



Title IX and SGD Hearing Panel Training, Part I

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Fall 2020

1



Title IX and SGD Hearing Panel Training, Part I

Content Warning

This presentation will discuss sexual violence, sexual harassment, and other acts of sex and gender discrimination (SGD). If those topics can be triggering for you, please practice self-care and/or reach out to your support system as needed.

If you need someone to talk to confidentially, you can contact the **Guadalupe Valley Family Violence Shelter at outreach@safesequin.org or 830-372-2780 or 800-834-2033 (24/7)**

or the RAINN National Sexual Assault Hotline at 800-656-HOPE (24/7)

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2



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Overview

- **What's New with Title IX (TIX) and Sex/Gender Discrimination (SGD)?**
 - New Personnel; New Definitions; New Requirements; New Processes
- **TLU Policies and Processes**
 - Definitions; Investigation Process; Disciplinary Process
- **Advising Basics**
 - Expectations; Role in Meetings; Role in Hearing Panels

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3



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What's New with Title IX and SGD?

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4

Title IX Coordinator & Deputy TIX Coordinators

| | | | | | | |
|--|--|---|--|--|--|---|
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2020-21

5



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ED's TIX Regulations Timeline

- **April 4, 2011 – Obama admin ED sends “Dear Colleague Letter” on Sexual Violence (guidance, not law)**
 - **September 22, 2017 – Trump admin ED rescinds 2011 DCL**
- **November 16, 2018 – ED releases proposed new TIX regs (weight of law); opens comment/review period**
 - **May 6, 2020 – ED releases final new TIX regs (2000+ pages)**
- **August 14, 2020 – Effective date of new regs, including revised policy publication**

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6



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Summary of ED's New TIX Regulations

- **I. New definition of what is covered under Title IX**
- **II. New investigation procedure requirements**
- **III. New resolution procedure requirements**

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7



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Summary of ED's New TIX Regulations

- **I. New definition of what is covered under Title IX**
 - Title IX “sexual harassment” includes:
 - *Quid pro quo* harassment by a school employee RP
 - Unwelcome conduct “so severe, pervasive, and objectively offensive” that it denies CP equal educational access
- **Clery/VAWA sexual violence – sexual assault, stalking, dating violence, domestic violence**

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8



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Summary of ED's New TIX Regulations

- **In addition, TIX allegations:**
 - **Must occur in the US (study abroad implications)**
- **Must occur in the scope of a school's education program or activity (would include buildings owned by RSOs)**
- **Must involve CPs that are currently participating (or attempting to) in a school's education program or activity (former student implications)**

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9



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Summary of ED's New TIX Regulations

- **II. New investigation procedure requirements**
 - **Standardizes use of Complainant (CP) and Respondent (RP)**
- **Presumption that RP is "not responsible" for allegation(s) until a determination is made and "burden of proof" falls to the school, not the parties**
- **A formal complaint must be signed by CP (or TIX Coordinator if Reluctant CP) before an investigation can begin**

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10



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Summary of ED's New TIX Regulations

■ II. New investigation procedure requirements

- **RP (and CP) must receive Notice of Complaint as soon as formal complaint is signed**
- ***** Cases that don't meet new TIX standard must be dismissed (dismissals can be appealed by either party), but can still be investigated under school's own policies*****
- **Supportive measures offered can not be "unreasonably burdensome" to either party**

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11



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Summary of ED's New TIX Regulations

■ III. New resolution procedure requirements

- **Requires a live hearing for resolution (but may be held remotely, if needed, and parties may be separated)**
- **Requires that for testimony/evidence to be considered, a party (CP/RP/W) must participate in hearing and submit to cross-examination and W/RPs cannot be subject to discipline if they do not participate**
- **Requires that each party (CP/RP) must have an advisor present at hearing to conduct cross-examination (school must provided an advisor if a party does not have one)**

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12



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Summary of ED's New TIX Regulations

