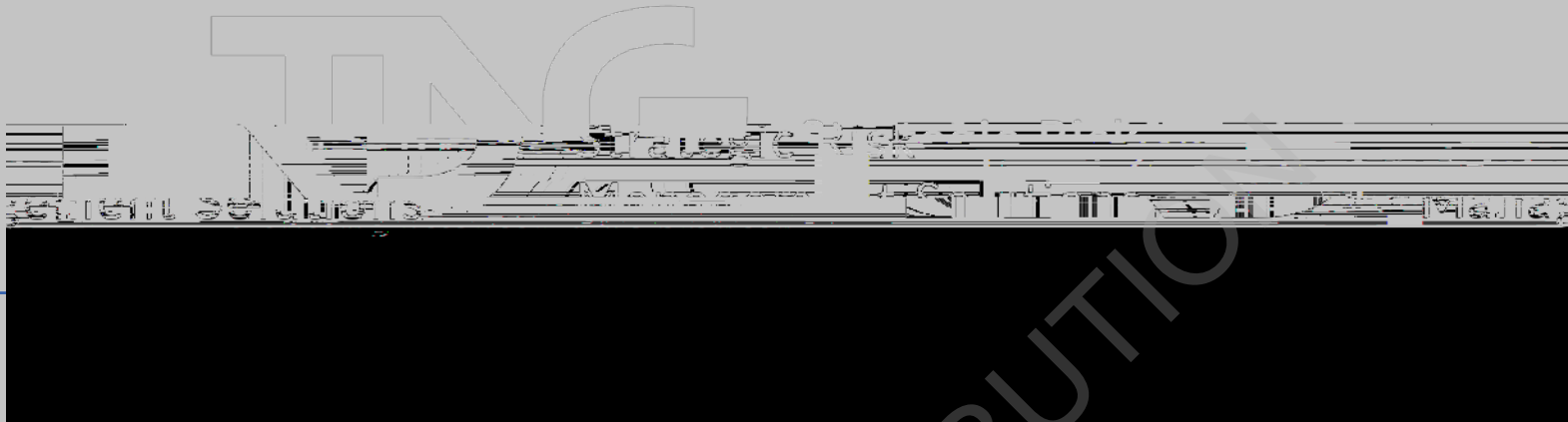




Association of
Title IX Administrators

Title IX Coordinator and Administrator

Coordinator One: Foundations
Training & Certification Course



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.



AGENDA

1 Title IX Team Roles & Responsibilities

2 Title IX Overview & History

3 Significant Cases

4 The OCR & Title IX

5 Clery Act & VAWA Section 304

6 When Does Title IX Apply?

AGENDA

7

Creating & Implementing Appropriate Policies & Procedures

8

Oversight & Coordinating Prompt & Equitable Grievance Procedures

9

Coordinating Overlap in Various Grievance Processes

10

Point Person for Complaints

11

Coordinating Informal Resolution

12

Supervising Investigations

AGENDA

- 13 Elements of an Investigation
- 14 Coordinating the Decision-Making Stages
- 15 Ensuring Compliance with Final Sanctions
- 16 Coordinating Appeal Processes
- 17 General Title IX Compliance Oversight



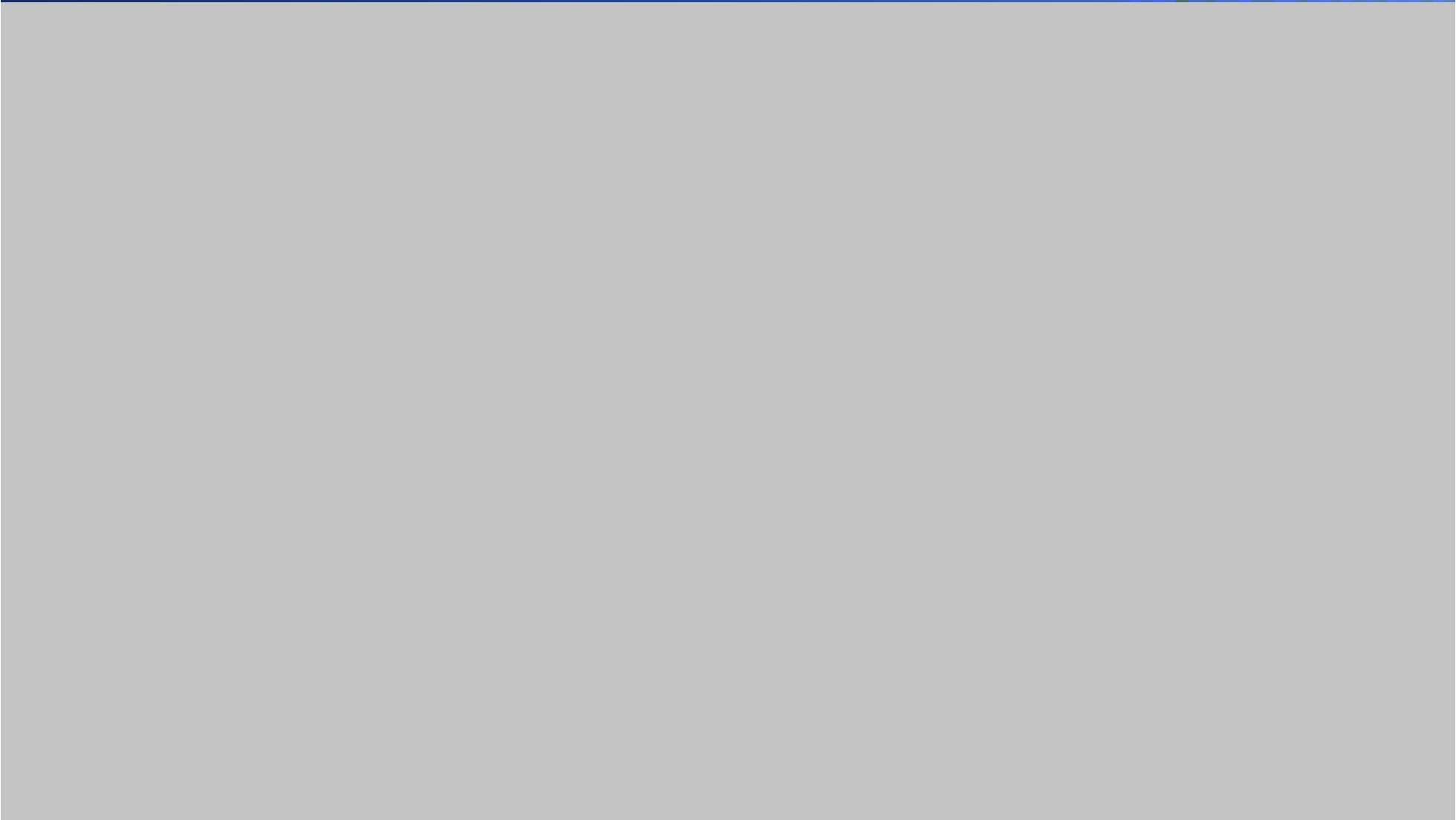
TITLE IX TEAM ROLES & RESPONSIBILITIES

- ! Sample Team Structure
- ! Title IX Coordinator
- ! Investigator
- ! Decision-Maker
- ! Informal Resolution Facilitator
- ! Training the Team

SAMPLE TITLE IX TEAM STRUCTURE FOR HIGHER EDUCATION

THE TITLE IX TEAM

- ! Title IX Coordinator(s)
- ! Deputy Coordinator(s)
- ! Investigator(s)
- ! Decision-Makers—can be a single Decision-maker or a panel of Decision-makers
 - ! Policy Violation
 - ! Appeal
- ! Informal Resolution Facilitator(s)
- ! Institution-appointed Advisors

