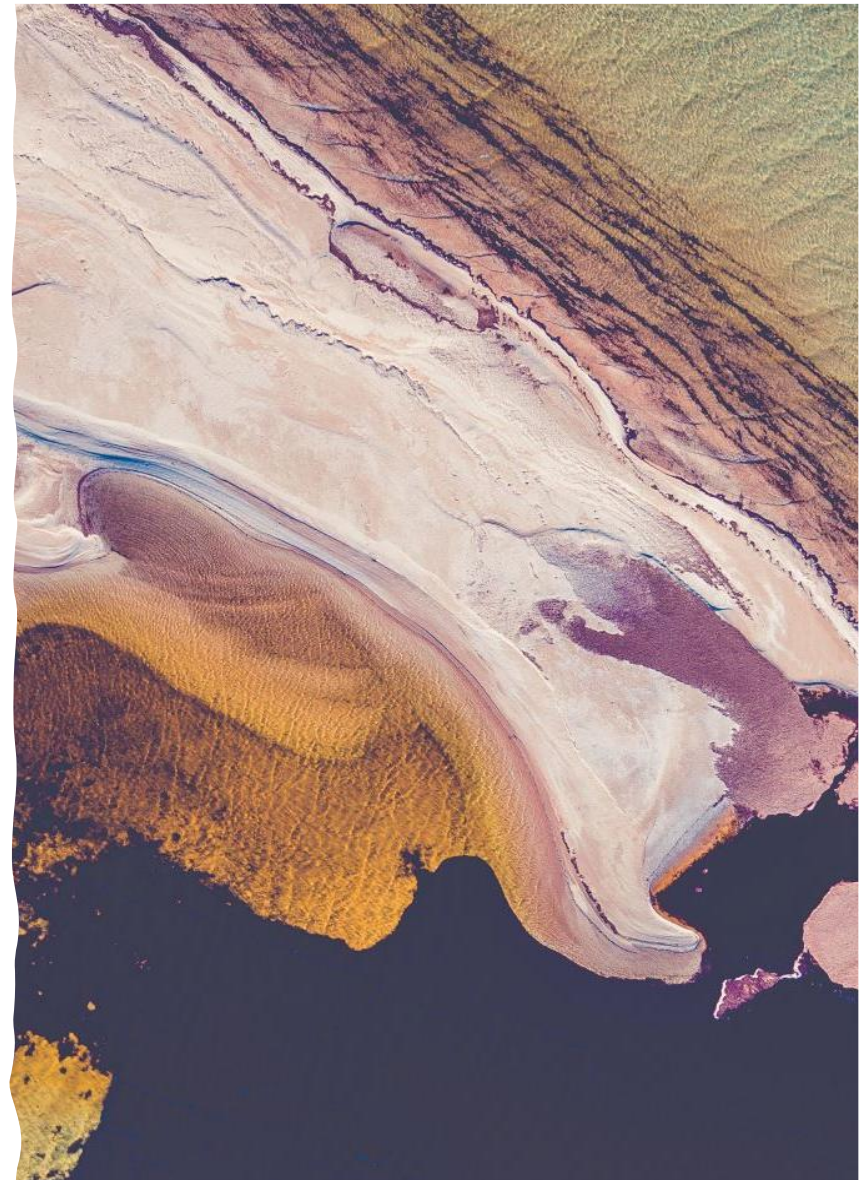


TITLE IX

Serving As An Advisor
What do you need to know?

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Introductions

- 42-year educator: 36 years active, 7 years in consulting
- ATIXA fully certified in Title IX, Title VI, and Title VII to serve as interim coordinator, investigator, decision-maker, advisor, and informal resolution facilitator
- Has conducted, participated in, or advised in over 50 Title VI, Title VII, and Title IX investigations and decision-making
- Served as IU Executive Director, interim superintendent, and consultant to charter schools and school districts



Title IX

The Basics

What is Title IX?

Title IX of the Education Amendments of 1972 is a **federal civil rights law** which prohibits discrimination on the basis of sex in all federally-funded educational institutions.

Title IX applies to **all K-12 schools and postsecondary educational institutions** which receive any kind of federal financial assistance

Text of Title IX

Title IX states

- *No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. (28 U.S.C.A. §1681)*

Applies to an entire school, not just programs receiving funding.

❖ Exceptions – Military and private religious schools



Title IX Enforcement

- Governed by Title IX statute and the 2020 Title IX regulations
 - Department of Education's Office of Civil Rights (OCR)
 - Case Law
- Guidance* from
 - Dear colleague letters
 - Executive orders
 - OCR resolutions

*Tolerance for risk



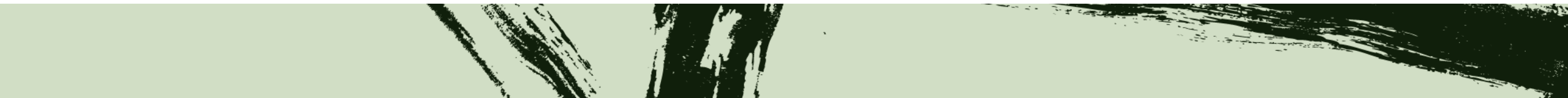
Title IX is a Gender Equity Law

Seeks to remedy the inequities sex-based harassment and discrimination create

STOP

PREVENT

REMEDY



Two Paths of Enforcing Title IX



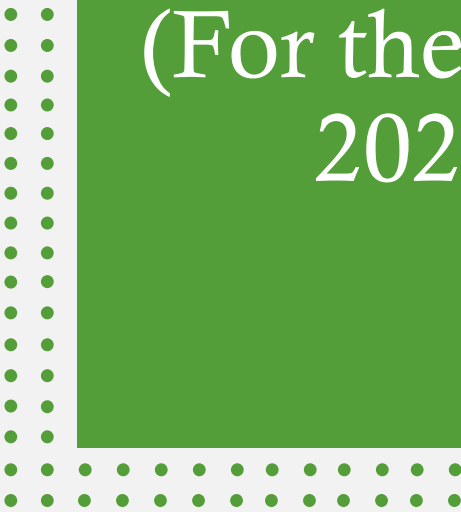
Judicially – In Court*

- Lawsuit in federal court against educational institution
- Plaintiff(s) must show that a school official had actual knowledge and was deliberately indifferent

Administratively - Agency

- By reporting to the school's Title IX Coordinator and following its Title IX grievance procedures
- By reporting to the Office for Civil Rights (OCR), subsidiary of DOE

*Some courts will require plaintiffs to exhaust administrative agency remedies first.