- **III. New resolution procedure requirements**
 - **“Rape shield” protections for CPs (no irrelevant questions/evidence regarding past sexual history) are in place**
 - **School can determine standard of evidence (“preponderance” vs. “clear and convincing”) but must use same for students and employees**
 - **Informal resolution is a possibility**

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13



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Potential Impacts of ED'S New TIX Regulations

- **Likely to see more attorneys involved in the hearing process (equity issue; CP/W non-participation?)**
 - **Informal resolution debate (appropriateness for sexual violence vs. CP non-participation)**
- **CPs (and Ws) may opt-out of participating in the TIX formal process (rather than submit to cross-examination)**

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14



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New TLU Processes

- **Title IX Process – must meet Federal TIX definition; CP (or TIXC) must sign a formal request**
 - Formal – automatically results in hearing (using new TIX requirements)
 - Informal – likely does not result in hearing
- **University (TLU’s Civil Rights Equity Resolution Policy) SGD Process – may be used if complaint does not meet Federal TIX definition**
 - Formal – may result in hearing panel or administrative hearing officer (using former requirements)
 - Informal – likely does not result in hearing

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15



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Questions on What’s New?

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16



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TLU Policies and Processes

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17



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TLU Policies and Processes

- **Policy Definitions and Examples**
- **Investigation Process Basics**
- **Disciplinary Process Basics**

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18



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TLU Policies and Processes

- **Policy Definitions and Examples – Umbrella Terms**
 - Title IX “Sexual Harassment” includes:
 - **Quid pro quo harassment by Employee RP only**
 - Harassment so severe AND pervasive AND objectively offensive (hostile environment)
 - **Sexual violence: sexual assault, dating violence, domestic violence, or stalking**
 - University “Sex and Gender Discrimination” includes:
 - **Sexual exploitation**
 - Harassment so severe, persistent, OR pervasive (more than just hostile environment)
 - **Sexual violence: sexual assault, dating violence, domestic violence, or stalking – that doesn’t fall under TIX definition or jurisdiction**

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19



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- **Policy Definitions and Examples**
 - **Sexual Harassment (Federal definition):**
 - **Quid pro quo harassment by Employee RP only**
 - Harassment so severe AND pervasive AND objectively offensive that it prevents or inhibits education, employment, or other activities
 - **Used for TIX process**

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20



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TLU Policies and Processes

- **Policy Definitions and Examples**
 - **Sexual Harassment (State of Texas definition):**
 - “[...] in the employment context, unreasonably interferes with a person’s work performance or creates an intimidating, hostile, or offensive work environment”, and;
 - “[...] in the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with a student’s ability to participate in or benefit from educational programs or activities at a postsecondary educational institution.”
 - **Used for University (SGD) process**

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21



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Examples of Sexual Harassment Reports

- **“Employee A sent me nude photos of himself/herself via text today while I was working.”**
- **“Student B has texted me every night this week to come over to his/her apartment late at night to hook up. I’ve repeatedly told Student B I’m not interested.”**
- **“Employee C sits and just stares at me the entire time I’m swimming laps in the pool. It makes me feel uncomfortable. My friend has asked Employee C to stop, but he/she doesn’t. It makes me want to stop swimming.”**
- **“Student D was telling anti-gay jokes during our group meeting today in the library, even though he/she knows that group member Student E identifies as gay. We all asked Student D to stop, but he/she laughed it off like it wasn’t a big deal. It’s really impacting the group getting our project done.”**

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22



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TLU Policies and Processes

- **Policy Definitions and Examples**
 - **Sexual Assault**
 - **Forcible Offenses**
 - Forcible Rape
 - Forcible Sodomy
 - Sexual Assault with an Object
 - Forcible Fondling
 - **Non-Forcible Offenses**
 - Incest
 - Statutory Rape
 - **Used for TIX and University (SGD) processes**

