker (DM) to question parties and witnesses to **assess credibility**
 - No additional guidance provided as to structure
- Process must be outlined in policy and procedures
- Investigator can be the DM
 - TIXC can be the Investigator and/or the DM
- Advisors not required
- Questioning by parties not required
- Recipient must notify parties in writing of the determination, rationale, and appeal procedures (if offered)
- Appeal not required

Decision-Making Requirements: § 106.46

- Section 106.46 **requires** institutions to provide a process enabling the DM to question parties and for parties to **propose and ask relevant questions**
 - Individual meetings or live hearings
- Regardless of whether an institution uses individual meetings or live hearings, the DM makes relevance determinations of all questions prior to a party or witness answering
 - May not permit unclear or harassing questions, advisor may rephrase
- Investigator can be the DM (**not recommended**)
 - TIXC can be the Investigator and/or the DM (**not recommended**)
- A DM may place **less or no weight** on statements by a party or witness who refuses to respond to relevant questions
- A DM may not draw an inference about whether sex-based harassment occurred **solely** based on a party or witness's refusal to respond to relevant questions

Best Practices for Investigators Serving as Decision-Makers

Ensure the Investigator is well-trained on the following topics:

- Definition of Sex Discrimination
- Scope of education program or activity
- How to conduct a fair and adequate investigation and Title IX resolution process
- How to serve impartially, including by avoiding prejudgment of facts, conflicts of interest, and bias
- The meaning and application of the term relevant in relation to questions and evidence
- Types of evidence that are impermissible regardless of relevance
- Facilitating Decision-making process, including questioning
- Determining relevance
- Assessing credibility
- Making a finding of fact
- Determining whether policy was violated
- Assigning sanctions (if applicable)
- How to write a determination rationale

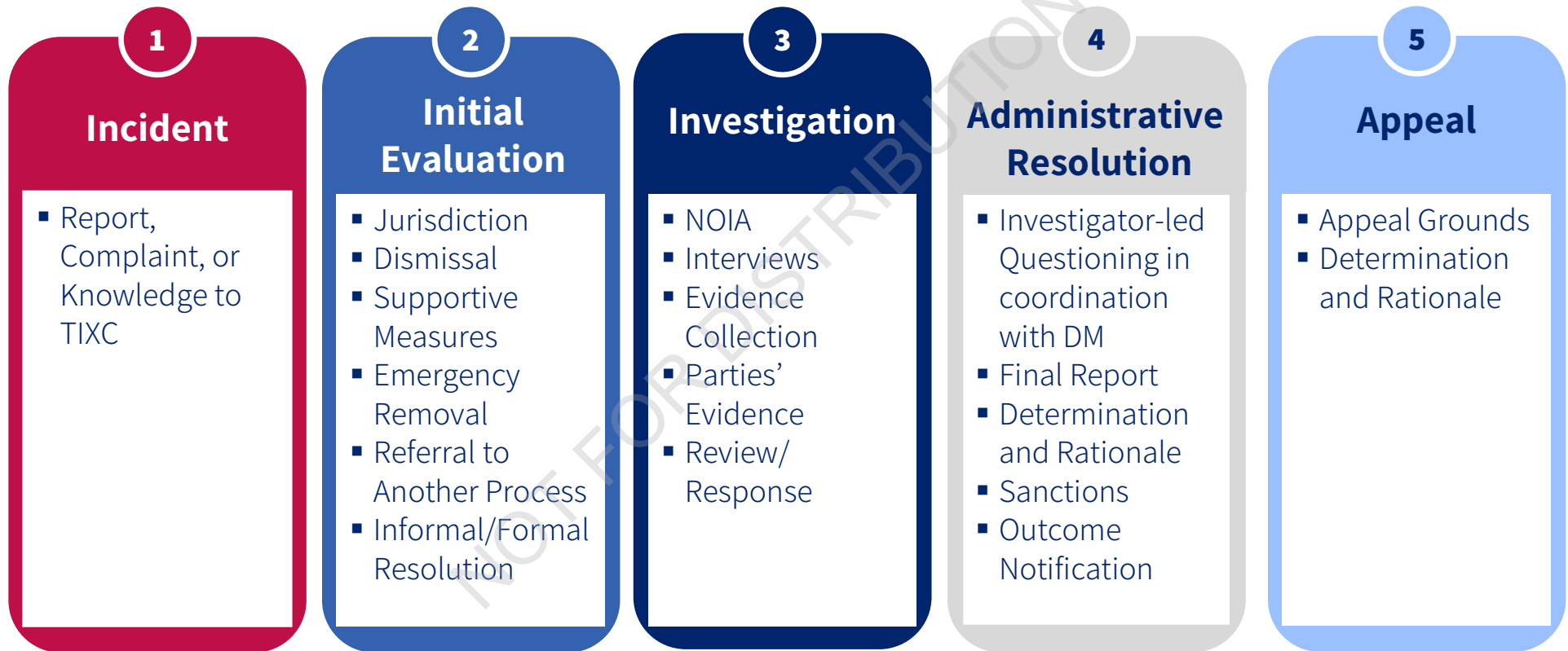
Best Practices for Investigators Serving as Decision-Makers

- Permit an appeal*
- Ensure that the Title IX Coordinator and/or General Counsel reviews the Investigator's work product
- Investigators make non-binding recommended findings and final determinations that are reviewed by separate administrator (*i.e.*, Title IX Coordinator) for final review/implementation
 - Allow this individual to engage in additional fact finding, when necessary
- Where violations of policy are found, have a separate administrator determine sanctions

ATIXA's Recommended Resolution Model

- Administrative Resolution Process
 - Outlined in 1P1P and AMPP
 - Satisfies the requirements of both § 106.45 and § 106.46
 - Ensures fairness and infuses best practices into the process
- Employs a separate Decision-maker who works with the Investigator to conduct separate meetings to question the parties and witnesses
 - The parties can also engage in questioning of each other/witnesses through the Investigator
- Collaborative approach to decision-making which allows for the individual most familiar with the facts of the complaint (*i.e.*, Investigator) to work with the Decision-maker to ensure a robust and efficient resolution process

ATIXA Title IX Resolution Process



Questions?

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