

Sexual Misconduct Case Management More Decision-Making Scenarios (Part 3)

Krista Anderson, Systemwide Title IX Coordinator

Sean Flammer, Assistant General Counsel

Fall 2021



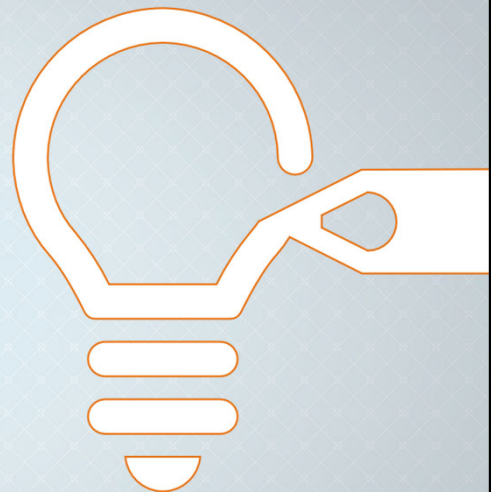
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

1

1

Agenda

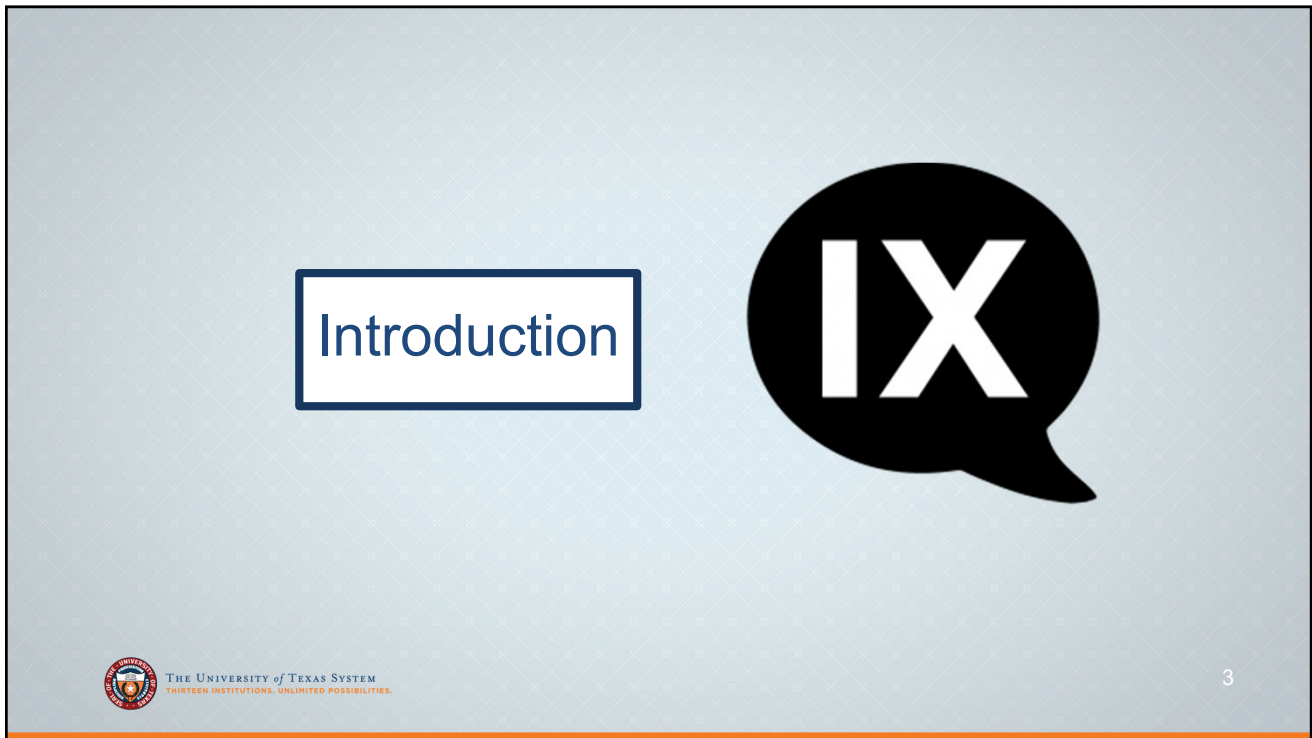
1. Title IX Introduction
2. Case Mgt Hypothetical Scenarios
 - Formal Complaint Dismissals & Alt. Grievance Process
 - Informal Resolutions
 - Athletics-related cases
 - Delays during the Grievance Process
 - Multiple Allegations and/or Multiple Complainants in same case
 - Sexually explicit images
3. Q & A



