

Sexual Misconduct Case Management Training (Part 2 Scenarios)

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Spring 2021

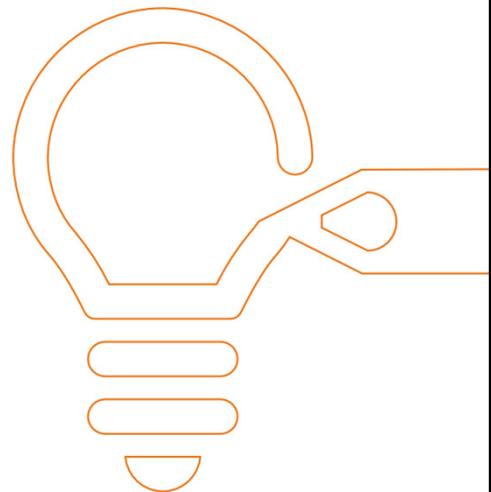


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Agenda

1. Title IX Introduction
2. Case Mgt Hypothetical Scenarios
 - General Case Mgt Decision-Points
 - TIXC: When to File a Formal Complaint?
 - Threat Assessment Cases
 - Formal Complaint Dismissals
 - Free Speech & Retaliation Cases
 - Delays during the Grievance Process
3. Q & A



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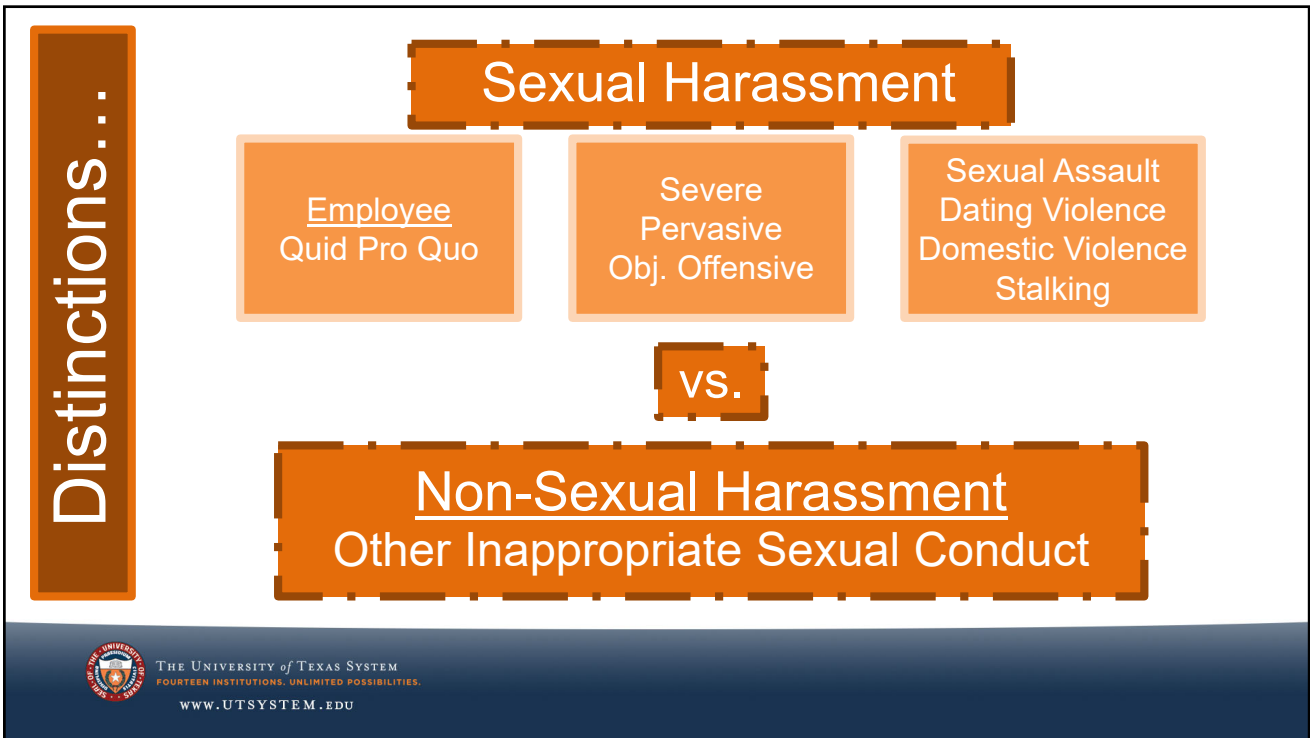


Introduction

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Distinctions...

Sexual Harassment

- Employee Quid Pro Quo
- Severe Pervasive Obj. Offensive
- Sexual Assault
Dating Violence
Domestic Violence
Stalking

VS.