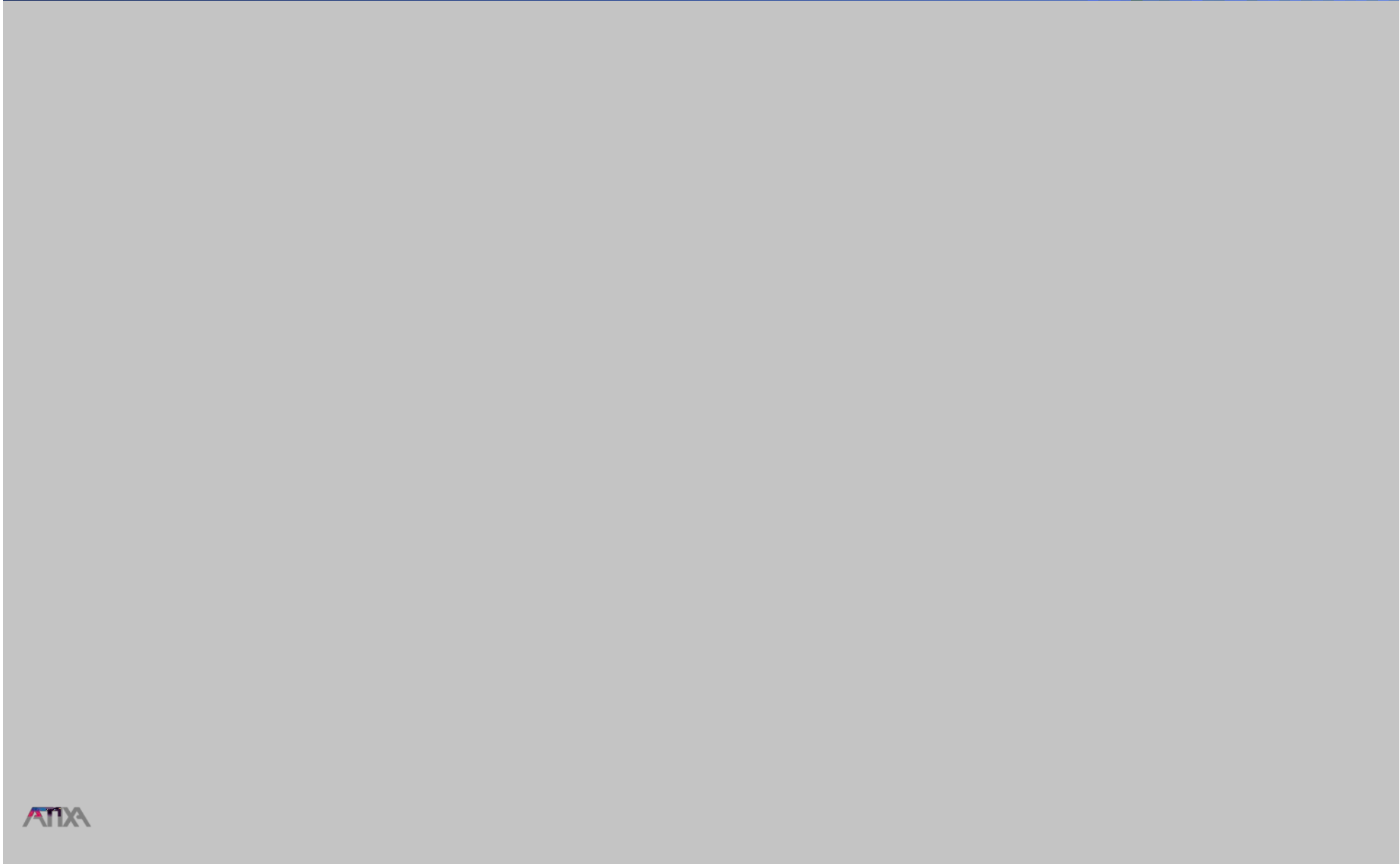


THE TITLE IX COORDINATOR

- ! Recipients are required to designate at least one employee as the “Title IX Coordinator”
- ! Administrator with significant authority and wide-ranging responsibilities
- ! Affects change across many departments, including human resources, academic affairs, athletics, and student conduct
- ! Some institutions will allocate part-time responsibilities to the

TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES

- ! Create and implement appropriate policy and procedures
- ! Navigate First Amendment protections
- ! Point person for reports and complaints
- ! Contact for government inquiries
- ! Oversight of prompt and equitable grievance procedures
- ! Coordinate overlap of various student and employee grievance processes
- ! Oversight of informal resolution processes
- ! Supervise investigations



ROLE OF THE INVESTIGATOR

- ! Conduct reliable, prompt, fair, and impartial investigations
 - ! Work with TIXC to develop investigation strategy
 - ! Identify and interview parties and witnesses
 - ! Identify, organize, and compile relevant information
 - ! Maintain accurate and thorough investigation records and notes
 - ! Share the evidence with the parties and their Advisors
 - ! Provide notices to the parties (may be done in conjunction with TIXC)

- ! Create an investigation report that fairly summarizes relevant evidence

ROLE OF THE DECISION-MAKER(S)

- ! Determine whether institution's policy has been violated based upon the applicable standard of evidence
 - ! Decisions must be based upon an independent assessment of the evidence

TIX TEAM TRAINING REQUIREMENTS

- ! Robust training mandates
- ! Coordinators, Investigators, Decision-makers, Appeal Decision-makers, Informal Resolution Facilitators
- ! Training materials cannot include sex stereotypes; should promote impartiality
- ! Training materials must be maintained for seven years and posted publicly on Recipient's website

REQUIRED TRAINING TOPICS

- ! Definition of sexual harassment
- ! Scope of the Recipient's education program or activity
- ! How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
- ! How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- ! Use of any technology to be used at a live hearing

REQUIRED TRAINING TOPICS (CONT.)

- ! Issues of relevance for both questions and evidence, including when questions and evidence about the Complainant's prior sexual behavior is not relevant
- ! Issues of relevance regarding the creation of an investigation report that fairly summarizes relevant evidence
- ! Note: The OCR sets the minimum training requirements and institutions should conduct training that covers a broader range of topics





TITLE IX OVERVIEW & HISTORY

- ! Text of the Law
- ! The Road to Title IX
- ! Where We are Today
- ! Key Title IX-Related Issues
- ! Essential Compliance Elements
- ! The IX Commandments

TITLE IX

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

A BRIEF HISTORY OF TITLE IX: PRE-1972

1964 - Title VI of the Civil Rights Act

- ! Prohibits discrimination on the basis of race, color, or national origin in any program or activity receiving federal financial assistance

1964 - Title VII of the Civil Rights Act

- ! Prohibits discrimination in the terms, conditions, or privileges of employment on the basis of an employee's race, sex, color, religion, or national origin

1965 - Executive Order 11246

- ! Prohibits federal contractors from discriminating on the basis of race, color, religion, or national origin. "Sex" was added in 1968; renamed Exec. Order 11375.