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

2

2



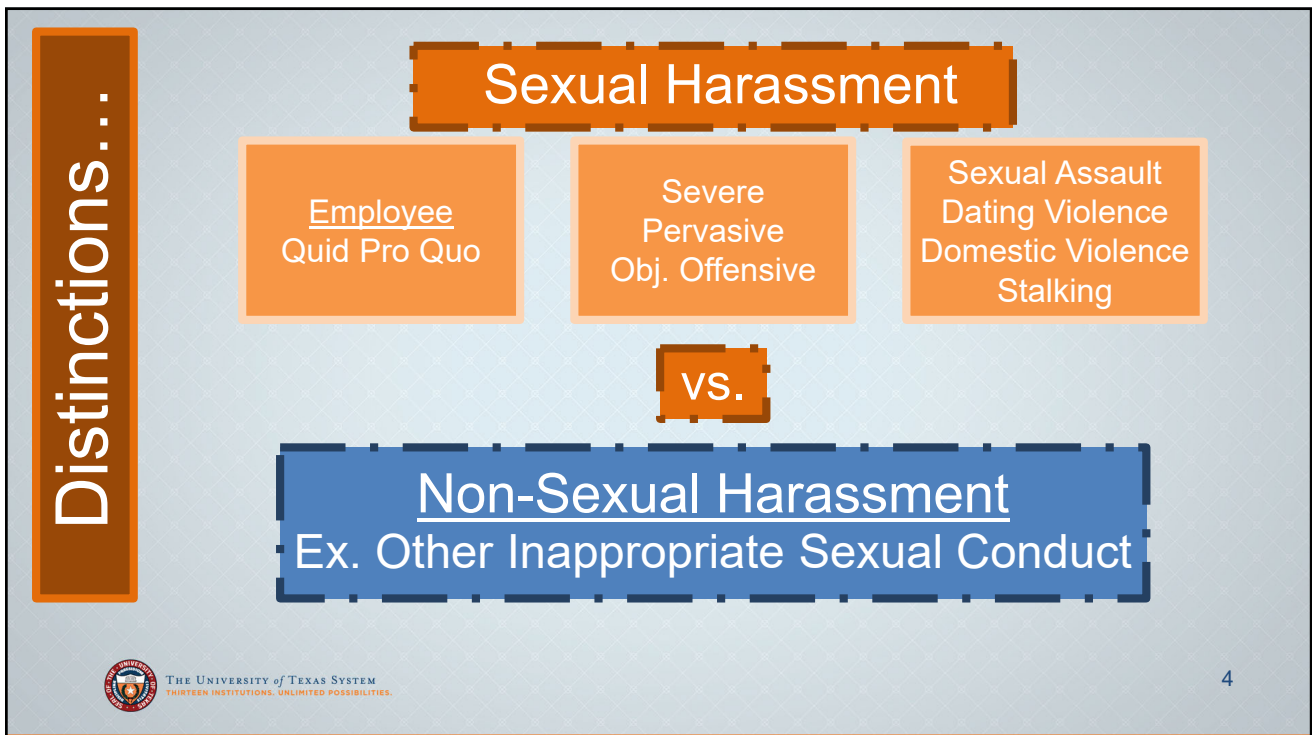
Introduction

IX

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

3

3



Distinctions...

Sexual Harassment

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

VS.

Non-Sexual Harassment
Ex. Other Inappropriate Sexual Conduct

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

4

4

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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

5

5

“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.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source: Title IX Regulations (2020)

6

6

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...



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2020)

7

7

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;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature; or
- Deliberate physical interference with or restriction of movement.




THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Source:

UT System Model Policy for Sexual Misconduct (2020)