Non-Sexual Harassment
Other Inappropriate Sexual Conduct

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Definition of “Sexual Harassment” under Title IX

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

1. An **employee** 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);
2. Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the institution’s education program or activity; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



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Source: Title IX Regulations (2020)

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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 **severe or pervasive** that they created a Hostile Environment, as defined in the Model Policy.
2. Physical conduct.



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Source: UT System Model Policy for Sexual Misconduct (2020)

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Definition of “Other Inappropriate Sexual Conduct” (Cont.)

Potential 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;
- Deliberate, repeated humiliation or intimidation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.



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Source: *UT System Model Policy for Sexual Misconduct (2020)*

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“Education program or activity” under Title IX

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



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Source: *Title IX Regulations (2020)*

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Key Pillars: Title IX Processes

Title IX processes should focus on **impartiality, respect, fairness, & equity** for all of the participants:

- Complainants*
- Respondents*
- Witnesses*
- Third-party Reporters*



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Serving Impartially in Your Role

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

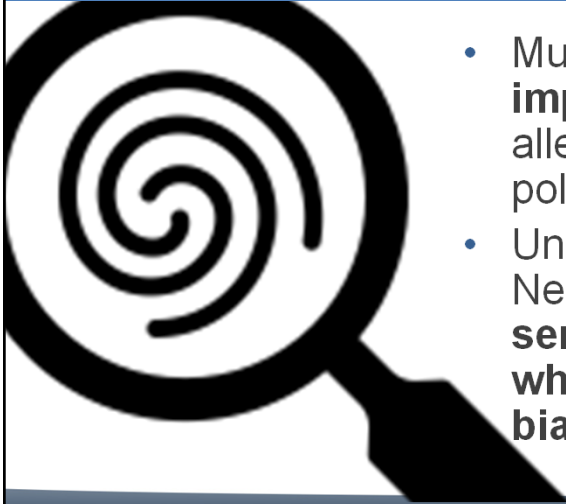


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Source: Title IX Regulations (2020)

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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)*)...



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Avoiding Bias

- Must **not** treat a party differently:
 - On the basis of the person’s **sex**;
 - On **stereotypes** about how men or women behave with respect to sexual violence; and/or
 - On the basis of the person’s **characteristics**: sex, race, ethnicity, sexual orientation, gender identity, disability, immigration status, financial ability, socioeconomic status, or other characteristic.



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“Reasonable Person” Standard



Use a “**reasonable person**” standard for weighing all of the evidence:

- An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.



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Bottom Line
for Case
Management

- Be **consistent**
- Refer to **case precedent** (e.g. similar facts or elements)
- Follow your **policy** and **process**