A BRIEF HISTORY OF TITLE IX: 1972-1979

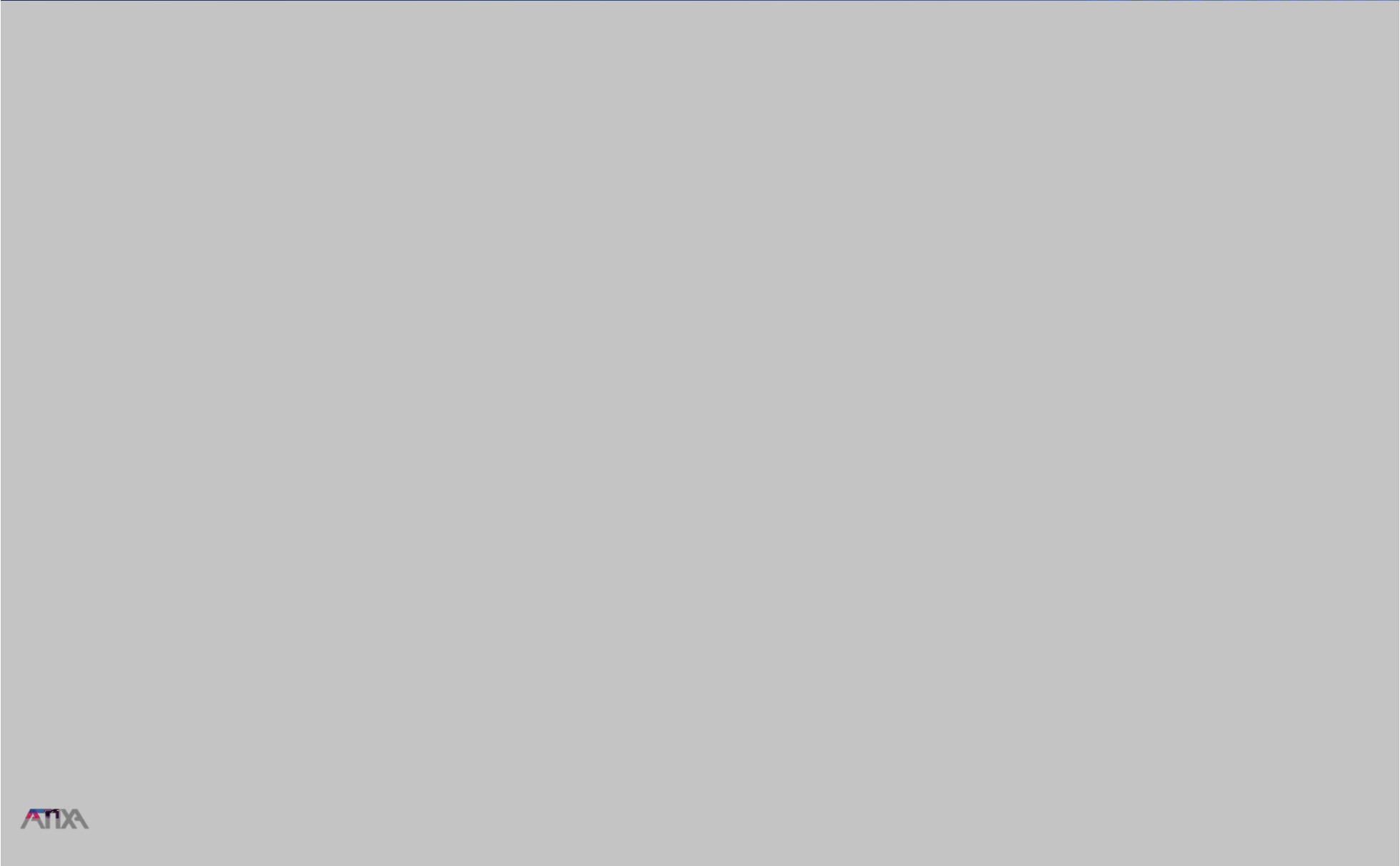
- ! 1972: Title IX passed and signed into law by President Nixon
- ! 1975: Department of Health, Education, and Welfare (HEW) codified Title IX regulations
 - ! HEW was the precursor to the current U.S. Dept. of Ed.
- ! 1979: Supreme Court created a private right of action under Title IX
 - ! *Cannon v. U. of Chicago*, 441 U.S. 677 (1979)
- ! 1979: HEW promulgated three-part test for athletics to evaluate equity in athletic participation and access to resources and equitable opportunities

A BRIEF HISTORY OF TITLE IX: 1980-2020

- ! 1980: U.S. Department of Education created
 - ! Title IX oversight transferred to Dept. of Ed.'s Office for Civil Rights (OCR)
- ! 1982: Supreme Court holds "Employment discrimination comes within Title IX's prohibition"
 - ! *North Haven Bd. of Education v. Bell*, 452 U.S. 512.
- ! 2020: Title IX sexual harassment regulations issued
- ! 2020: Supreme Court holds that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex under Title VII
 - ! *Bostock v. Clayton County*, 590 U.S. ____ (2020)

A BRIEF HISTORY OF TITLE IX: 2021-PRESENT

- ! 2021: Department of Education issues “Notice of Interpretation: Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*”
- ! 2021: OCR announces intent to issue a Notice of Proposed Rulemaking (NPRM) related to Title IX by April 2022



TITLE IX ESSENTIAL COMPLIANCE ELEMENTS

Once an official with authority has actual notice of sexual harassment/sexual misconduct, the institution must:

- ! Take immediate and appropriate steps to investigate what occurred
 - ! The obligation to investigate is absolute, even if just an Initial Assessment is completed (see *Davis*)
- ! Take prompt and effective action to:
 - ! Stop the harassment
 - ! Prevent the recurrence
 - ! Remedy the effects

NOTE: This is regardless of whether the Complainant makes a formal complaint or asks the school to take action