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23



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TLU Policies and Processes

- **Policy Definitions and Examples**
 - **Sexual Assault**
 - **Forcible Rape:**
 - Penetration,
 - **no matter how slight,**
 - **of the vagina or anus with any body part or object, or**
 - **oral penetration by a sex organ of another person,**
 - **without the consent of the Complainant.**
 - **Forcible Sodomy:**
 - Oral or anal sexual intercourse with another person,
 - **forcibly,**
 - **and/or against that person's will (non-consensually), or**
 - **not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.**

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24



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- **Policy Definitions and Examples**
 - **Sexual Assault**
 - **Sexual Assault with an Object:**
 - The use of an object or instrument to penetrate,
 - **however slightly,**
 - the genital or anal opening of the body of another person,
 - **forcibly,**
 - and/or against that person's will (non-consensually),
 - or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
 - **Forcible Fondling:**
 - The touching of the private body parts of another person (buttocks, groin, breasts),
 - for the purpose of sexual gratification,
 - **forcibly,**
 - and/or against that person's will (non-consensually),
 - or not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

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25



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- **Policy Definitions and Examples**
 - **Sexual Assault**
 - **Incest:**
 - Non-forcible sexual intercourse,
 - **between persons who are related to each other,**
 - within the degrees wherein marriage is prohibited by Texas state law.
 - **Statutory Rape:**
 - Non-forcible sexual intercourse,
 - with a person who is under the statutory age of consent in Texas, which is 17 years old, although if the victim was at least 14 years old, it is not statutory rape if the other party was not more than three years older.

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26



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TLU Policies and Processes

- **Policy Definitions and Examples**
 - **Consent**
 - **Force**
 - **Coercion**
 - **Incapacitation**

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27



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TLU Policies and Processes

- **Policy Definitions and Examples**
 - **Consent:**
 - **knowing, and**
 - **voluntary, and**
 - **clear permission**
 - **by word or action**
 - **to engage in sexual activity.**
 - **Individuals may perceive and experience the same interaction in different ways. Therefore, it is the responsibility of each party to determine that the other has consented before engaging in the activity.**

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28



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TLU Policies and Processes

Policy Definitions and Examples

- If consent is not clearly provided prior to engaging in the activity, consent may be ratified by word or action at some point during the interaction or thereafter, but clear communication from the outset is strongly encouraged.
- For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct. Reasonable reciprocation can be implied. For example, if someone kisses you, you can kiss them back (if you want to) without the need to explicitly obtain their consent to being kissed back.
- Consent can also be withdrawn once given, as long as the withdrawal is reasonably and clearly communicated. If consent is withdrawn, that sexual activity should cease within a reasonable time.

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29



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Policy Definitions and Examples

- Consent to some sexual contact (such as kissing or fondling) cannot be presumed to be consent for other sexual activity (such as intercourse). A current or previous intimate relationship is not sufficient to constitute consent.
- Proof of consent or non-consent is not a burden placed on either party involved in an incident. Instead, the burden remains on the University to determine whether its policy has been violated. The existence of consent is based on the totality of the circumstances evaluated from the perspective of a reasonable person in the same or similar circumstances, including the context in which the alleged incident occurred and any similar and previous patterns that may be evidenced.
- Consent in relationships must also be considered in context. When parties consent to BDSM or other forms of kink, non-consent may be shown by the use of a safe word. Resistance, force, violence, or even saying "no" may be part of the kink and thus consensual, so the University's evaluation of communication in kink situations should be guided by reasonableness, rather than strict adherence to policy that assumes non-kink relationships as a default.

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30



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■ Policy Definitions and Examples

- Silence or the absence of resistance alone is not consent. Consent is not demonstrated by the absence of resistance. While resistance is not required or necessary, it is a clear demonstration of non-consent

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31



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■ Policy Definitions and Examples

- Force:
 - The use of physical violence and/or physical imposition to gain sexual access.
 - Force also includes threats, intimidation (implied threats), and coercion that is intended to overcome resistance or produce consent
 - e.g., "Have sex with me or I'll hit you," which elicits the response, "Okay, don't hit me, I'll do what you want."
 - Sexual activity that is forced is, by definition, non-consensual, but non-consensual sexual activity is not necessarily forced