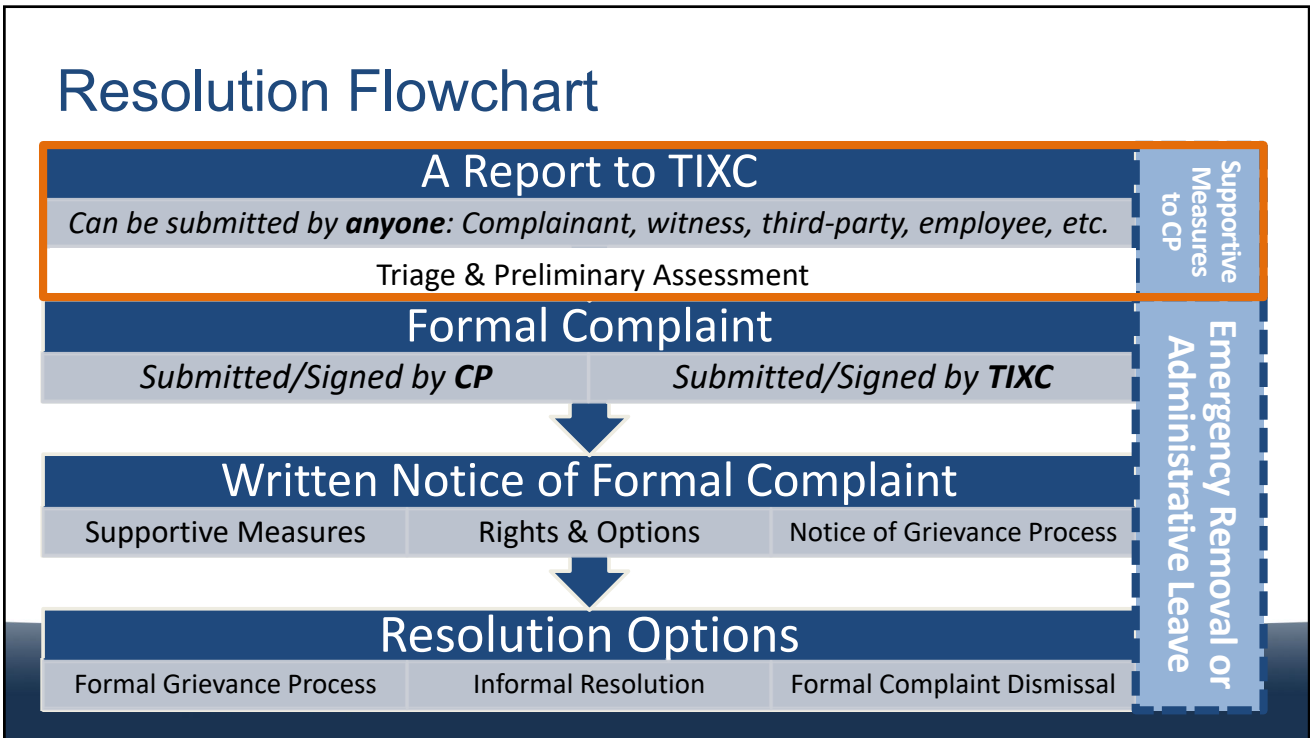


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Triage & Case Management (General Framework)

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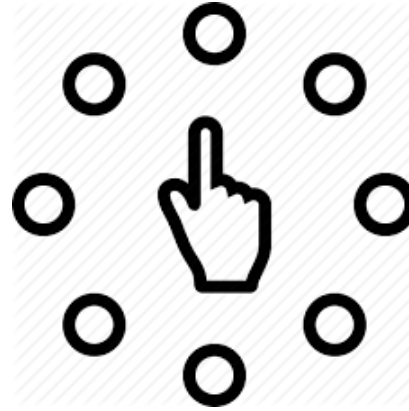
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TIXC: Options for Next Steps

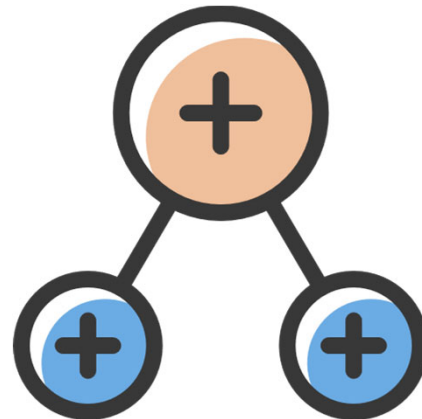
- Supportive Measures for the CP
- CP's right to file a formal complaint
- TIXC files a formal complaint, in lieu of a Reluctant Complainant & compelling reasons to investigate further...

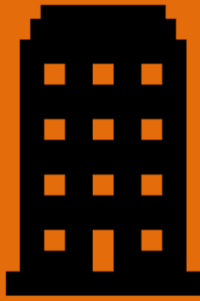


TIXC: File a Formal Complaint?

Consider if there are compelling reasons:

1. The **nature, circumstances, & seriousness** of the alleged conduct;
2. The **safety & risk of harm** to others;
3. Any **pattern evidence**, other similar conduct or allegations of the **RP**;
4. **RP's affiliation** with the institution & **applicable options** for institutional action; and/or
5. Other relevant factors in the specific matter?





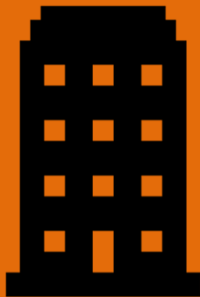
Hypothetical Scenario 1

- Responsible employee submits a **report** to the TIXC
- CP (student) disclosed being a victim of a “sexual assault” by RP (student) at an off-campus apt “last semester”

Triage/next steps?



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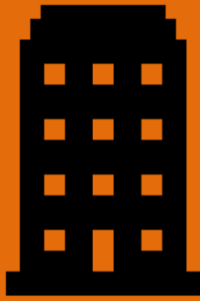
Hypothetical Scenario 1 Follow-up

- Responsible employee submits a **report** to the TIXC
- CP (student) disclosed being a victim of a “sexual assault” by RP (student) at an off-campus apt “last semester”
- CP expressly wishes “no investigation”
- Two previous reports of alleged “sexual assault” in the past year against same RP

Should the TIXC file a Formal Complaint?



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Hypothetical Scenario 1 Considerations

1. Opportunity to revisit with the 3 CP's (independently) & explore options again?
2. Case precedent? Similar cases like this in the past?
3. Specific circumstances of the alleged sexual assaults? Any predatory behaviors alleged?
4. Weigh the safety factors when filing a F.C. without CP's support or cooperation. Impacts or risks?



Hypothetical Scenario 2

- Responsible employee submits a **report** to the TIXC
- CP (student) disclosed being the victim of “sexual blackmail” by RP (student) via multiple texts and emails: Accused of threatening to post sexually explicit content of the CP “if the CP doesn’t talk to the RP”.
- CP & RP were in a previous romantic/sexual relationship; currently not together.

Triage/next steps?