8

8



Bottom Line
for Case
Management


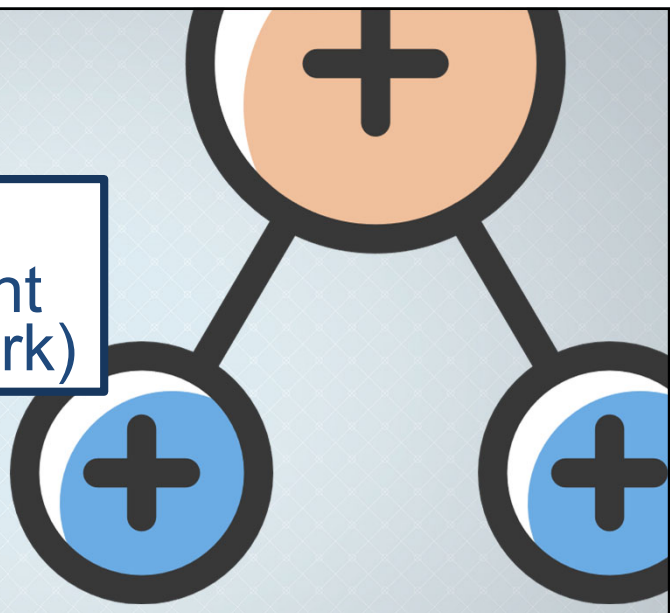
- Be **consistent**
- Refer to **case precedent** (e.g. similar facts or elements)
- Follow your **policy** and **process**



9

9

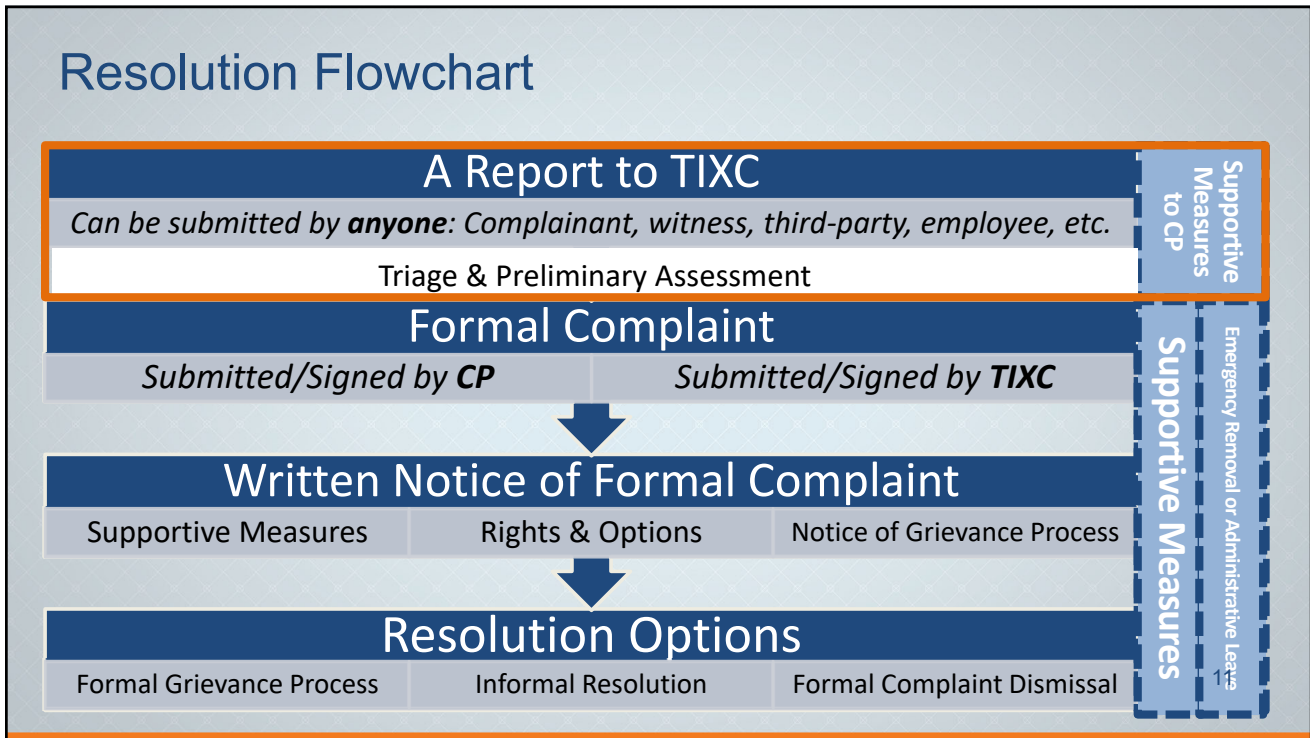
Triage &
Case Management
(General Framework)