THE STANDARD OF LIABILITY (For the institution: 2020 Regs)

A School Entity with actual knowledge of sexual harassment in an education program or activity of the School Entity against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.

Definition of Title IX Sexual Discrimination/Harassment

Discrimination: adverse treatment of a group/individual on the basis of sex

Sexual Harassment (a form of discrimination):

1. Conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct
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 College's education program or activity
3. "Sexual assault," "dating violence," "domestic violence," or "stalking"

Today's Agenda

- Overview
 - Title IX
 - Scope
 - Definitions
 - Serving impartially
- Grievance Process – Advisor Role
 - Intake and Investigation
 - Pre-Hearing
 - The Hearing
 - Post-Hearing
- Questions

Title IX

Advisor - Overview

Advisor of Choice

- Must give the parties the same opportunity to have others present during any part of a grievance process
- Cannot limit the parties' choice of advisor or limit their presence during proceedings
 - can be an attorney but doesn't have to be
 - friend family roommate staff member other
- Doesn't have to have an advisor until the Live Hearing



Advisor of Choice

- CAN define the parameters of what the advisor can and cannot do, as long as it applies to both parties equally
 - Often limited role in meetings
- May have one advisor for pre-hearing proceedings but another advisor at the live hearing
- Procedures determine if a party can have more than one person with them
 - an advisor and an emotional support person or union representative (employee), for example



Advisor of Choice

- A party need not have an advisor if they do not want one for pre-hearing procedures

HOWEVER (Higher Education only)

If a party does not have an advisor by the time of the live hearing, the institution **MUST** appoint a *trained* advisor for that party IF the party hasn't identified an Advisor of their choice

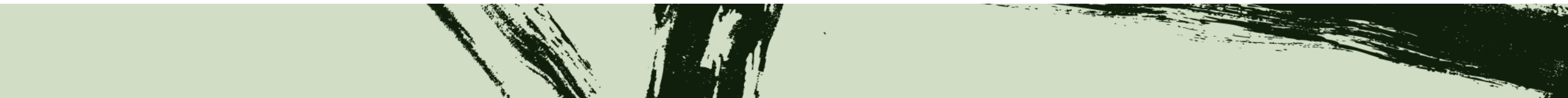
*The advisor plays an important role at the live hearing

Institution Appointed Advisors

- Don't have to appoint until the Live Hearing
- Your advisee may not like you/You may not like him/her
 - May not agree on strategy
 - Doesn't have to listen to you
 - Can "fire" you
 - Can refuse to cooperate with you



Institution Appointed Advisors

- Must have a strong ethical code and integrity
 - Must not have a conflict of interest or bias
 - Must be trained
 - Must know the applicable policies and procedures
 - Must be available-the institution does not have to accommodate your schedule
 - Don't try to purposely delay the hearing
- 



Institution Appointed Advisors

- Privilege does not automatically attach – you could be called as a witness at the live hearing
 - Confidentiality of advisors is protected in NCC procedures BUT you can still be called as a witness on other matters that you may have knowledge about
- Mandated reporter – remind students/employees to not share anything they don't want disclosed
- You could be sued for inadequate representation-institution should cover you