Hypothetical Scenario 2 Follow-up

- Responsible employee submits a **report** to the TIXC
- CP (student) disclosed being the victim of “sexual blackmail” by RP (student) via multiple texts and emails: Accused of threatening to post sexually explicit content of the CP “if the CP doesn’t talk to the RP”.
- CP & RP were in a previous romantic/sexual relationship; currently not together.
- CP expressly wishes “no investigation”.
- CP has history of academic probation and withdrawals.

Should the TIXC file a Formal Complaint?



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Hypothetical Scenario 2 Considerations

1. Opportunity to revisit with the CP, discuss warning signs of “stalking”, safety tips, supportive measures for academic impacts, & explore options again?
2. Case precedent? Similar cases like this in the past?
3. Specific circumstances of the alleged “sexual harassment” or “stalking”? Any threats of violence, intimidation, or predatory behaviors alleged?
4. Weigh the safety factors when filing a F.C. without CP’s support or cooperation. Impacts or risks?
5. Opportunity for BIT referral for the RP?
CP?



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Hypothetical Scenario 3

- Responsible employee submits a **report** to the TIXC
- CP (student) disclosed being a victim of an “abusive relationship” by RP (student). Both CP & RP live “off campus” and are currently in a relationship together.

Triage/next steps?



Hypothetical Scenario 3 Follow-up

- Responsible employee submits a **report** to the TIXC
- CP (student) disclosed being a victim of an “abusive relationship” by RP (student). Both CP & RP live “off campus” and are currently in a relationship together.
- CP expressly wishes “no investigation”.
- One additional report of alleged “dating violence” in past month against the same RP by the same CP, involving a physical altercation (pushing and restraining arms during an argument).
- CP has described RP as “jealous” toward CP’s interactions with others, and RP “has a temper” and “gets angry easily.”
- RP has threatened “suicide” in the past when CP doesn’t return calls/texts.

Should the TIXC file a Formal Complaint?





Hypothetical Scenario 3 Considerations

1. Opportunity to revisit with the CP, discuss warning signs of “dating violence”, safety tips, supportive measures (e.g. counseling, victim advocacy) & explore options again?
2. Case precedent? Similar cases like this in the past?
3. Specific circumstances of the alleged “dating violence”? Any threats of violence, intimidation, or predatory behaviors alleged? How lethal?
4. Weigh the safety factors when filing a F.C. without CP’s support or cooperation. Impacts or risks?
5. Opportunity for BIT referral for the RP? CP?



Hypothetical Scenario 4

- Responsible employee submits a **report** to the TIXC
- CP (employee) disclosed witnessing “inappropriate conduct” of a sexual nature in the workplace by RP1 (employee) and RP2 (employee):
 - RP1 uses “vulgar” language & “picks on the women” in the office;
 - RP2 talks about their own “sexual encounters” and how attractive the coworkers are in the office.
 - The supervisor “doesn’t seem to address any of the behavior,” and it’s “interfering with the office morale & work environment.”

Triage/next steps?





Hypothetical Scenario 4 Follow-up

- Responsible employee submits a **report** to the TIXC
- CP (employee) disclosed witnessing “inappropriate conduct” of a sexual nature in the workplace by RP1 (employee) and RP2 (employee):
 - RP1 uses “vulgar” language & “picks on the women” in the office;
 - RP2 talks about their own “sexual encounters” and how attractive the coworkers are in the office.
 - The supervisor “doesn’t seem to address any of the behavior,” and it’s “interfering with the office morale & work environment.”
- CP isn’t sure what to do; and “fears retaliation” from the supervisor and coworkers.
- CP says that other women in the office have expressed “feeling uncomfortable” and have considered quitting.
- CP says the office has been like this “for a long time.”

Should the TIXC file a Formal Complaint?