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32



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Policy Definitions and Examples

- **Coercion:**
 - **Unreasonable pressure for sexual activity**
 - **Coercive conduct differs from seductive conduct based on factors such as the type and/or extent of the pressure used to obtain consent**
 - **When someone makes clear that they do not want to engage in certain sexual activity, that they want to stop, or that they do not want to go past a certain point of sexual interaction, continued pressure beyond that point can be coercive**

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33



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Policy Definitions and Examples

- **Incapacitation:**
 - **A person cannot consent if they are unable to understand what is happening or is disoriented, helpless, asleep, or unconscious for any reason, including by alcohol or other drugs**
 - **Incapacitation occurs when someone cannot make rational, reasonable decisions because they lack the capacity to give knowing/informed consent**
 - **e.g., to understand the “who, what, when, where, why, and how” of their sexual interaction**
 - **Incapacitation is determined through consideration of all relevant indicators of an individual’s state and is not synonymous with intoxication, impairment, blackout, and/or being drunk**
 - **This policy also covers a person whose incapacity results from a temporary or permanent physical or mental health condition, involuntary physical restraint, and/or the consumption of incapacitating drugs**
 - **It is a defense to a sexual assault policy violation that the Respondent neither knew nor should have known the Complainant to be physically or mentally incapacitated. “Should have known” is an objective, reasonable person standard that assumes that a reasonable person is both sober and exercising sound judgment**

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34



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Examples of Sexual Assault Reports

- **“Student A and I were at a party together Saturday. I got really drunk and blacked out. I remember dancing and then the next thing I remember, my clothes were on the floor in Student A’s bedroom and Student A was having sex with me/touching me/performing oral sex on me.”**
- **“Employee B came up behind me while I was standing at the printer and grabbed my breast/buttocks/crotch.”**
- **“Student C is my partner and we’ve been sexually active with each other for two years. Last night, we were having consensual sex and I told Student C that I wanted to stop. Student C wouldn’t stop until he/she was finished.”**

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35



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- **Policy Definitions and Examples**
 - **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 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.**
- **Used for TIX and University (SGD) processes**

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36



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TLU Policies and Processes

■ Policy Definitions and Examples

- 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 Texas, 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 Texas.
- Used for TIX and University (SGD) processes

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37



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Examples of Dating/Domestic Violence Reports

- "I've been dating Student A for two weeks. Last night, we got into an argument because he/she called me stupid and ugly. I yelled back at Student A and eventually I slapped him/her."
- "Employee B tried to break up with his/her partner, Employee C, last weekend. Employee C got really upset and broke Employee B's phone, screaming, 'I know you are seeing someone else' and 'I'll never let you go'."
- "My roommate and ex-partner, Student D, came home falling-down drunk Friday night. When I tried to help Student D get to his/her bedroom, Student D got mad and shoved me hard against the wall and yelled in my face that he/she didn't need my help."

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38



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TLU Policies and Processes

- **Policy Definitions and Examples**
 - **Stalking:**
 - engaging in a course of conduct,
 - on the basis of sex,
 - directed at a specific person, that
 - would cause a reasonable person to fear for the 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.
 - Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
 - Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
 - **Used for TIX and University (SGD) processes**

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39



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Examples of Stalking Reports

- **“Student A and I broke up two months ago. He/she texts me repeatedly every day and calls me late at night and hangs up. Now, Student A has started waiting for me outside of my classes. I’ve told Student A to stop contacting me, but he/she won’t stop.”**
- **“Student B and I were friends until he/she told me he/she had feelings for me. Student B got upset and started blowing me up on Messenger. I eventually blocked Student B on all social media. Now, Student B has created a number of fake accounts and keeps trying to add/follow me, until I block those accounts, too. Student B doesn’t identify himself/herself, but I know it’s him/her. It’s really upsetting me and I’m worried what will happen next.”**