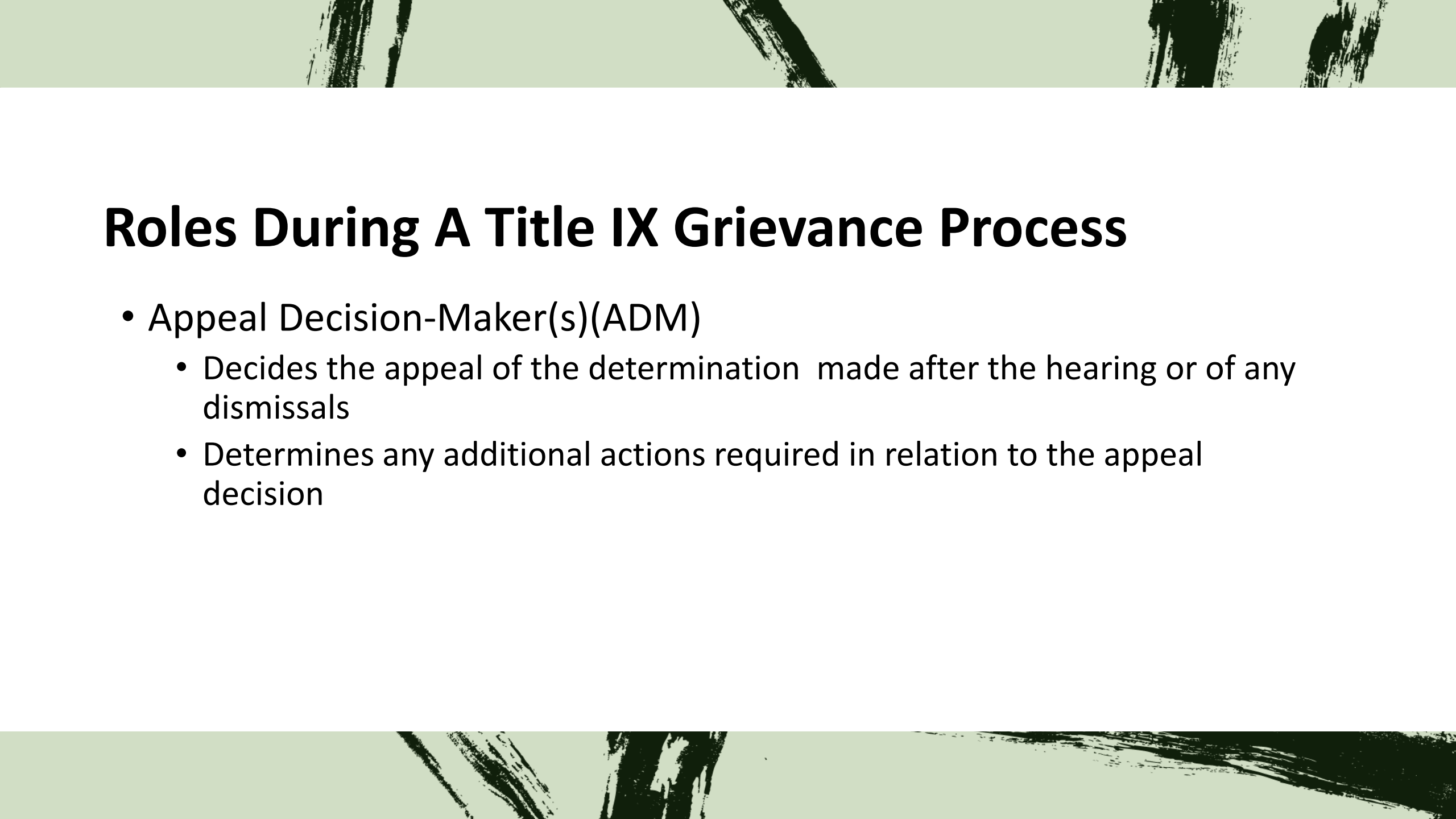


Roles During A Title IX Grievance Process

- Title IX Coordinator
 - Responsible for the institution's compliance with Title IX and its regulations
 - NOT the decision-maker!
 - Receives and processes the Complaint
 - Responsible for overseeing and adhering to process
 - Responsible for overseeing implementation of sanctions and remedies

Roles During A Title IX Grievance Process

- The Investigator(s)
 - Gathers relevant evidence, including interviewing witnesses
 - Writes investigation report
- Hearing Officer/Panel (usually 3 people-one will be the Chair)
 - Hears evidence at the hearing, determines relevancy of evidence, coordinates questioning of parties and witnesses, reviews the investigation report, asks questions
 - Makes the determination/finding, writes determination report, may determine sanctions and remedies (Not at NCC)

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Roles During A Title IX Grievance Process

- Appeal Decision-Maker(s)(ADM)
 - Decides the appeal of the determination made after the hearing or of any dismissals
 - Determines any additional actions required in relation to the appeal decision



Roles During A Title IX Grievance Process

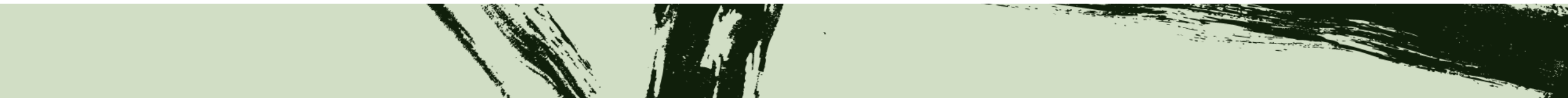
- Advisors of Choice/Institution Appointed Advisors
 - Advises their advisee on their rights – request dismissal, for example
 - Assists in preparing for the hearing
 - Questions their advisee/cross examines the other party at the live hearing
 - Questions witnesses at the live hearing
 - Assists their advisee with any appeals





Roles During A Title IX Grievance Process

- Informal Resolution Facilitator
 - Facilitates a written agreement between the parties to resolve the Complaint
 - Voluntary
 - Can run simultaneously with the investigation and live hearing or investigation and hearing can be postponed
 - Not final until it is signed by all parties, including the institution



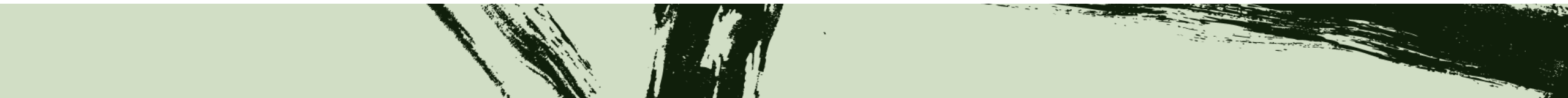


Serving Impartially

Title IX Team members (internal or external third-party members) must not have a conflict of interest or bias against:

- Complainants, generally
- Respondents, generally
- The parties involved in the current complaint
- The subject matter or details of the Complaint

***Conflict of interest or bias on the part of those involved in the Complaint is one basis for appeal.**



Serving Impartially

Conflict of Interest – What is it?

- An actual (or perceived) clash
- Between the role the person is playing in the process and a current or previous relationship with one of the parties
- That prevents neutrality or objectivity on the part of the team member

Serving Impartially

Bias – What is it?

- Prejudice for or against a person or group, or an unwillingness/inability to be influenced by factual evidence

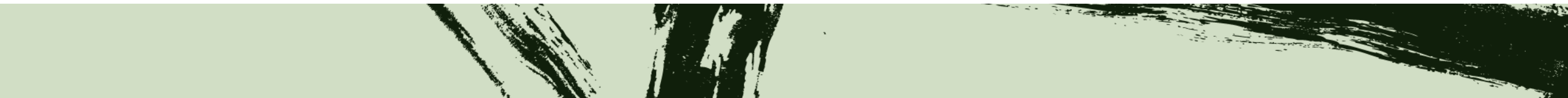


Serving Impartially

If you believe you have a conflict of interest or bias, discuss it with the TIXC.