10

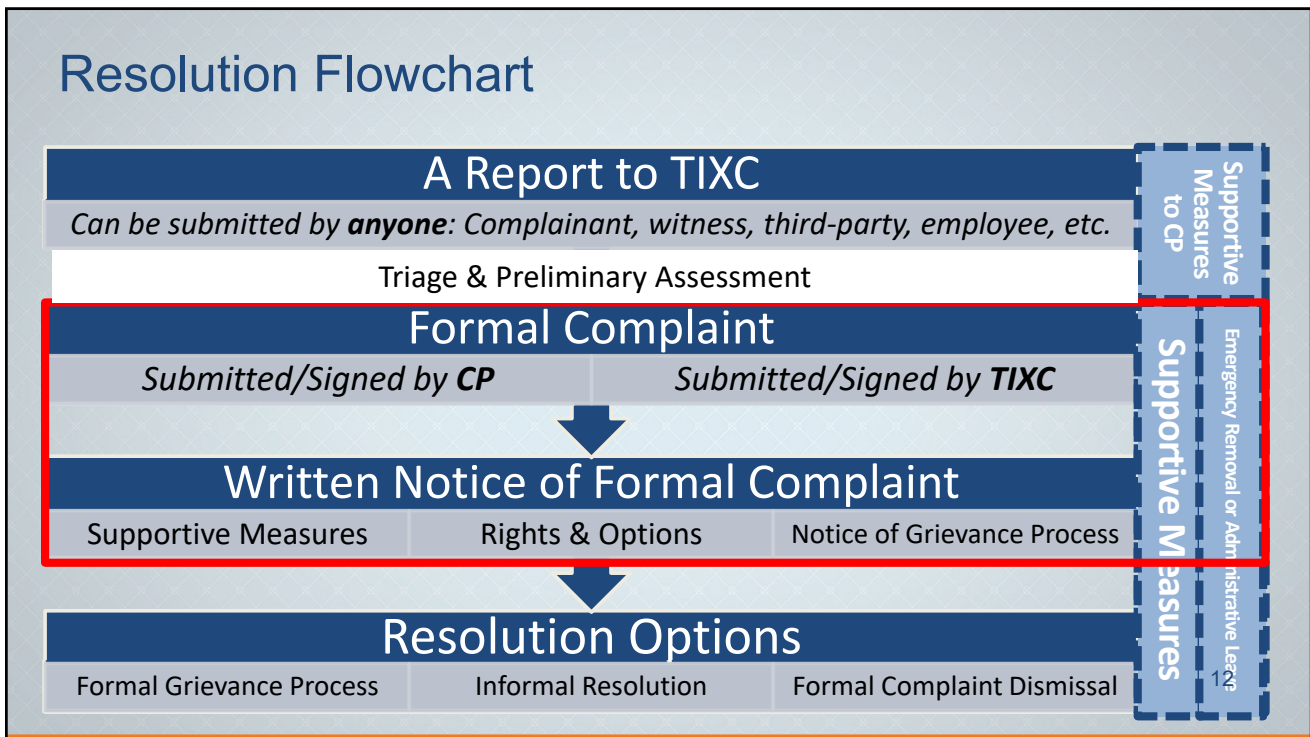
10

Resolution Flowchart

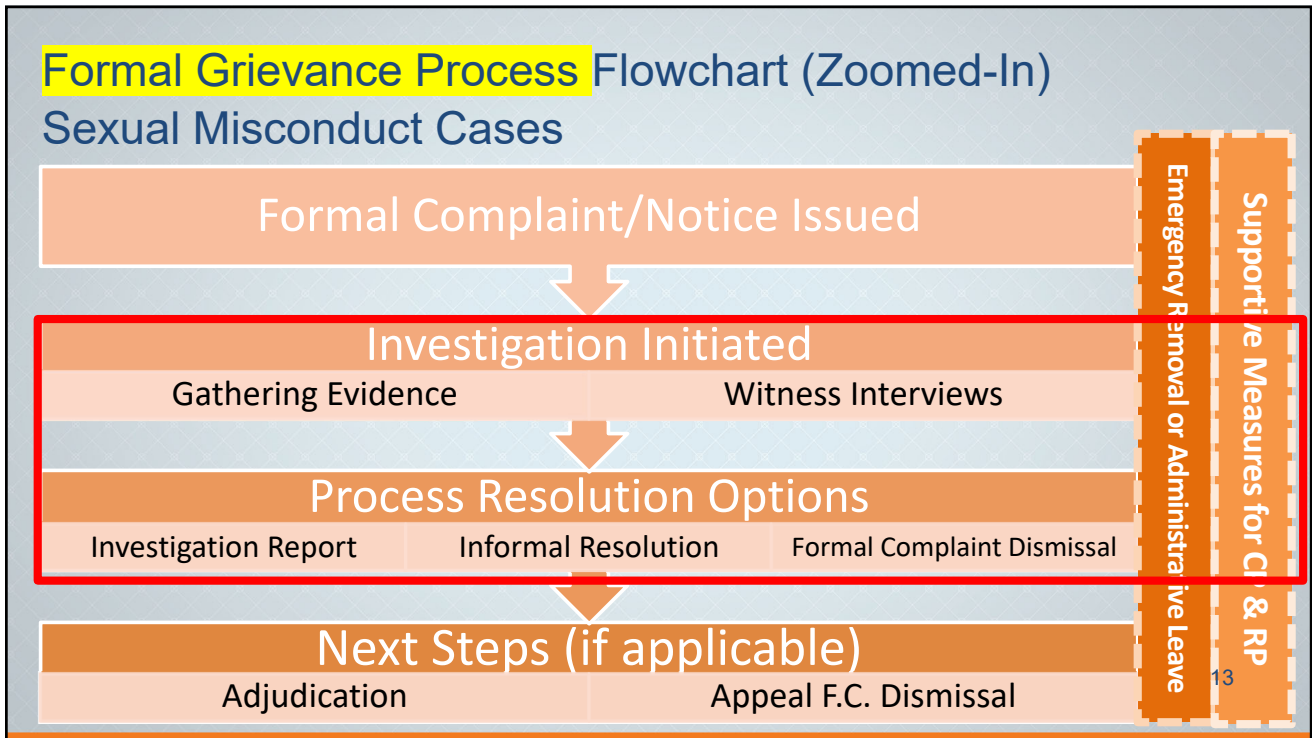


11

Resolution Flowchart



12



13

Hypothetical 1

- Responsible employee submits a **report** to the TIXC.
- CP (student) disclosed being a victim of “**sexual harassment**” by RP (student) “during class earlier this semester.”

Triage/next steps?

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

14

14



Hypothetical 1 Follow-up

- Responsible employee submits a **report** to the TIXC.
- CP (student) disclosed being a victim of “**sexual harassment**” by RP (student) “during class earlier this semester.”
- CP explains that the RP made sexual jokes toward the CP, and talked about CP’s private parts during class one day. CP “felt uncomfortable” and “couldn’t concentrate” on the class’s lecture and discussion.