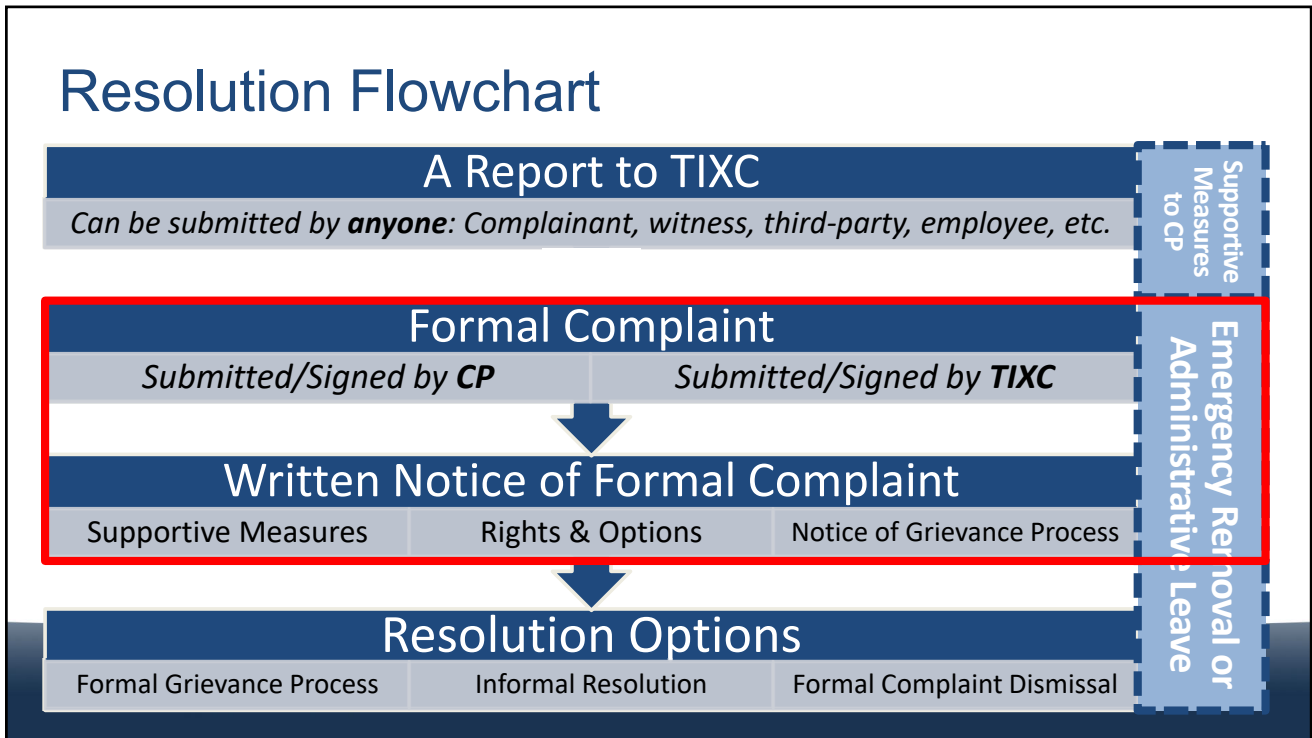


Hypothetical Scenario 4 Considerations

1. Opportunity to revisit with the CP, discuss supportive measures & discuss that the TIXC can file a F.C. to address the potential “hostile environment” in the education program or activity (e.g. work environment of the institution).
2. Duty to respond under Title VII?
3. Case precedent? Similar cases like this in the past?
4. Specific circumstances of the alleged “hostile environment”? Any intimidation, manipulation or predatory behaviors alleged? How severe?
5. Weigh the safety factors when filing a F.C. possibly without CP’s support or cooperation. Impacts or risks?