Bias must be substantiated bias, not perceived bias.

Recuse yourself if there is any question of your ability to serve impartially.



Title IX

Advisor Role – Intake and
Investigation

#1 - Intake and Formal Complaint

- Assist in the writing and filing of the Formal Complaint (if you've been asked to serve as advisor prior to it being written)
- Purpose – TIXC gains understanding of complaint to determine whether it falls under Title IX
- Accompany your advisee to any intake meeting

Prior to the intake:

- Review the Formal Complaint with your advisee
- Review the Notice of Allegations and Investigation letter with your advisee
- Discuss with your advisee whether to advocate for or against dismissal of the complaint
 - help them frame their arguments and write their rationale
- Discuss if the advisee would be interested in informal resolution (if so, confer with TIXC)
- Discuss the investigation and live hearing process

#1 - Intake and Formal Complaint

- Assist in the writing and filing of the Formal Complaint (if you've been asked to serve as advisor prior to it being written)
- Purpose – TIXC gains understanding of complaint to determine whether it falls under Title IX
- Accompany your advisee to any intake meeting
 - You can attend meetings or participate in conversations that are follow-up to the initial meeting
 - Talk to your advisee regarding expectations regarding your participation.

#1 - Intake and Formal Complaint

Notice of Allegations and Investigation (NOIA)

IMPORTANT: Goes to both Complainant(s) and Respondent(s)– Critical

- **Allegations - detailed description**
- Parties involved
- **Right to an advisor**
- **Incident Details – Date and location of incident**
- Grievance Process
- **Presumption of Non-Responsibility**
- **Supportive Measures available**
- Contact Information for Title IX Coordinator

Initial Assessment: Is this Title IX?

Mandatory Reasons to Dismiss

- **Conduct is outside Title IX's scope:** The alleged behavior, even if proven, would not legally constitute sex discrimination or sexual harassment under Title IX.
- ***Location of conduct:** The alleged conduct did not occur within the school's education program or activity. This includes off-campus conduct unless the school has substantial control over both the respondent and the context of the harassment.
- **No U.S. connection:** The alleged conduct did not occur against a person in the United States.

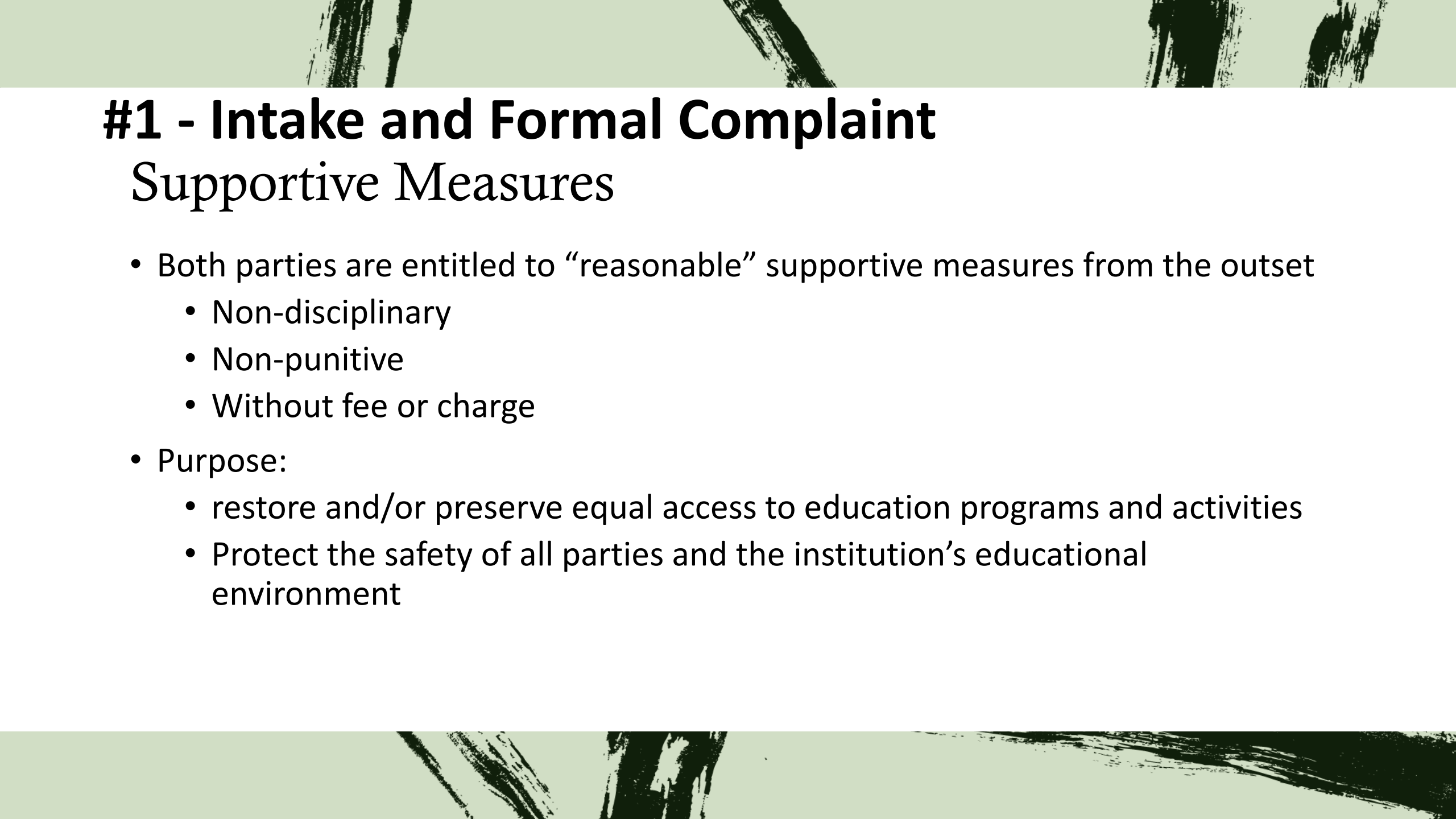
Initial Assessment – Is this Title IX?