- CP expressly doesn’t want to file a formal complaint but would like to resolve the situation through an “informal resolution.”
- No previous complaints on file regarding the RP.

1. *Based on the description of allegations, what are the possible policy violations?*
2. *Should the TIXC file a Formal Complaint?*
3. *Triage/next steps.*



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

15

15



Hypothetical 1 Considerations

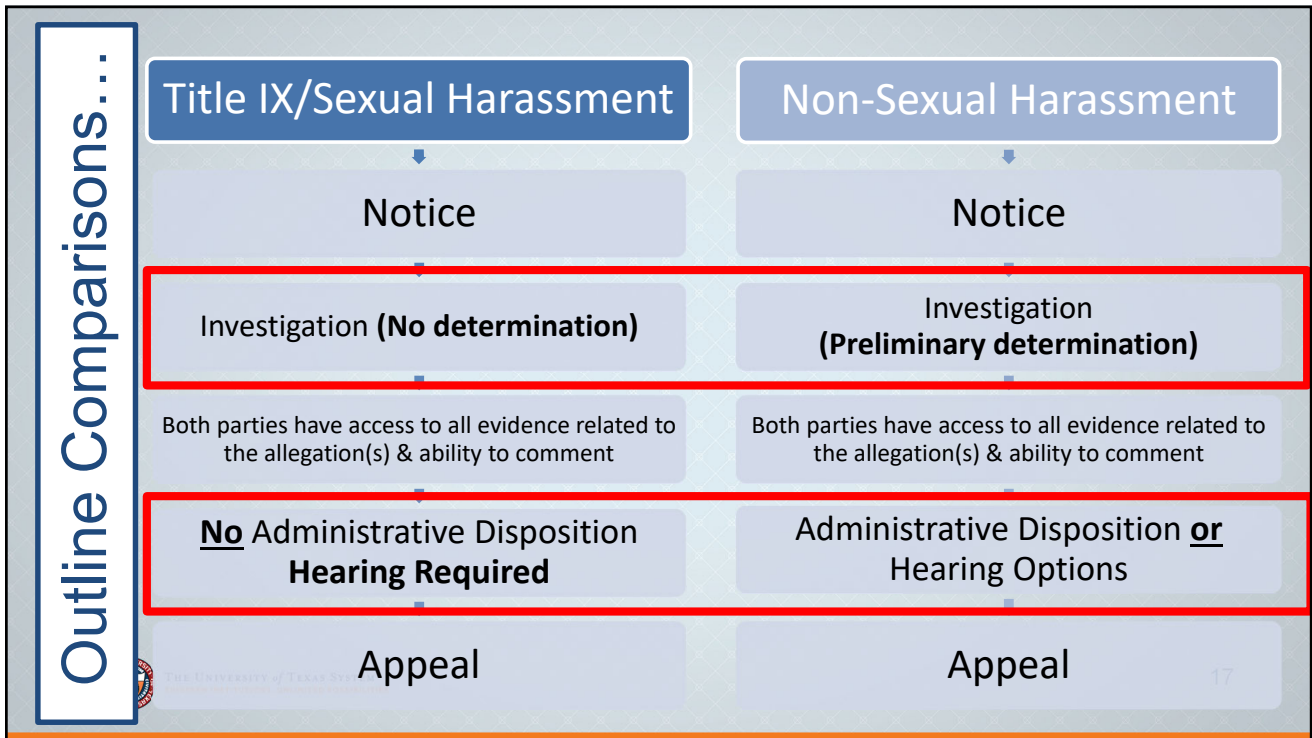
1. File a F.C. to initiate an informal resolution? By either the CP or TIXC? Impacts to either filing?
2. Case precedent for informal resolutions? Is an I.R. available and applicable based on the information provided?
3. Options if an I.R. isn’t the outcome, once a F.C. is filed?