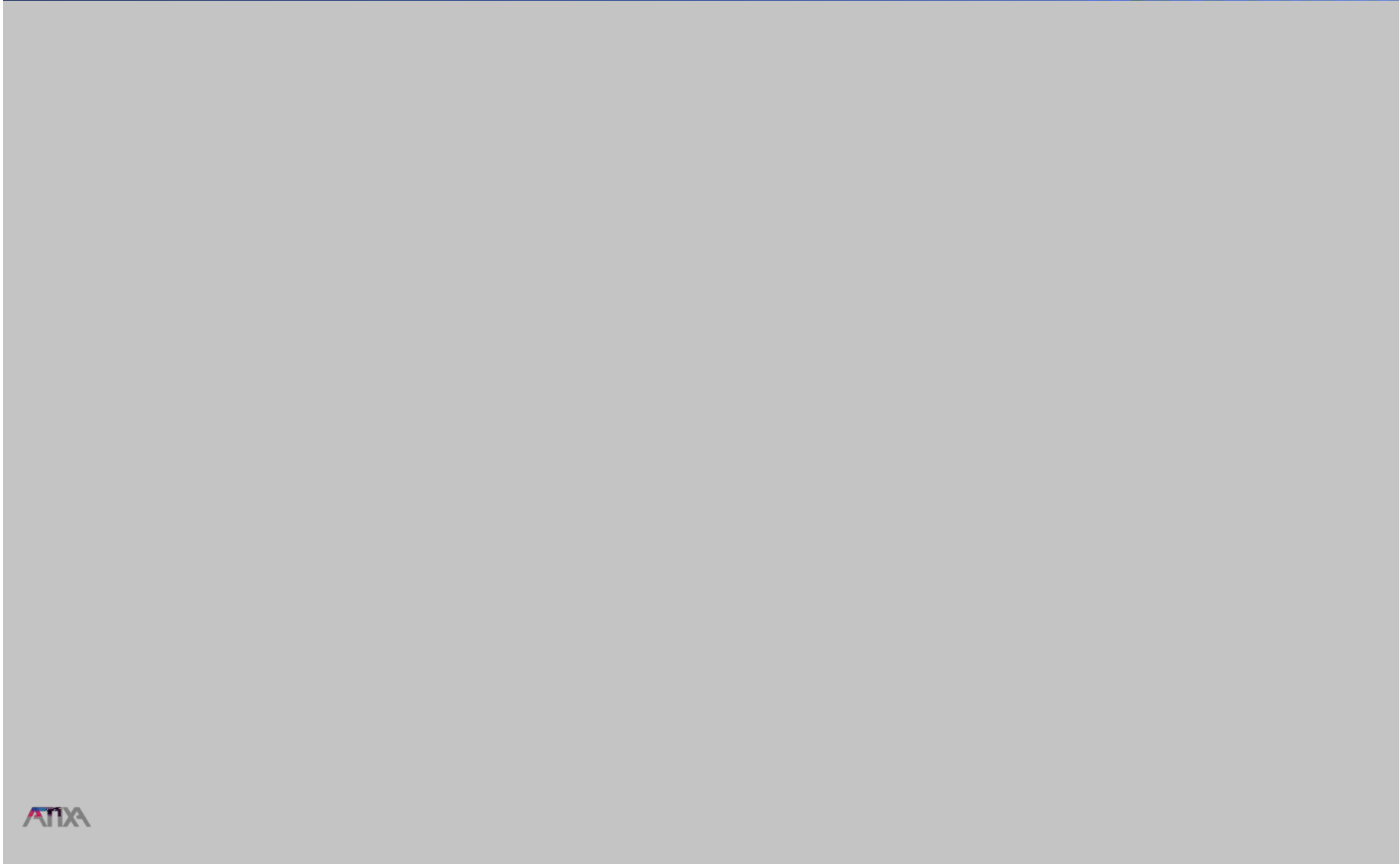
THE IX COMMANDMENTS

INVESTIGATION



SIGNIFICANT CASES

- ! *Franklin v. Gwinnett County Public Schools*,
503 U.S. 60 (1992)
- ! *Gebser v. Lago Vista Independent School District*,
524 U.S. 274 (1998)
- ! *Davis v. Monroe County Bd. of Education*,
526 U.S. 629 (1999)



GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

The Supreme Court ruled individuals cannot recover monetary damages against the school unless:

! Three-part standard:

1. An official of the educational institution must have had "actual notice" of harassment;
2. The official must have authority to "institute corrective measures" to resolve the harassment problem; AND
3. The official must have "failed to adequately respond" to the harassment and, in failing to respond, must have acted with "deliberate indifference."

DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)

Finding in favor of Davis, the Supreme Court expanded on the *Gebser* case:

- ! The institution must have “actual notice” of the harassment; and the institution must have responded to the harassment with “deliberate indifference.”

Additionally, court held:

- ! Harassment must be “severe, pervasive, and objectively offensive,” and the indifference “systemic,” to the extent that the victim is deprived of educational opportunities or services.
- ! Justice O’Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “_____”



THE OCR & TITLE IX

- ! OCR's Role
- ! Civil Lawsuits v. Administrative Actions
- ! OCR Guidance
- ! OCR Resources





CIVIL LAWSUIT VS. ADMINISTRATIVE ACTION

Lawsuit

- ! Filed in federal court
- ! Monetary damages, injunction
- ! Requires:
 - ! Actual notice
 - ! Employee with authority to take action
 - ! Deliberate Indifference

Administrative Action

- ! Initiated by the OCR
- ! Voluntary compliance or findings
- ! Requires:
 - ! Actual OR constructive notice ("knew or should have known")
 - ! Investigate
 - ! End harassment
 - ! Remedy effects
 - ! Prevent recurrence

OCR GUIDANCE

Key Regulatory and Sub-Regulatory Guidance from OCR

- ! Rescinded:

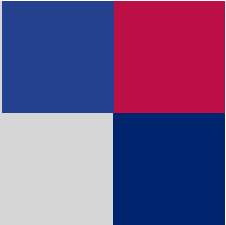
- ! 2001 OCR Revised Sexual Harassment Guidance

OCR GUIDANCE (CONT.)

Key Regulatory and Sub-Regulatory Guidance from OCR

! In effect:

- ! 2003 DCL on Title IX and Free Speech
- ! 2010 DCL on Harassment and Bullying
- ! 2013 DCL on Pregnant and Parenting Students
- ! 2020 Amendments to Title IX Regulations
- ! 2020 Q&A on Final Title IX Rule
- ! 2021 Q&A on Title IX and Single Sex Scholarships, Clubs, and other Programs
- ! 2021 Notice of Interpretation – Discrimination Based on R(s)-18 -38 460.3(h) TJETQq0.24 0 0 0.240218 148.418 -369.883



CLERY ACT AMENDMENT: VAWA SECTION 304 (2013)

CLERY ACT AMENDMENT: VAWA SECTION 304 (CONT.)

- ! Prohibits retaliation
- ! Clery Handbook rescinded and replaced with the Clery Act Appendix for Federal Student Aid (FSA) Handbook
 - ! <https://ifap.ed.gov/electronic-announcements/100920RescissionReplace2016HandbookForCampusSafetySecurityReporting>



WHEN DOES TITLE IX APPLY?

- ! Personal Jurisdiction
- ! Covered Programs
- ! Geographic Jurisdiction
- ! Subject Matter Jurisdiction
- ! When Title IX Does Not Apply
- ! Group Discussion

WHEN DOES TITLE IX APPLY?

- ! Regulations emphasize the *Davis* standard - Title IX applies, and jurisdiction is required, when the Recipient has:
 - ! Control over the harasser (Respondent) AND control over the context of the harassment
 - ! “Education program or activity” means...
 - locations, events, or circumstances under substantial control
 - any building owned or controlled by an officially recognized student organization

WHEN DOES TITLE IX APPLY?

Personal Jurisdiction

- ! At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the Recipient's education program or activity.
 - ! The OCR adopts a fairly broad definition of what could constitute "attempting to participate"
 - ! Can include dual enrollment students, alumni, prospective students/employees, medical residents, etc.

WHEN DOES TITLE IX APPLY?

Personal Jurisdiction (Cont.)

- ! When is a student a “student”?
 - ! Upon application? Once admitted? Once registered?
Upon matriculation?
 - ! What about winter and summer breaks?
- ! When is an employee an employee?
 - ! Exempt vs. Non-Exempt Employees

WHEN DOES TITLE IX APPLY?

Personal Jurisdiction (Cont.)

- ! If Respondent is not affiliated with the institution in any way, the institution lacks authority to take disciplinary action
 - ! E.g.: Employee of an outside company (e.g., vendor, construction worker); guest or invitee; prospective student; former student; former employee; student from another institution

WHEN DOES TITLE IX APPLY?

Covered Programs

- ! All programs run by a federal funding Recipient
- ! It does not matter whether the program receives federal funding, all institutional programs are covered
- ! All programs using facilities of the funding Recipient
 - ! e.g., camps using Recipient fields/stadium
- ! Includes hospitals, residency programs, branch or satellite campuses
- ! What about virtual learning and employment settings?

WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction

- ! Sexual Harassment and Discrimination cases
 - ! Must be dismissed if did not occur against a person in the United States, but...
 - Contrary case law
 - ! There is NO expectation that you exercise jurisdiction over off-site/off-campus incidents UNLESS
 - The property is owned or controlled by the school OR
 - The property is being used for a program or event sponsored by the school or an organization recognized by the school OR
 - The property is owned or controlled by an organization recognized by the school

WHEN DOES TITLE IX APPLY?