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40



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TLU Policies and Processes

- **Policy Definitions and Examples**
 - **Sexual Exploitation:**
 - **An individual taking non-consensual or abusive sexual advantage of another for their own benefit or for the benefit of anyone other than the person being exploited, and that conduct does not otherwise constitute sexual harassment under this policy.**
 - **Examples of Sexual Exploitation include, but are not limited to:**
 - **Sexual voyeurism (such as observing or allowing others to observe a person undressing or using the bathroom or engaging in sexual acts, without the consent of the person being observed)**
 - **Invasion of sexual privacy**
 - **Taking pictures, video, or audio recording of another in a sexual act, or in any other sexually-related activity when there is a reasonable expectation of privacy during the activity, without the consent of all involved in the activity, or exceeding the boundaries of consent (such as allowing another person to hide in a closet and observe sexual activity or disseminating sexual pictures without the photographed person's consent), including the making or posting of revenge pornography**
 - **Prostituting another person**
- **Used for University (SGD) process (only)**

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41



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TLU Policies and Processes

- **Policy Definitions and Examples**
 - **Examples of Sexual Exploitation include, but are not limited to:**
 - **Engaging in sexual activity with another person while knowingly infected with human immunodeficiency virus (HIV) or a sexually-transmitted disease (STD) or infection (STI), without informing the other person of the virus, disease, or infection**
 - **Causing or attempting to cause the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity, or for the purpose of making that person vulnerable to non-consensual sexual activity**
 - **Misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual connections**
 - **Forcing a person to take an action against that person's will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity**
 - **Knowingly soliciting a minor for sexual activity**
 - **Engaging in sex trafficking**
 - **Creation, possession, or dissemination of child pornography.**
- **Used for University (SGD) process (only)**

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42



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Questions on Policy Definitions?

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43



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TLU Policies and Processes

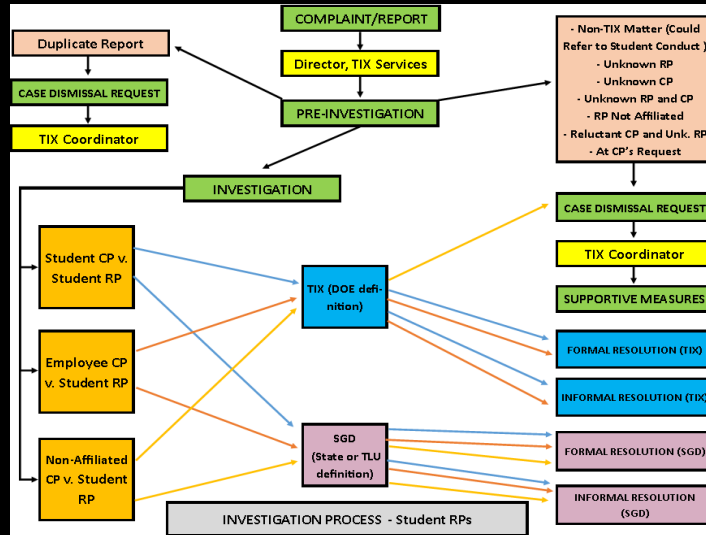
- **Investigation Process**
 - **Student as Respondent (RP)**
 - **TIX Process or University (SGD) Process**
 - **Employee as Respondent (RP)**
 - **TIX Process or University (SGD) Process**
 - **Non-Affiliated as Respondent (RP)**
 - **Case Dismissal (may refer elsewhere)**