Discretionary Reasons to Dismiss

- **The complainant withdraws the complaint** The Title IX Coordinator may, however, decide to initiate their own complaint if they determine the alleged conduct warrants it.
- **The respondent is no longer at the school**
- **Inability to identify the respondent:** The institution is unable to identify the person who is accused of the misconduct, despite reasonable attempts to do so.
- **Insufficient evidence:** Specific circumstances prevent the school from gathering enough evidence to reach a determination on the allegation (Complainant is not cooperating or is no longer on campus*)

Dismissing a Complaint...

- Written notice to the Complainant(s) AND Respondent(s) stating the reason for the dismissal under Title IX
- The notice must state they have a right to appeal the dismissal and include the bases under which they may appeal:
 - Procedural error
 - New evidence that was not available at the time of the dismissal
 - Conflict of Interest or Bias
 - Others



#1 - Intake and Formal Complaint

Supportive Measures

- Both parties are entitled to “reasonable” supportive measures from the outset
 - Non-disciplinary
 - Non-punitive
 - Without fee or charge
- Purpose:
 - restore and/or preserve equal access to education programs and activities
 - Protect the safety of all parties and the institution’s educational environment

Intake and Formal Complaint

Supportive Measures - Examples

- Counseling
- Medical/health services
- Employee Assistance Program
- Change to campus housing
- Campus escorts
- No Contact Orders
- Academic supports
 - Deadline extensions
- Leaves of absence
- Class schedule modifications
- Increased security at certain campus locations

Should be kept as confidential as possible

Parties may not want or need any supportive measures

#1 - Intake and Formal Complaint

Emergency Removals/Interim Suspension/Restrictions

Students

- After conducting a safety and risk analysis AND
- Determining there is an immediate threat to any student or other individuals arising out of the complaint
 - Institution **MUST** give notice and an opportunity for the Respondent to appeal the removal immediately after removal

#1 - Intake and Formal Complaint

Emergency Removals/Interim Suspension/Restrictions

- Advisors
 - Review with advisee any removal and the safety/risk analysis
 - Discuss whether the advisee wishes to appeal the removal
 - Assist with the appeal
 - Ensure that all rights under Individual with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, or the American with Disabilities Act have been preserved

***If you need assistance, confer with Title IX Coordinator**

#1 - Intake and Formal Complaint

Emergency Removals/Interim Suspension/Restrictions

Employees

- Administrative Leave under current procedures/union contracts
- Usually given with pay
- Union will likely be involved
- Institution must preserve any rights under Section 504 and ADA
- Advisors
 - Work closely with the union representative, if there is a union
 - Follow procedures and union contract language carefully

#2 – Investigation

Your advisee will be interviewed!

- Assist in thinking through strategy
- Gather and sift through any evidence that is *Relevant*
- Develop a witness list to provide to the investigator(s)
- Provide any evidence you have and suggest evidence that may exist but that you don't have
- Identify any expert sources or expert witnesses you might have
- Don't speak for your advisee. If you need to have a discussion, ask for a break and leave the room.
 - Most institutions limit the role of the advisor in interviews
- If your advisee is getting emotional, ask for a break.
- Some investigators will want to record the interview (In PA your advisee must consent)

#2 – Investigation

- After the investigation is complete, both parties will receive a draft copy of the investigation report and copies of all evidence
- You will have 10 days to review the draft with your advisee (check procedures to see if this is 10 calendar days or 10 workdays) and submit a written response within those 10 days:
 - Is the summary of your interview correct?
 - Are there other witnesses you think the investigator should interview?
 - Questions the investigator didn't ask the other party or a witness you think should be asked?
 - Do you think any of the evidence is not relevant? Is there any new evidence that was not previously available?
 - Are there any factual errors in things like dates, location of incident, etc.?

#2 – Investigation

A written response to the draft investigation report is
not a REDO of the investigation