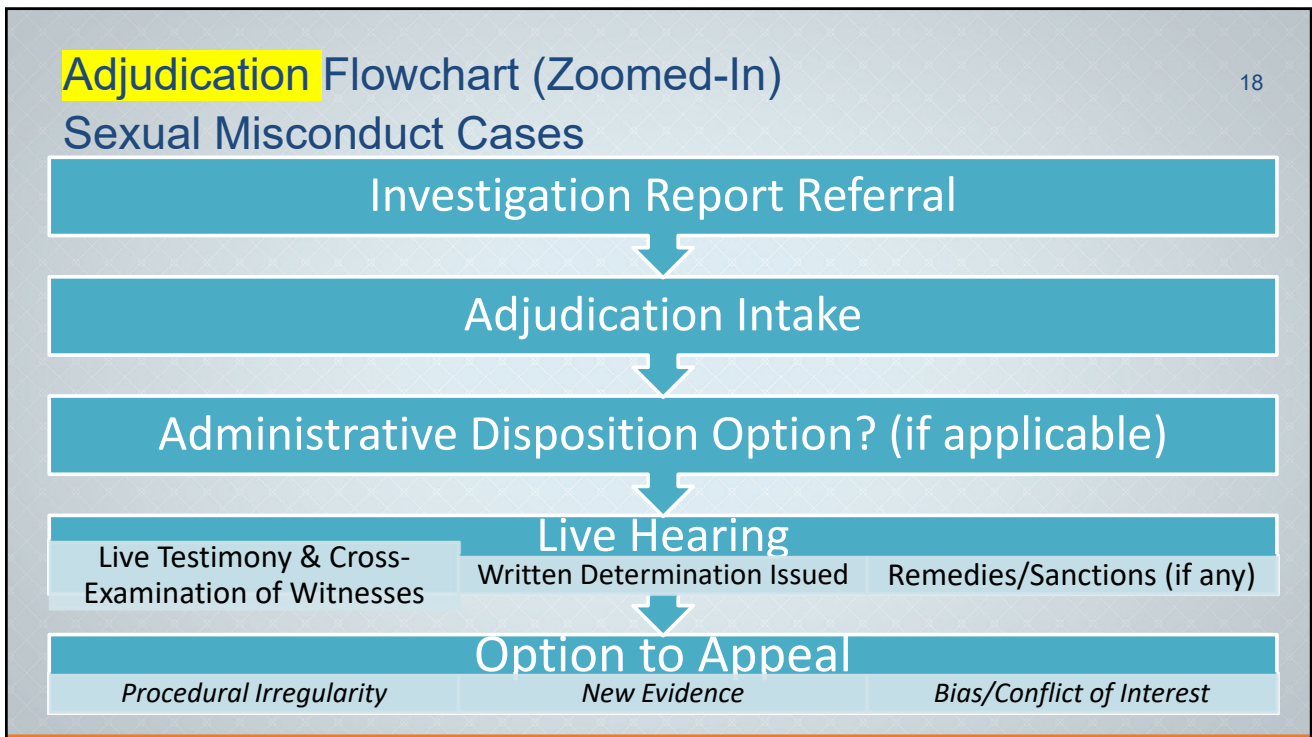
THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