Geographic Jurisdiction (Cont.)

- ! The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- ! Other forms of liability may still apply and the PPTVWM analysis may come into play here
- ! The Recipient may still be taking discretionary jurisdiction over incidents off-campus or on non-school property, but under other policies, not Title IX

WHEN DOES TITLE IX APPLY?

Subject Matter

- ! Sexual Harassment as defined in the 2020 Title IX regulations
- ! Sex/Gender discrimination (Equity)
 - ! The OCR recently noted this includes sexual orientation and gender identity (based on biological sex) following Supreme Court's *Bostock* case
- ! Any other policy violation that is sex/gender-based that

WHEN DOES TITLE IX APPLY?

Subject Matter (Cont.)

! Limitations:

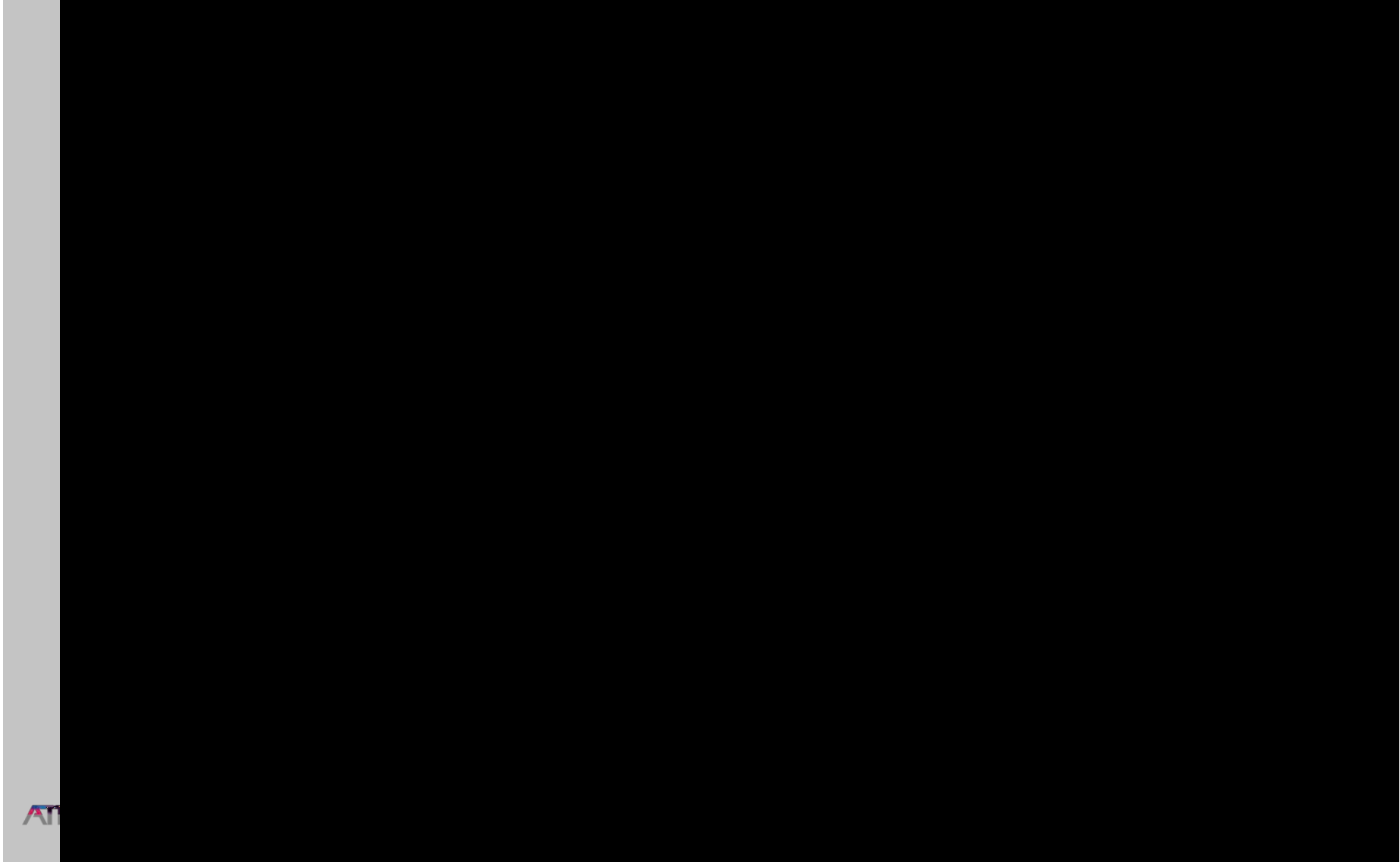
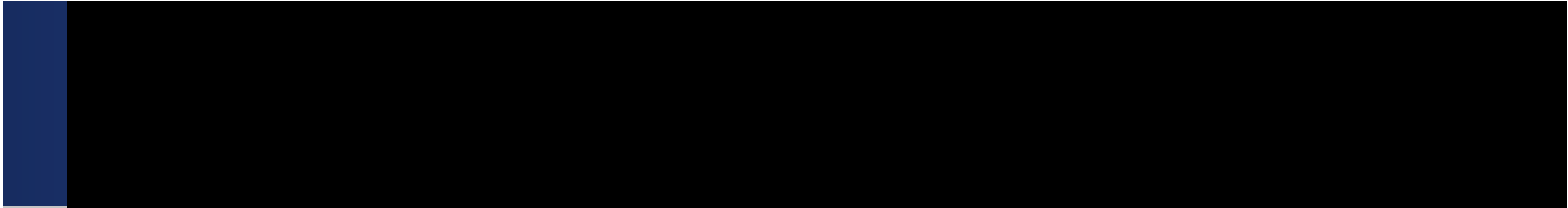
- ! Actions/conduct/speech protected by academic freedom
 - Pedagogically appropriate and germane to the subject matter of course that instructor hired to teach/research
- ! Actions/conduct/speech protected by the First Amendment.
 - Merely offensive conduct cannot be disciplined at a public school
 - Must be severe, pervasive, and objectively offensive

IF TIX JURISDICTION IS NOT PRESENT

- ! Behavior could still violate and be addressed under:
 - ! Institutional harassment/discrimination policies
 - ! Student Handbook/conduct policies
 - ! Technology/Acceptable Use policies
 - ! Employee Handbook/conduct policies
 - ! Professionalism standards
- ! Institution should still take steps to:
 - !

GROUP DISCUSSION QUESTIONS

- ! Does your institution exercise jurisdiction over off-campus/non-school property incidents?
 - ! Under what circumstances?
 - ! For Students? Faculty? Staff?
- ! When is a student officially a student under your code of conduct and/or Title IX policies?
- ! What are you doing to address off-campus intimate partner violence?
- ! What are you doing to address online harassment and discrimination?



CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES

- ! Policies = The Rules
 - ! Should clearly define expected/prohibited conduct
 - ! Should be regularly updated, revised, and assessed
- ! Procedures/“ Process” = How alleged policy violations are addressed
 - ! Should clearly channel the parties to appropriate resources
 - ! Should provide for the equitable remedying of complaints
- ! The 2020 Regulations have likely required substantial changes to existing policies and procedures.

CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

- ! TIXC must be an integral part of the policy/procedure development and review process
 - ! Ensure all policies/procedures related to sex/gender misconduct and discrimination are legally accurate and complete
 - ! Confirm that new or revised grievance procedures are posted and published promptly and that old procedures are removed from publications and websites
 - Beware of multiple conflicting or varying versions of published policy
 - Internally maintain copies of old policies and procedures for reference in the event of a lawsuit, etc.

CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

- ! If the institution has multiple policies and procedures (for faculty, staff, students), Recipient must ensure that these policies are not conflicting, or do not contain conflicting definitions
 - ! A strong argument for a single policy!
 - !

CREATING AND IMPLEMENTING APPROPRIATE POLICY BY 309

CREATING AND IMPLEMENTING APPROPRIATE POLICY & PROCEDURES (CONT.)

- ! Written in a manner that is easily understood
- ! Clearly articulate the difference between making a report v. making a formal complaint
- ! Clearly identify the individuals to whom discrimination complaints can be submitted

DEFINITIONS OF SEXUAL HARASSMENT

- ! Quid Pro Quo Sexual Harassment
- ! Hostile Environment Sexual Harassment
- ! Sexual Assault
- ! Domestic Violence
- ! Dating Violence
- ! Stalking

REQUIRED DEFINITIONS – TIX REGULATIONS

Sexual Harassment is conduct on the basis of sex meeting one of the following conditions:

- ! An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual's participation in unwelcome sexual conduct;
- ! 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 Recipient's education program or activity; or
- ! "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v)
"Dating violence" as defined in 34 U.S.C. 12291(a)(10)
"Domestic violence" as defined in 34 U.S.C. 12291(a)(8)
"Stalking" as defined in 34 U.S.C. 12291(a)(30)



HOSTILE ENVIRONMENT: “REASONABLE PERSON”

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”)§AF&D-0

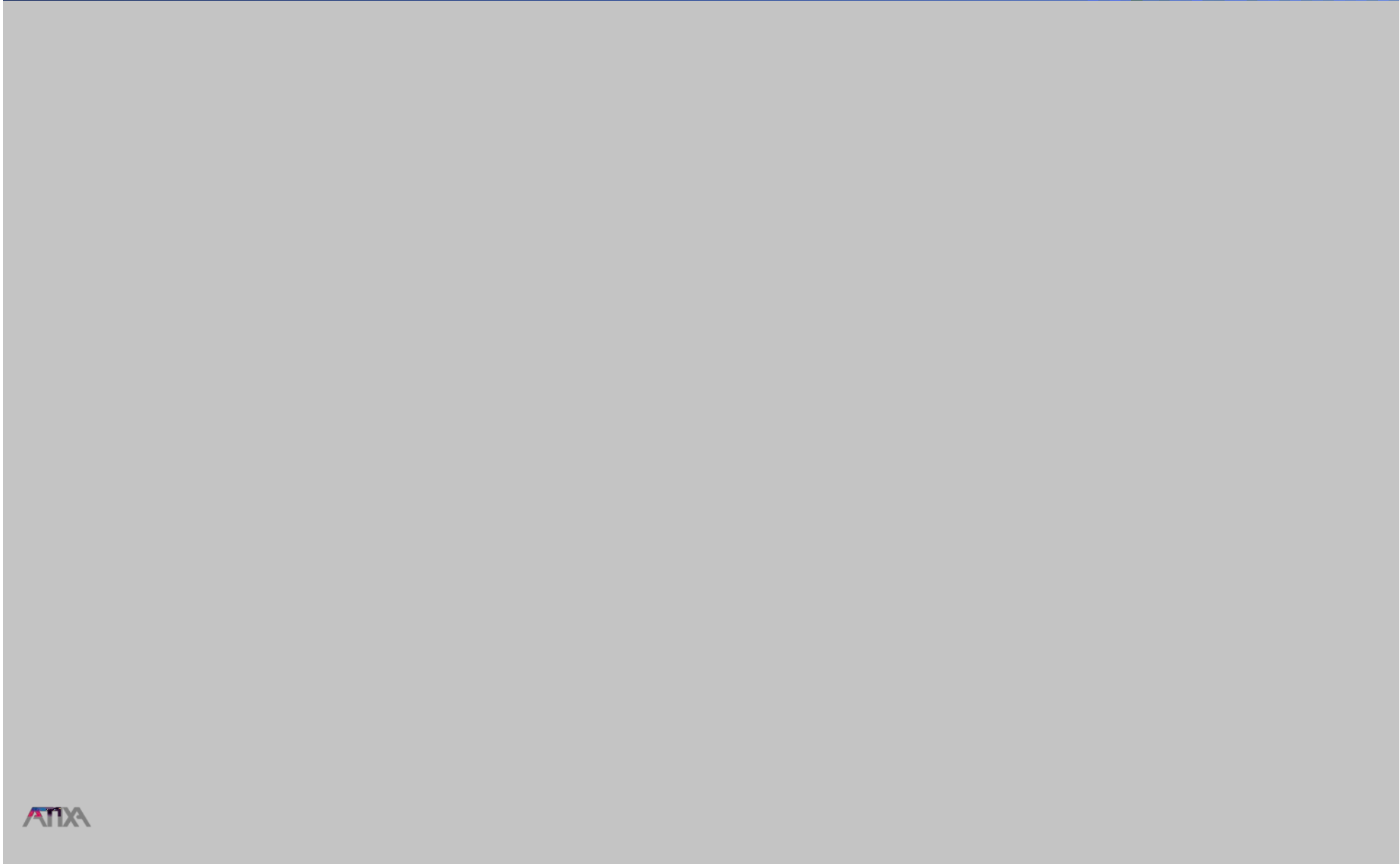
HOSTILE ENVIRONMENT: "SEVERE"

! Physical conduct is more likely to be severe

!

HOSTILE ENVIRONMENT: “PERVASIVE”

- ! Widespread
- ! Openly practiced
- ! Well-known among students or employees – reputation of a hostile environment



HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- ! Hostile environment analysis requires that you evaluate the “totality of the circumstances.”
- ! Totality of the circumstances to consider:
 - ! Frequency, nature, and severity of the conduct (see factors previously discussed)
 - ! Identity of and relationship between the parties
 - ! Age of the parties
 - ! Size of the school, location of the incidents, and context in which they occurred

HOSTILE ENVIRONMENT:

SEXUAL ASSAULT

Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.

- ! 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 their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.
- ! 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 where the

SEXUAL ASSAULT (CONT.)