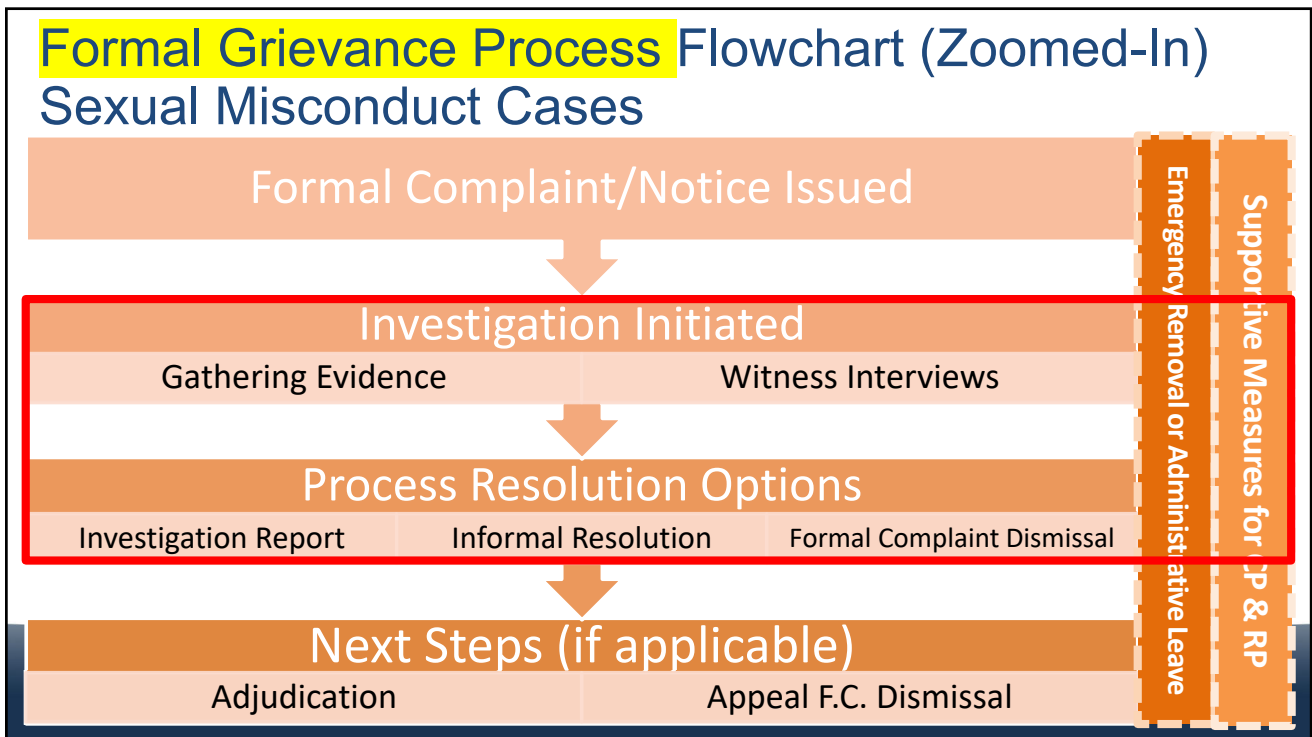


Resolution Flowchart



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Formal Grievance Process Flowchart (Zoomed-In) Sexual Misconduct Cases



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Hypothetical Scenario 4 Updates

- TIXC initiates & signs **formal complaints** into: (a) the allegations of possible **“inappropriate conduct” of a sexual nature** & potential **“hostile environment”** in the workplace by RP1 (employee), RP2 (employee), & (b) & possible **“failure to report” of a responsible employee** by RP3 (supervisor). RP3 supervises CP1, along with possible witnesses to the investigations.
- The notice of the formal complaints are issued and an included provision reiterates that retaliation is prohibited.
- CP1 has requested “supportive measures” of (a) being reassigned to a different supervisor, (b) that CP1’s performance appraisal be completed by someone other than RP3, and to be stationed “out of sight” from RP1, RP2, and RP3.
- The office space is relatively small with “no additional workspaces,” according to the Dept’s Director.

Triage/next steps?



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Hypothetical Scenario 4 Considerations

1. What are “reasonably available” individualized supportive measures that can be arranged for CP1 in this specific situation?
2. Case precedent? Similar cases like this in the past?
3. Can reasonable alternatives be offered or arranged instead?
4. Other options or issues at play?



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Hypothetical Scenario 5.a

- CP files a **formal complaint** to the TIXC
- CP (student) alleges being the victim of “sexual harassment” by RP (student): CP feels uncomfortable by the RP; RP gives the CP “strange looks” and unwanted verbal contact.

Triage/next steps?



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Hypothetical Scenario 5.a Updates

- In the course of the investigation, evidence gathered shows that the RP asked the CP to “hangout” and tried to initiate a “study date.”
- The RP had romantic interest in the CP at the time of the attempted forms of contact.
- CP didn’t respond to the RP’s attempts at contact and CP said the RP acts “awkward” and “creepy.”
- RP says that the CP is making a “false complaint.”
- Using a “reasonable person” standard, investigators examine & determine that the alleged conduct doesn’t constitute “sexual harassment,” “other inappropriate sexual conduct” and the conduct doesn’t meet the definitions of any other prohibited conduct under the Sexual Misconduct Policy.

Triage/next steps?



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Hypothetical Scenario 5.a Considerations

For the CP's Formal Complaint:

1. Follow-up with CP & gather any additional information or testimony necessary.

If there is no other information that may change the investigators' conclusion then...

2. Issue a Formal Complaint Dismissal to CP & RP regarding the open case, dismissing all of the allegations and therefore closing the case.
 - Both CP & RP have the option to appeal the F.C. Dismissal.

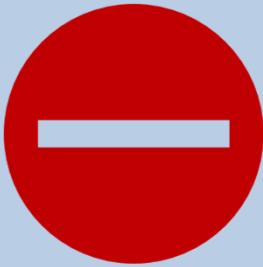


Hypothetical Scenario 5.a Considerations (Cont.)

For the RP's verbal allegation of "false complaint" against the CP:

1. Review the definition of "false information & false complaint" in the Sexual Misconduct Policy.
2. Is there any preliminary evidence to any elements of the "false complaint" definition that show this is a reasonable consideration for the TIXC to file a formal complaint against the original CP regarding these allegations?
3. Explain to RP that the Formal Complaint has been dismissed and closed, and the reason(s).
4. Provide the original RP with the process for filing formal complaints, as well as providing the definition of prohibited conduct under the policy (e.g. "false information & false complaints") so that the RP has a description of that type of conduct.
 - RP has the right to file a formal complaint (e.g. against the CP) regarding any prohibited conduct in the Sexual Misconduct Policy.