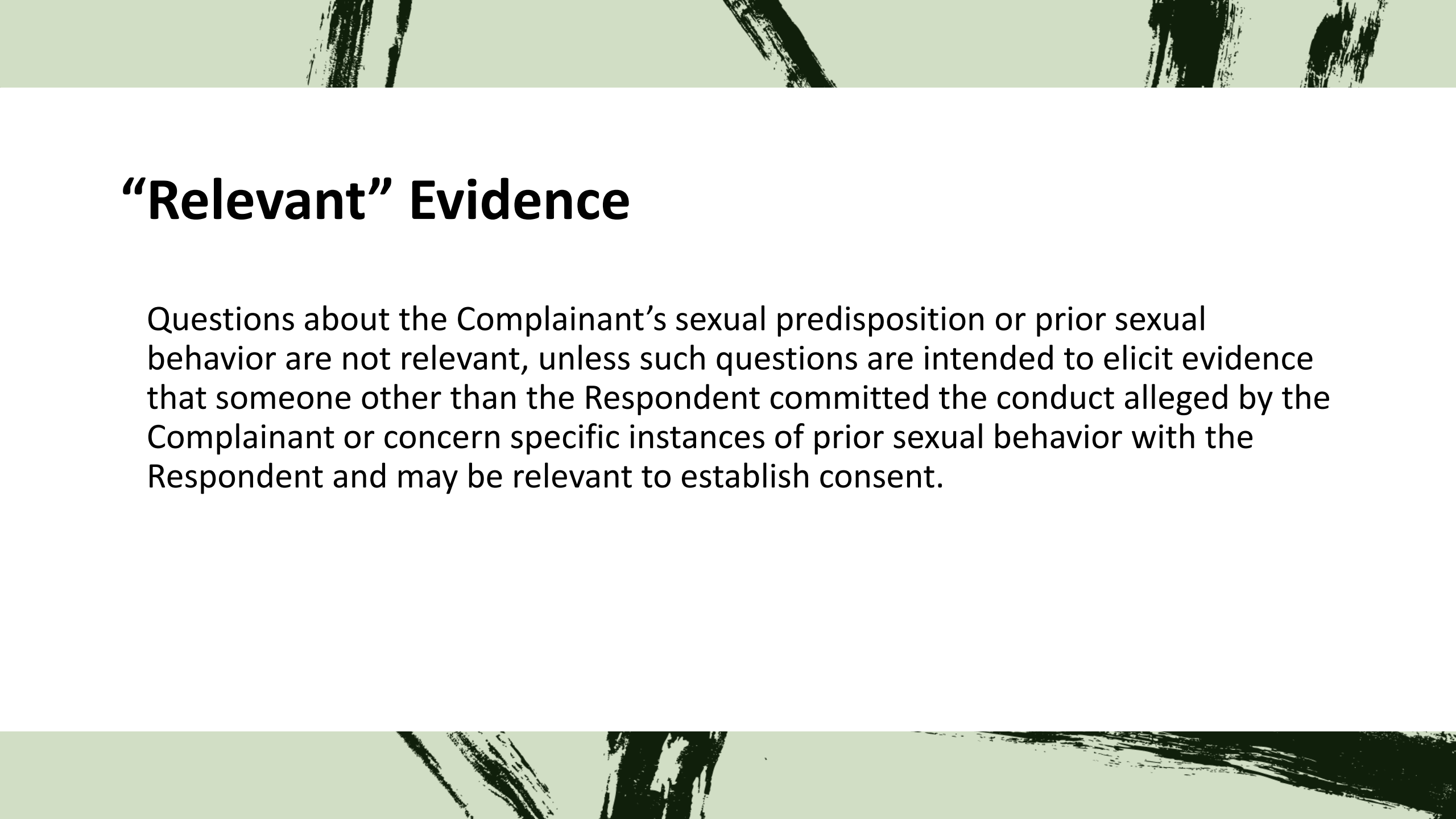
“Relevant” Evidence

- Tends to prove or disprove a fact
- Is pertinent to the allegations
- Can be inculpatory or exculpatory

“Relevant” Evidence

Evidence about a complainant's prior sexual history is generally irrelevant and not permissible UNLESS

1. it's offered to show another person committed the act **OR**
2. to prove lack of consent in a specific instance with the respondent



“Relevant” Evidence

Questions about the Complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions are intended to elicit evidence that someone other than the Respondent committed the conduct alleged by the Complainant or concern specific instances of prior sexual behavior with the Respondent and may be relevant to establish consent.

Know your Title IX definitions

- Severe
 - the impact or nature of the conduct, suggesting it is extreme or egregious. A single, intensely abusive incident can be considered severe
- Pervasive
 - the frequency and persistence of the conduct. It means the behavior is not an isolated event but is repeated or ongoing.
- Objectively Offensive
 - a reasonable person, in the same or similar circumstances, would find the conduct offensive, regardless of their personal opinions



Important definition

Consent – not defined in the regulations

It is the responsibility of the person who wants to engage in sexual activity to ensure they have consent from their partner.



Important definition

Consent

- **Affirmative and active:** Consent must be a *clear "yes" through words or actions*, not a "maybe" or "no." It can never be assumed and *must be ongoing throughout sexual activity*.
- **Freely and voluntarily given:** Consent must be a choice made *without coercion, pressure, or manipulation*.
- **Knowing and informed:** A person *must be aware* of what they are agreeing to and *be able to make a rational decision*.
- **Mutual and ongoing:** Both parties must give consent, *and it can be withdrawn at any time before or during the activity*.
- **Specific:** *Consent to one act does not imply consent to another*. Previous relationships do not grant consent to future sexual acts.

Important definition

Consent is not possible when:

Incapacitation: A person cannot give consent if they *are incapacitated due to alcohol or drugs, asleep, or unconscious.*

Coercion or manipulation: Consent given under pressure is not valid

Lack of capacity: A person who is mentally disabled or a minor (depending on state laws and specific Title IX definitions) *may not be able* to give consent.

Important definition

Retaliation

- when an educational institution takes adverse action
- against an individual
- for exercising their rights under Title IX, such as reporting a sex discrimination complaint or participating in an investigation.

To prove retaliation, an individual must show they

- engaged in protected activity,
- suffered an adverse action, and
- that the two are causally connected

Parse the Policy

Did the alleged conduct occur? (Quid pro quo, unwelcome conduct, and /or sexual assault, stalking, dating violence, domestic violence)

If the alleged conduct occurred, was it sex-based?

If it was sex-based, does it meet the other definition requirements?

Example: was there an adverse impact for saying no? (QPQ)
was it severe, pervasive, and objectively offensive?
(unwelcome conduct)

Parse the Policy

Definition:

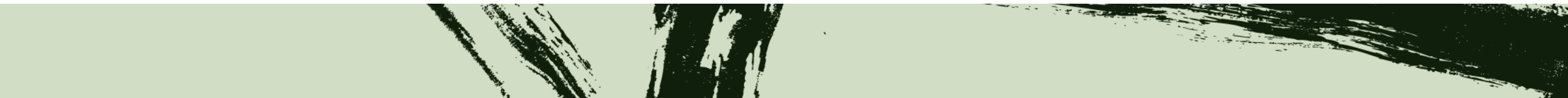
Stalking means to engage in a course of conduct on the basis of sex directed at a specific person that would cause a reasonable person to either: (1) fear for their safety or the safety of others (2) suffer substantial emotional distress.

1. Did the respondent(s) engage in a specific “course of conduct?” If so, what was it?
2. Was the course of conduct carried out on the basis of sex?
3. Was the conduct directed at a specific person(s)?
4. Would the conduct cause a reasonable person to either (1) fear for their safety or the safety of others OR (2) suffer substantial emotional distress?