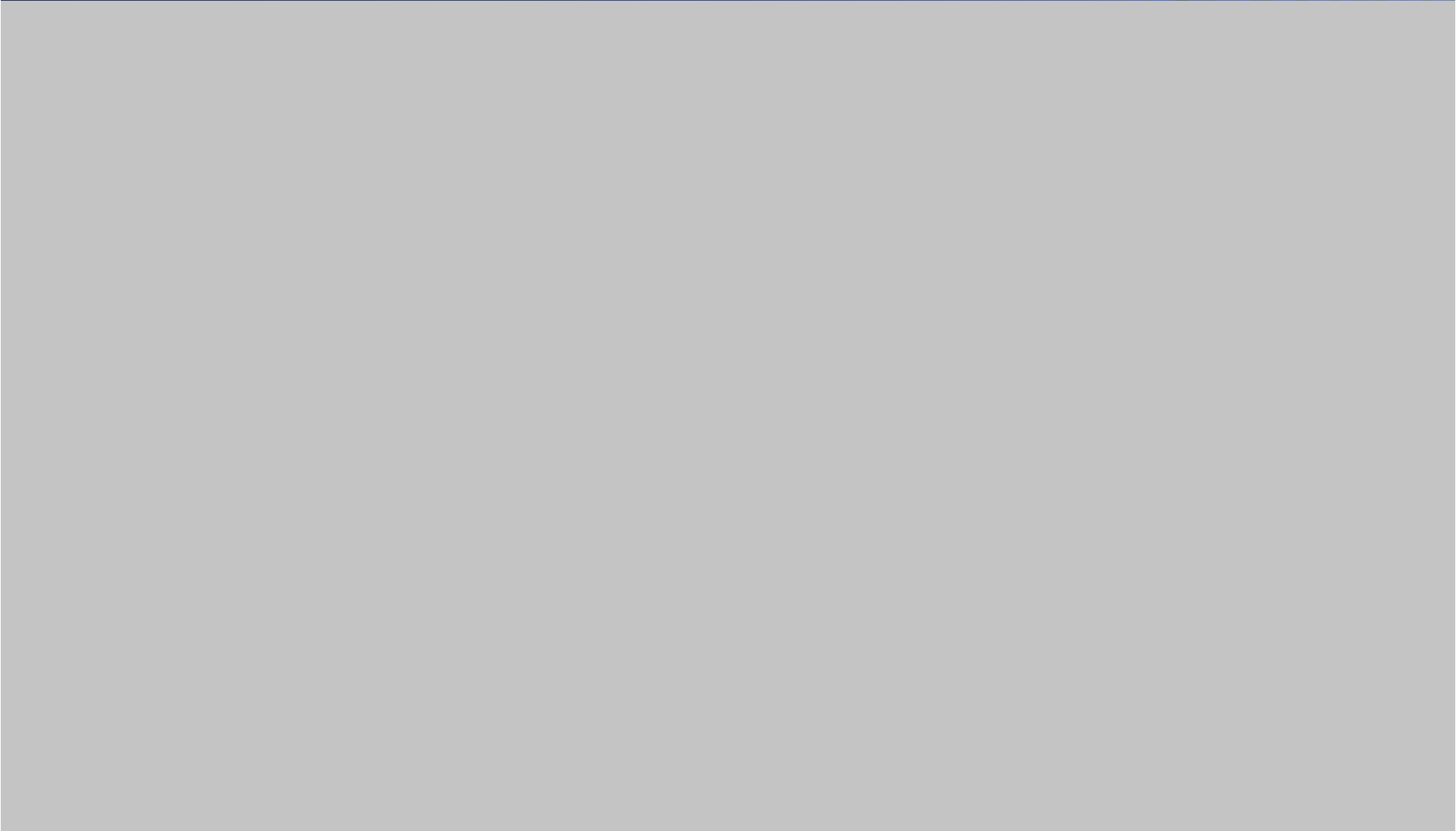
- ! Incest - Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by [insert state] law.
- ! Statutory Rape - Nonforcible sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

DATING VIOLENCE

- ! Violence committed by a person who is 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.

DOMESTIC VIOLENCE

- ! A felony or misdemeanor crime of violence 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;
 - ! By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
 - ! By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
 - ! 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 [insert your state here].







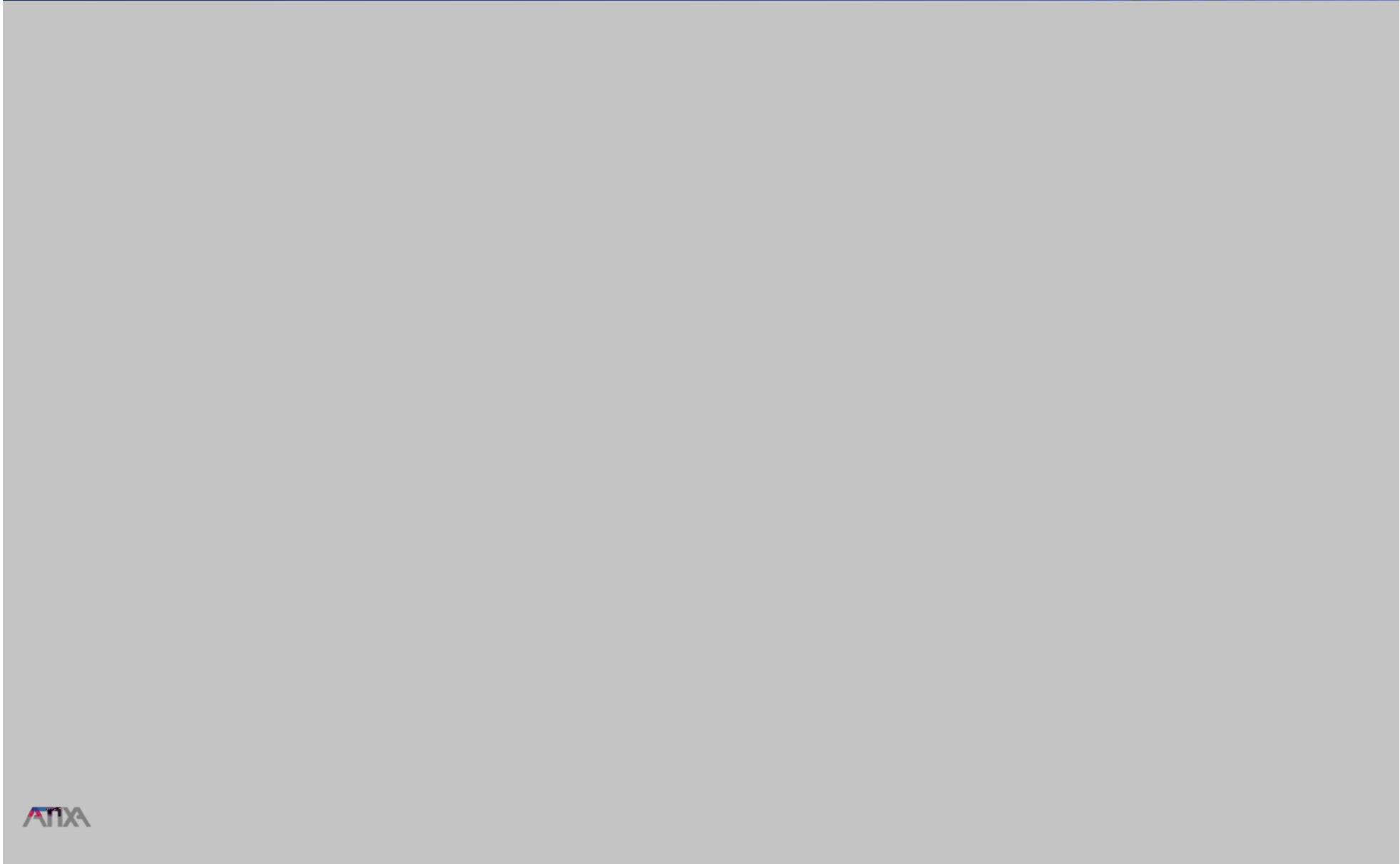
OTHER POLICY DEFINITIONS

- ! Retaliation
- ! Sexual Exploitation

RETALIATION – REGULATION DEFINITION

§ 106.71 Retaliation

! *Retaliation prohibited.* No Recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...



RETALIATION

§ 106.71 Retaliation.

- ! The Recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any Complainant, any individual who has been reported to be the perpetrator of sex discrimination, any Respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder...