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44



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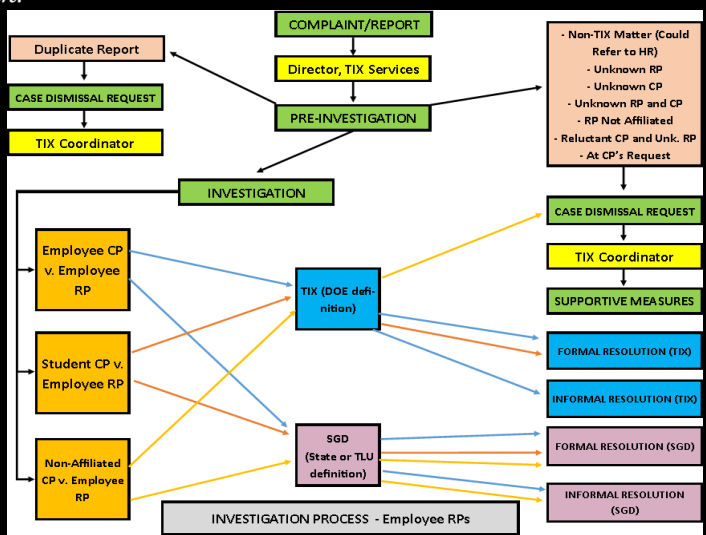


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45



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46



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TLU Policies and Processes

Steps of Investigation

- Preliminary Investigation – speak with each party; offer supportive measures (such as *No Contact Orders*); get written statements; assess what we have
- For Title IX (only), CP must request in-writing for formal investigation to proceed (TIXC can sign off on CP's behalf)
- *Notice of Investigation/Allegations* – sent to both parties
- Meet with CP and RP (w/Advisors); Ask for witnesses, evidence, questions for other party
- Meet with Ws
- Last Call for Witnesses/Evidence
- Write investigation report – timeline, meeting notes, evidence, all communications, undisputed facts. For ERP investigations (non-TIX), also credibility assessments, policy review. NO RECOMMENDATIONS.
- Parties receive/review report – may submit responses/adequacy requests to TIXC

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47



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Disciplinary Process

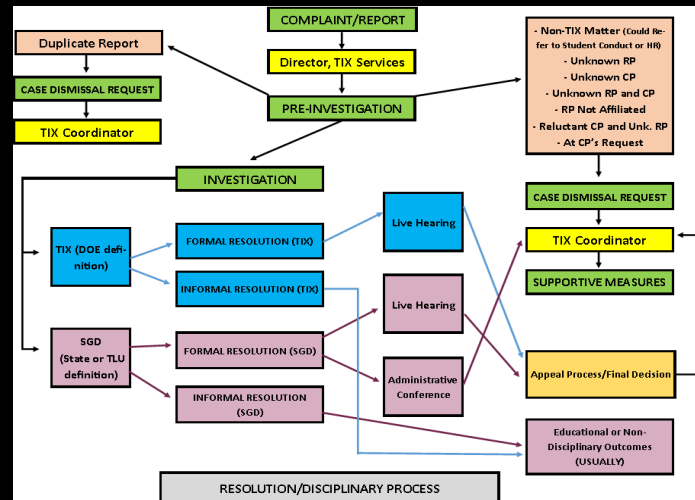
- Title IX Process
 - Formal = Live Hearing
 - Informal
- University (SGD) Process
 - Formal = Live Hearing or Administrative Conference
 - Informal

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48



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49



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TLU Policies and Processes

Steps of Disciplinary Process

- ADOS or Director, Human Resources receives the investigation report; assigns date of hearing
- **Notice of Hearing** to all parties
- Scheduled hearing panel members (Chair + three voting members) are notified
- **(Title IX hearings only) Advisors are assigned to the parties if they don't have their own**
- **(Title IX hearings only) Pre-Hearing meeting with Chair and Party Advisors**
- **Hearing conducted**
- ADOS or Director, Human Resources receives deliberation report from Chair
- **Determination letter with sanctions (if assigned) sent to parties, with appeals procedures for both parties**
- **If appeal is approved, appeal panel members notified; receive appeal for review**
- **Appeal approved/denied**
- **Final determination**

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50



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Questions on Basic Processes?