#2 - Investigation

You and your advisee will receive a FINAL Investigation Report no less than 10-days prior to the live hearing.



Title IX

Advisor Role – Pre-Hearing

Role of the Advisor – Pre-Hearing

- Refer to your institution's Live Hearing Procedures to prepare!!!!
- If the party has not had an advisor up to this point, the institution **MUST** appoint one

Role of the Advisor – Pre-Hearing

- Your advisee will receive from the TIXC notice of the hearing 37 business days prior to the hearing:
 - the date, time, and location of the hearing
 - the names of the hearing panel members
 - the charges to be reviewed by the Hearing Panel
 - the essential allegations concerning the violation
 - the provisions of the Policy(ies) alleged to have been violated
 - the requirement that the parties have an advisor

Role of the Advisor – Pre-Hearing

- You and your advisee will have 10 days to submit a written response to the notice of hearing
- PLEASE refer to your Live Hearing Procedures regarding what information you must provide to the TIXC:
 - Who will serve as the advisor at the hearing?
 - Witnesses you would like to attend the hearing for questioning (can be new witnesses)- YOU must make sure they attend!
 - Questions or topics you would like to discuss at the hearing
 - Whether you and your advisee prefer to participate via technology or in-person
 - Any objections to any of the hearing panel members and the reasons for the objections
 - Any new evidence you plan to present at the hearing that was not reasonably available at the time of the investigation
 - Other (Refer to the procedures)

Role of the Advisor – Pre-Hearing

- The Hearing Panel Chair will hold a pre-Hearing meeting (in-person, phone, video) with each party and their advisor:
 - Will review how the hearing will be conducted
 - Will review witnesses – not all may be necessary
 - Will make determinations regarding any questions of relevancy of evidence raised prior to the hearing
- Opportunity to ask clarifying questions
 - To review witnesses
 - To challenge rulings of relevancy

Don't argue with the chair but do present your view
Leave a ruling you disagree with for the appeal process

Title IX

Advisor Role – The Live
Hearing



The Live Hearing

The Hearing Panel Chair is in charge

Not a court hearing but has similarities

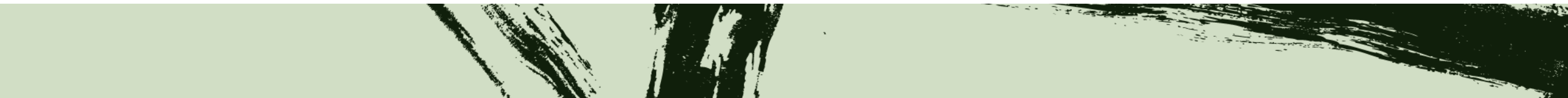
Hearing Chair will review the process and ask people to state their names for the record

Complainant and Respondent may be in separate rooms, if requested

Advisors are to be present with their advisee

Witnesses will be kept separate until they are called for questioning

A written transcript or audio or video record will be kept of the hearing



The Live Hearing – Sequence

The Hearing Panel will ask their questions first (but also may interrupt later if party or witness testimony prompts follow-up questions for the panel)

Each advisor will be given the opportunity to make an opening statement, if they wish to

Starting with the Complainant's Advisor, the Advisor will first ask direct questions of their advisee and then cross-examine the other party

The Complainant's Advisor will then call any witnesses for questioning

After the Complainant's Advisor is finished, the same will proceed from the Respondent's Advisor

The Live Hearing

As an Advisor with your Advisee:

Respect the rules of decorum/Respect the Hearing Chair and his/her decisions

Don't be antagonistic

Have your opening statement and questions prepared

Pause after each question to allow the Chair to rule on relevancy

*If the ruling doesn't go your way, leave it for an appeal

Prepare your witnesses and exhibits or visuals ahead of time

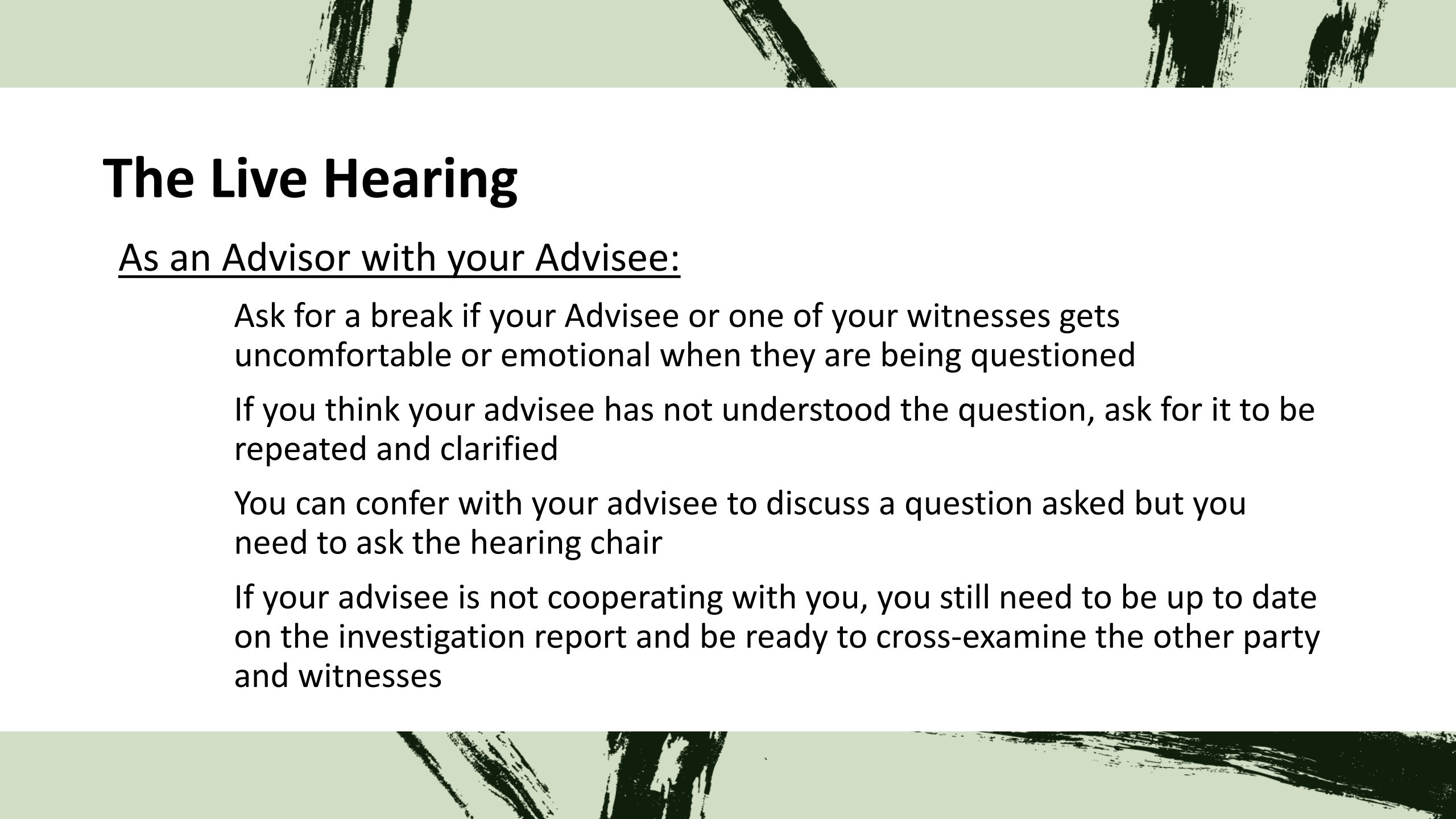
Rehearse with your advisee and witnesses if you feel it necessary