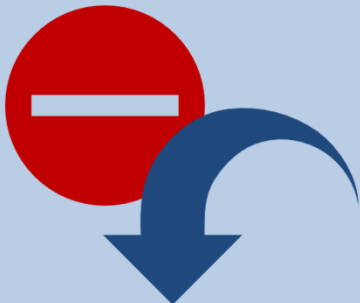




Hypothetical Scenario 5.b

- To re-cap, the **original formal complaint** by the CP alleging “sexual harassment” against the original RP has been dismissed and closed, and both parties have been notified.
- However, the original RP now files a **formal complaint** alleging “false complaint” against the original CP.

Triage/next steps?

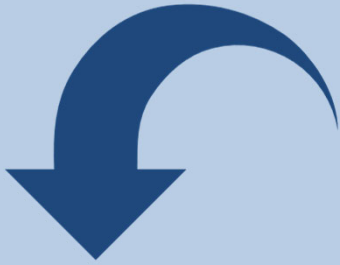


Hypothetical Scenario 5.b Updates

- To re-cap, the **original formal complaint** by the CP alleging “sexual harassment” against the original RP has been dismissed and closed, and both parties have been notified.
- However, the original RP files a **formal complaint** alleging “false complaint” against the original CP.
- Notice of the new formal complaint regarding the “false complaint” allegation is issued and sent to both parties.
- Shortly thereafter, the original CP files a formal complaint of “retaliation” against the RP and against the institution.
- CP threatens to file an OCR complaint of “retaliation” against the institution if the “false complaint” allegation isn’t dismissed immediately. CP has an attorney advisor.

Triage/next steps?





Hypothetical Scenario 5.b Considerations



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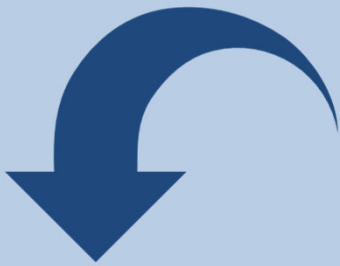
For the original CP's Formal Complaint regarding the "retaliation" allegation against the **institution**:

1. Refer the formal complaint to your institution's Legal Affairs Office for immediate guidance.

Regarding the original CP's **threat to file an OCR complaint** for "retaliation" against the institution:

1. Refer the concern to your institution's Legal Affairs Office for guidance.
2. Refer the original CP to your Sexual Misconduct Policy; OCR's contact information is available there.

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Hypothetical Scenario 5.b Considerations (Cont.)



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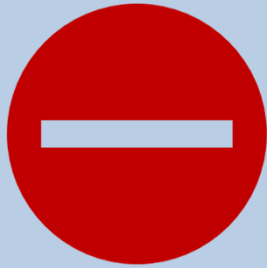
For the original CP's Formal Complaint regarding the "retaliation" allegation against the **original RP**:

1. Issue notice to CP & RP of the Formal Complaint for "retaliation" against CP.
2. Follow-up with both parties & conduct initial interviews. Make a good faith effort to investigate.
3. Expedite the interviews, due to the escalation of the cases, and the filing of multiple formal complaints against each other.

If there is a valid reason to dismiss the Formal Complaint during the investigation, then...

3. Issue a Formal Complaint Dismissal to CP & RP regarding the "retaliation" allegation, dismissing the allegation, and therefore closing the case.
 - o Both CP & RP have the option to appeal the F.C. Dismissal.

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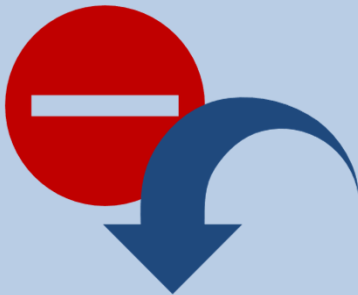
Hypothetical Scenario 5.b Considerations (Cont.)

For the original RP's Formal Complaint regarding the "false complaint" allegation against the original CP:

1. Follow-up with both parties & conduct initial interviews. Make a good faith effort to investigate.
2. Expedite the interviews, due to the escalation of the cases, and the filing of multiple formal complaints against each other.

If there is a valid reason to dismiss the Formal Complaint during the investigation, then...

3. Issue a Formal Complaint Dismissal to CP & RP regarding the "false complaint" allegation, dismissing the allegation, and therefore closing the case.
 - Both CP & RP have the option to appeal the F.C. Dismissal.



Hypothetical Scenario 5.b Considerations (Cont.)

1. TIXC can revisit with both parties about **supportive measures**, **expressed wishes**, and **options**.
2. Investigators can revisit with both parties about **what to expect** of the process, the policy, and **procedures** of the grievance process.
 - Focus on the impartiality & neutrality of your role as a fact-finder.
 - Center on the elements of conduct definitions that constitute a possible policy violation.
 - Be consistent.





Hypothetical Scenario 6

- CP files a **formal complaint** to the TIXC
- CP (student) alleges being the victim of “sexual harassment” by RP (faculty): CP says that the RP made inappropriate comments about the CP’s gender in class and made sexually suggestive comments toward CP in one-on-one appointments.
- RP teaches about gender & sexuality.