16

16



17



18



Hypothetical 2

- An investigation is underway regarding a **dating violence** formal complaint.
- The RP (student) is alleged of:
 - a) Pushing & slapping the CP (student) while arguing in a residence hall a few weeks ago;
- At least one person is identified as an eye-witness.
- CP/RP are in a sexual relationship together.
- RP has not attempted to contact CP since the reported incident.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

19

19



Hypothetical 2 Follow-up

- An investigation is underway regarding a **dating violence** formal complaint.
- The RP (student) is alleged of:
 - a) Pushing & slapping the CP (student) while arguing in a residence hall a few weeks ago;
- At least one person is identified as an eye-witness
- CP/RP are in a sexual relationship together.
- RP has not attempted to contact CP since the reported incident.
- In the course of the investigation, a bystander (witness) provides a witness statement to investigators:
 - W attempted to stop the physical altercation between CP/RP by getting physically between CP/RP.
 - The RP seemed to be aiming for the CP, but grabbed & pushed the W instead, which resulted in the W falling against a wall and acquiring a bruise on the arm.
- CP hasn't responded to investigators regarding interview attempts or evidence collection.
- No previous reports regarding the RP.


*What are the main issues presented?
Triage/next steps?*




THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

20


20


 <p>Hypothetical 2 Main Issues</p>	Main Issues	Possible Options?
	<p>1. Decision-point about the Formal Complaint of “dating violence” incident in residence hall against RP.</p> <p>2. Decision-point about W’s alleging “physical altercation” against same RP, regarding the same alleged incident.</p>	<p>a. Formal Complaint dismissal due to lack of participation from CP?</p> <p>b. Continue formal investigation under Title IX?</p> <p>a. Consolidate case w/ Title IX allegation and manage jointly under Formal Grievance process?</p> <p>b. Separate the “physical altercation” component & refer to Student Conduct process?</p>


 THE UNIVERSITY of TEXAS SYSTEM
 THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

21

21

 <p>Hypothetical 2 Considerations</p>	<p><u>Issue #1: Dating Violence allegation</u></p> <ol style="list-style-type: none"> Continue the investigation since there is at least one participating witness (at this time) with relevant testimony. Witness testimony may be sufficient for a decision-maker to consider, regardless if CP is not participating in the investigation.
	<p><u>Issue #2: Physical Altercation allegation</u></p> <ol style="list-style-type: none"> For consolidation of non-sexual misconduct allegations into a SHSM case, what is the justification for doing so? Case precedent for investigations or adjudication? Other considerations when consolidating cases: <ul style="list-style-type: none"> CP1 and CP2 information/privacy waivers SH due process examples: Apply the live hearing rules (e.g. cross-examination by advisors, rules of relevance apply, etc.)


 THE UNIVERSITY of TEXAS SYSTEM
 THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

22

22



Hypothetical 2 Considerations

1. Any other threats of violence, intimidation, or predatory behaviors alleged? Any continuous acts of violence since the reported incident?
2. Opportunity for BIT referral for the RP? CP?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

23

23



Hypothetical 3

- 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?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

24

24



Hypothetical 3 Considerations

1. TIXC & investigator: Review the Sexual Misconduct Policy to ensure compliance and/or remedy any procedural irregularities (if applicable).
2. 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.
3. General status updates should be provided to the parties on a regular basis as well.
4. If an extension is provided to one party, ensure the extension is extended to both parties equally.



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

25

25



Hypothetical 4

- Investigations are underway regarding a **set of formal complaints** about the **same RP**.
- The RP (student athlete) is alleged of:
 - A. **“Sexual Harassment”** allegations: Touching and caressing CP1 (student) on the shoulders, breasts, and back at different times during a party. CP1 says the physical conduct was not consensual, and felt “uncomfortable.”
 - B. **“Sexual Harassment”** and **“Other Inappropriate Sexual Conduct”** allegations: Making a sexual comment toward CP2’s body & sexual experience (student) on a group text chat with CP2 (student). CP2 says they felt “humiliated” and “embarrassed” by the alleged conduct.
- Both CP1 & CP2 have provided testimony and evidence, regarding their respective cases.
- RP hasn’t responded to interview or participation invitations yet.


Triage/next steps for Case A and Case B?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.