Keep track of questions so you don't ask them a second time

The Live Hearing

As an Advisor with your Advisee:

- Your advisee could choose to appear, not to appear (NOT GOOD)
- Choose to appear and answer all questions or only some questions
 - The Panel cannot draw an inference based solely on a party or witness's absence from the live hearing or refusal to answer questions
- If conflict of interest or bias seems to appear at the hearing, through statements or questioning, raise the issue with the Chair.



The Live Hearing

As an Advisor with your Advisee:

Ask for a break if your Advisee or one of your witnesses gets uncomfortable or emotional when they are being questioned

If you think your advisee has not understood the question, ask for it to be repeated and clarified

You can confer with your advisee to discuss a question asked but you need to ask the hearing chair

If your advisee is not cooperating with you, you still need to be up to date on the investigation report and be ready to cross-examine the other party and witnesses

Title IX

Advisor Role – Post-Hearing

Standard of Evidence

Preponderance of the evidence is the industry standard

whether it is more probable than not that the alleged conduct occurred and constituted a violation of policy. Under Pennsylvania law, a preponderance of the evidence standard is defined as “the greater weight of the evidence” with the criteria that such evidence “tip a scale” slightly. Raker v. Raker, 2004 PA Super 107, 87 A.2d 720, 724 (2004).

After the Live Hearing

The Hearing Panel is the Decision-Maker

They will prepare a Written Notice of Outcome no later than 10 days after the Hearing

If there is a finding of responsibility on the part of the Respondent, the Written Notice of Outcome will go to the appropriate disciplinary authority to determine what sanctions and/or remedies will be administered

- Nature of the conduct
- Impact of the conduct on the complainant
- Previous disciplinary record
- Expression of remorse
- Other (See Procedures)

After the Live Hearing

- No later than 23 days after the TIXC receives the final report from the Hearing Chair, both parties and their advisors will receive the final Written Notice of Outcome.
- The Written Notice of Outcome will include information **on filing an appeal to the determination.**
- The other party is notified of the appeal and given a reasonable time to respond to it.

After the Live Hearing

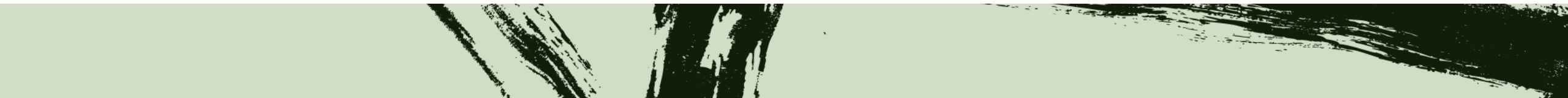
Appeals are limited to the following bases

- Procedural irregularity *that could have affected the outcome of the matter*
- New evidence that was not reasonably available and *that could have affected the outcome of the matter*
- A member of the hearing panel had a substantiated conflict of interest or bias *that could have affected the outcome of the matter*
- A witness and/or evidence was ruled by the Panel Chair as relevant or not relevant, when the Panel Chair should have ruled the opposite and either included or excluded the witness and/or evidence inappropriately *AND it could have affected the outcome of the matter*



After the Live Hearing

As the Advisor

- Review the written notice of outcome with your advisee
 - Determine if any of the appeal grounds apply
 - Ask to review the hearing transcript, audio, or video if needed
 - Assist your advisee in writing the appeal
 - include the basis for appeal and the rationale
 - Submit the appeal on time
 - The Appeal Decision-Maker reviews the appeal and determines whether to uphold or deny it
- 

Appeal Outcomes

- Deny appeal; original determination upheld
- Remand to original or new investigator for new or further investigation
- Remand to original or new decision-maker for additional consideration or new determination/hearing

Not recommended for appeal decision-maker to modify the original determination

Title IX Coordinator is responsible for implementing the appeal determination!

QUESTIONS?

Brian J. Taylor, Esquire – Chair
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