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51



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Advising Basics

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52



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Advising Basics

- **Selecting an Advisor**
- **Advisor Expectations**
- **Advising in the Investigation Process**
- **Advising in the Hearing Process**

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53



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Advising Basics

- **Selecting an Advisor**
 - Parties select their own advisors – may be family member, friend, roommate, mentor, attorney, etc.
 - Ideally should not be an involved party (W), but new TIX regulations prevent prohibiting that
 - If parties don't have an advisor, University may offer a list of trained Fac/Staff advisors
 - Currently: Hearing panel pool + non-investigating Deputy TIX Coordinators
 - Soon: Creating a pool specific to advising
 - Parties have the right NOT to have an advisor, except in Title IX formal hearings
 - Parties can switch advisors at any point

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54



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Advising Basics

- **Advisor Expectations**
 - Advisors should help parties prepare for meetings and advise ethically, with integrity, and in good faith
 - **Not an easy role**
 - Should let party know up front if they do not wish or are not able to perform role
 - **Advisors should adjust their schedules to attend scheduled meetings**
 - Advisors should take the time to read University policies and procedures and all correspondence sent from the Investigators/Hearing administrators
 - **Advisors are subject to University policies and procedures, must know their role, and should not disrupt proceedings**

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55



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Advising Basics

- **Advising in the Investigation Process**
 - The advisee must sign a FERPA release form to allow information to be shared with the advisor
 - **Advisors are expected to maintain total privacy of records or info shared with them**
 - Advisors may request to meet with the Investigators prior to meetings/interviews
 - **Main job is to support and advise – parties are expected to respond to questions on their own behalf**
 - Advisors may ask procedural questions or advise the advisee to respond/not respond to a question
 - **Advisors should monitor advisee's mental/physical state and request breaks when needed, either to confer about questioning and/or for health reasons**

Fall 2020

56



Title IX and SGD Hearing Panel Training, Part I

Advising Basics

- **Advising in the Hearing Process**
 - The advisee must sign a FERPA release form to allow information to be shared with the advisor
 - **Advisors are expected to maintain total privacy of records or info shared with them**
 - Advisors should formulate questions (in conjunction with advisees) for other parties (Investigators, Ws, RP/CP) prior to hearing and share with Chair at pre-hearing meeting.
 - **Can also ask procedural questions or challenge evidence (relevant/irrelevant) during pre-hearing meeting**
 - Advisors are expected to ask cross-examination questions of other parties. Refusal to do so may result in hearing being delayed and Advisor replaced.
 - **Advisors will submit cross-examination questions to Chair, who will ask the parties the questions directly**
 - Otherwise, role is the same – support and advise. May not directly address the hearing panel. Evidence challenges are only permitted in pre-hearing meetings

Fall 2020

57



Title IX and SGD Hearing Panel Training, Part I

Questions on Advising?

Fall 2020

58



Title IX and SGD Hearing Panel Training, Part I

Next Time (Part II)

- **Hearing Panel Procedures In-Depth**
 - Chair Responsibilities; TIX Formal Hearings (Differences from SGD Hearings); Implicit Bias/Objectivity; Evaluating Evidence; Hearing Checklists and Scripts; Trauma Informed Processes; Appropriate Remedies
- **ATIXA Training Videos (Likely On Own)**
 - Assessing Credibility (Parts I and II); Due Process; Questioning; Applying Preponderance and Making a Finding; Deliberations and Groupthink; Pattern and Predation; Appeals
- **Special Topics – As we go?**
 - Social Media Updates/Phone Technology; Effects of Alcohol

Fall 2020

59



Title IX and SGD Hearing Panel Training, Part I

How to Report a TIX or SGD Allegation?

- **By Phone (24/7): Campus Conduct Hotline 866-943-5787**
- **Online (24/7): MyTLU > Public > File a Complaint > Incident Reporting Form**
or
my.tlu.edu/TIXreport
- **In-Person (Email/Voicemail 24/7): titleix@tlu.edu; Title IX Coordinator; Deputy Title IX Coordinators; Director, TIX Services**

Fall 2020

60



**Title IX and SGD
Hearing Panel
Training, Part I**

To Contact TIX Services

- **Email: mhunt@tlu.edu**
- **Call: 830-372-6327**

Fall 2020