Triage/next steps?



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Hypothetical Scenario 6 Updates

- RP responds to the allegations that RP’s conduct was in relation to the curriculum, and they have “academic freedom” in the course & scope of their faculty role.
- CP provides investigators with testimony and witnesses from class to help corroborate the “sexual harassment” allegations.
- As the investigation continues, CP posts on social media that they are the victim of “sexual harassment” and names the RP publicly.
- Shortly thereafter, the RP files a formal complaint of “retaliation” against the CP, based on CP’s social media post.

Triage/next steps?



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Hypothetical Scenario 6 Considerations



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For the original CP's Formal Complaint regarding the "sexual harassment" & "other inappropriate sexual conduct" allegations against the original RP:

1. There could be elements of a legitimate "other inappropriate sexual conduct" complaint & legitimate free speech/academic freedom rights (e.g. RP's defense, RP's course & scope of teaching). Continue to make a good faith effort to investigate.
2. Administrative Leave for RP?

If there is a valid reason to dismiss the Formal Complaint during the investigation, such as for the "sexual harassment" allegation, then...

3. Issue a Formal Complaint Dismissal regarding the "sexual harassment" allegation, dismissing the allegation "under Title IX" but the investigation is continuing under the Sexual Misconduct Policy's grievance process for "other inappropriate sexual conduct".
 - Both CP & RP have the option to appeal the F.C. Dismissal.

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Hypothetical Scenario 6 Considerations (Cont.)



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For the original RP's Formal Complaint regarding the "retaliation" allegation against the original CP:

1. The original CP's conduct can be an expression of free speech, but there should be a thoughtful analysis on alleged adverse action claim toward original RP.
2. Issue notice to CP & RP of the Formal Complaint for "retaliation" against CP.
3. Follow-up with both parties & conduct initial interviews. Make a good faith effort to investigate.
4. Expedite the interviews, due to the escalation of the cases, and the filing of multiple formal complaints against each other.

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Hypothetical Scenario 6 Considerations (Cont.)

For the original RP's Formal Complaint regarding the "retaliation" allegation against the original CP (cont):

If there is a valid reason to dismiss the Formal Complaint during the investigation, then...

5. Issue a Formal Complaint Dismissal to CP & RP regarding the "retaliation" allegation, dismissing the allegation, and therefore closing the case.
 - Both CP & RP have the option to appeal the F.C. Dismissal.



Hypothetical Scenario 6 Considerations (Cont.)

1. TIXC can revisit with both parties about **supportive measures, expressed wishes, and options**.
2. Investigators can revisit with both parties about **what to expect** of the process, the policy, and **procedures** of the grievance process.
 - Focus on the impartiality & neutrality of your role as a fact-finder.
 - Center on the elements of conduct definitions that constitute a possible policy violation.
 - Be consistent.





Hypothetical Scenario 7

- During the course of an investigation for allegations of a “sexual assault,” there have been continued delays, such as:
 - Delayed responses from the RP, and several CP & RP witnesses.
 - Meeting cancellations by the CP.
 - Extension requests to review & respond to evidence by the RP.
- The delays have impacted the estimated timeframe of the investigation stage, and the investigation is now “overdue” in completing this stage.
- CP emails the TIXC and complains that the process is “taking too long,” “nothing is being done,” and alleges that the institution isn’t following the institution’s Sexual Misconduct Policy properly.


Triage/next steps?



Hypothetical Scenario 7 Considerations

- TIXC & investigator: Review the Sexual Misconduct Policy to ensure compliance and/or remedy any procedural irregularities (if applicable).
- The institution can extend the timeframe for a part of the grievance process (e.g. investigation stage) for good cause.
 - In such a circumstance, the institution must provide a written notice to the parties (CP & RP) of the delays or extensions, and the reason(s) for the action.
- General status updates should be provided to the parties on a regular basis as well.






Other Issues
for Case Mgt

During an investigation, develop case mgt procedures for:

- Seeing relevant evidence of “interference with an investigation” or other elements of conduct that constitute a possible policy violation...

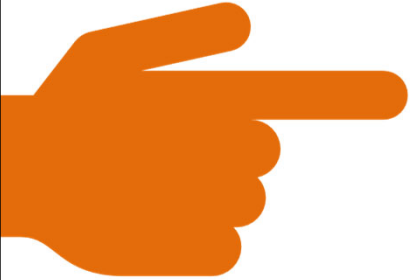
When does the TIXC file a Formal Complaint? Under what circumstances?



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Wrap-Up:
Bottom Line
for Case Mgt

- Focus on the **impartiality & neutrality** of your role
- Use **communication paths** for BIT referrals & “need to know” matters
- Be **consistent** with **case mgt decision-making**
- Refer to **case precedent** (e.g. similar facts or elements)
- Follow your **policy** and **process**



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Q & A


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