26

26



Hypothetical 4 Follow-up

- Investigations are underway regarding a set of formal complaints about the **same RP**.
- The RP (student athlete) is alleged of:
 - A. “Sexual Harassment”** allegations: Touching and caressing CP1 (student) on the shoulders, breasts, and back at different times during a party. CP1 says the physical conduct was not consensual, and felt “uncomfortable.”
 - B. “Sexual Harassment” and “Other Inappropriate Sexual Conduct”** allegations: Making a sexual comment toward CP2’s body & sexual experience (student) on a group text chat with CP2. CP2 says they felt “humiliated” and “embarrassed” by the alleged conduct.
- Both CP1 & CP2 have provided testimony and evidence.
- RP hasn’t responded to interview or participation invitations yet.
- Later in the investigation, RP calls and speaks with an investigator to go over rights and options for RP’s. After the investigator goes over everything, including RP has the right to participate or not, and cannot be disciplined or retaliated against for participating or not participating in the grievance process.
- RP says “hypothetically” what if the Athletics coach expects the RP to participate in the grievance process? Nothing explicit about consequences if they don’t participate in the process, but RP fears that they won’t get an opportunity to play in upcoming games this season.





THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

*What are the main issues presented?
Triage/next steps?*

27

27

	Main Issues	Possible Options?
 <h2 style="text-align: center; margin-top: 20px;">Hypothetical 4 Main Issues</h2>	<p>1. Decision-point about multiple SHSM cases (“sexual harassment”, and “other inappropriate sexual conduct”)</p>	<ul style="list-style-type: none"> a. Consolidate SHSM cases & manage jointly under Formal Grievance process? b. Separate the “other inappropriate sexual conduct” case & continue under the Alt. Grievance process?
	<p>2. Decision-point about the coach’s possible involvement and RP’s fear of “retaliation”</p>	<ul style="list-style-type: none"> a. Follow-up with coach and clarify rights & options of the parties? b. Follow-up with RP regarding the concern? c. Consider investigating “retaliation” of the coach?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

28

28



Hypothetical 4 Considerations



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

29

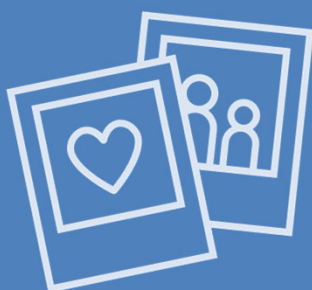
Issue #1: Multiple SHSM complaints

1. For consolidation of cases, what is the justification for doing so? Case precedent for when there's multiple unrelated incidents?
2. Other considerations when consolidating cases:
 - CP1 and CP2 information/privacy waivers
 - SH due process examples: Apply the live hearing rules (e.g. cross-examination by advisors, rules of relevance apply, etc.)

Issue #2: Coach's possible involvement

1. Follow-up with the coach and clarify rights & options of the parties. Clarify the impacts of "expecting" or "pressuring" a student athlete to participate or not in a grievance process and explain that retaliation is prohibited.
2. Follow-up with RP regarding the concern. Provide the RP with right and options for the grievance process, including the process for filing formal complaints (e.g. "retaliation").

29



Hypothetical 5



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

30

- An investigation is underway regarding a **sexual harassment (sexual exploitation)** formal complaint.
- The RP (employee) is alleged of:
 - a) Non-consensually showing a video and pictures of the CP (employee) and RP engaging in consensual sexual activity with other employees.
 - b) Creating a hostile work environment as a result.
- The video and pictures contain sexually explicit images (private parts of one or both parties).
- Neither party disputes the consensual sexual activity or the consensual recording of the video and pictures.
- CP requests that the video and pictures are redacted due to the sexually explicit nature of the images.
- RP has requested an unredacted copy of all of the related evidence before responding to the allegations.
- **No previous reports regarding the RP.**
- No threats or welfare concerns reported or detected for either party at this time.

Triage/next steps?

30



Hypothetical 5 Considerations

1. Administrative Leave for RP?
2. Parties' right to access to evidence in the investigation & adjudication stages of the Formal Grievance process.
 - Redactions? Under what (if any) circumstances?
 - Content warnings?
3. Disputed vs. undisputed facts?
4. Cases involving minors (or minors at the time)? Required reporting?



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

31

31



Wrap-Up: Bottom Line for Case Mgt

- Focus on the **impartiality & neutrality** of your role
- Be **consistent** with **case mgt decision-making**
- Refer to **case precedent** (e.g. similar facts or elements)
- Follow your **policy** and **process**



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

32

32



Q & A

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

33

33

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

THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

34

34