RETALIATION

(Cont.)...Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

! *Specific circumstances.*

(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION

Sexual Exploitation (non-Title IX sexual harassment)

- ! Occurs when one person takes 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 one of other sexual

ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

! Examples (continued):

- ! Knowingly making an unwelcome disclosure of (or threatening to disclose) an individual's sexual orientation, gender identity, or gender expression
- ! 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 non-consensual pornography
- ! Prostituting another person

ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- ! Examples (continued):
 - ! 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
 - ! Misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual connections (e.g., spoofing)
 - ! Forcing a person to take an action against that person's

ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- ! Examples (continued):
 - ! Knowingly soliciting a minor for sexual activity
 - ! Engaging in sex trafficking
 - ! Knowingly creating, possessing, or disseminating child pornography

CONSENT CONSTRUCT

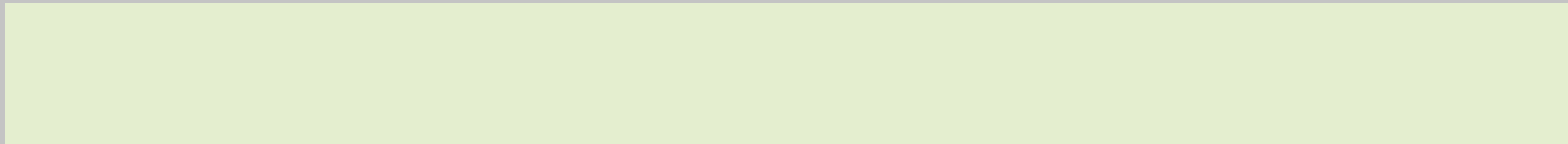
- ! Force
- ! Incapacity
- ! Consent



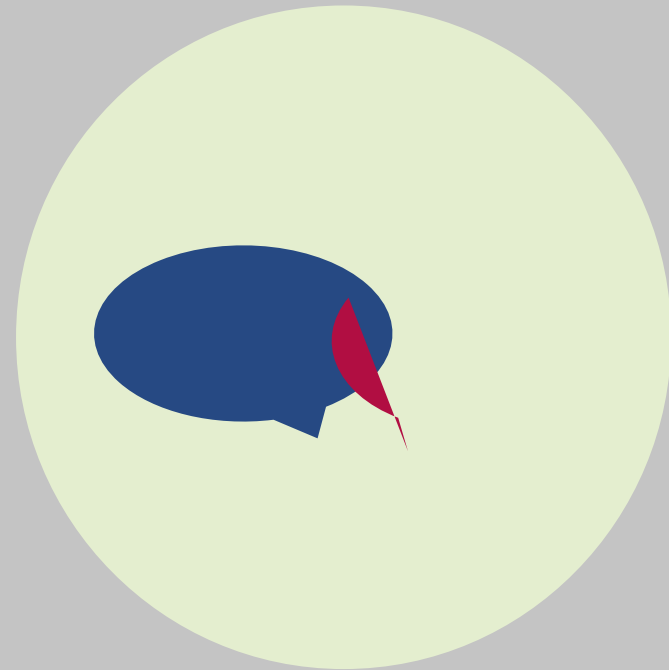


OVERVIEW OF THE THREE QUESTIONS

1. Was force used by the Respondent to obtain sexual or intimate access?
2. Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated?

- 
3. What clear words or actions by the Complainant gave the Respondent permission for each specific sexual or intimate act that took place as it took place?

NAVIGATING FIRST AMENDMENT PROTECTIONS

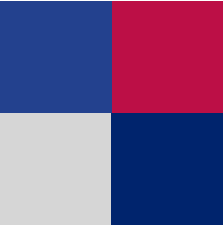


NAVIGATING FIRST AMENDMENT PROTECTIONS

“Congress shall make no law...abridging

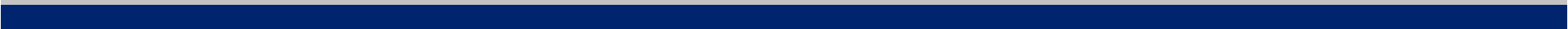
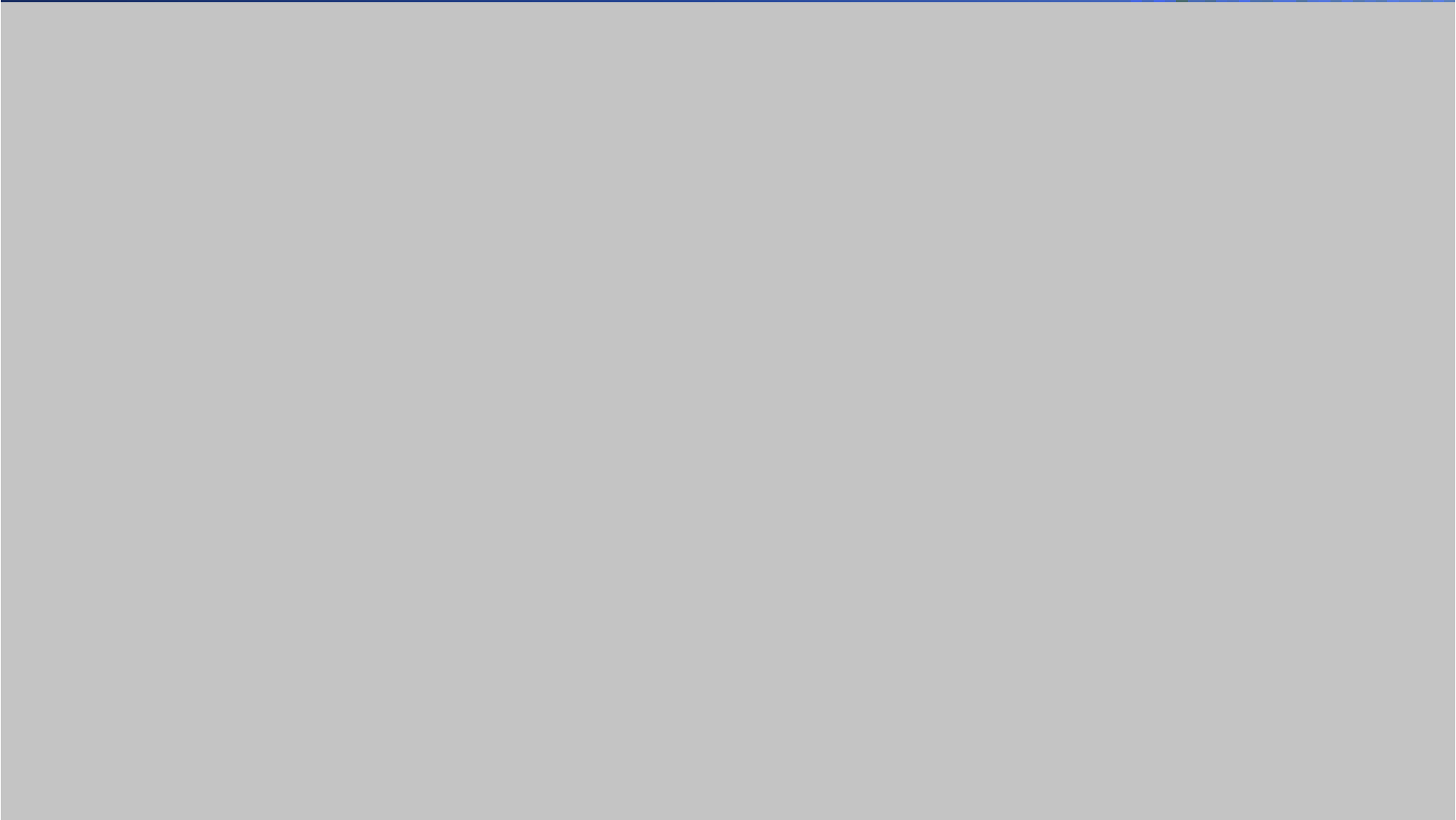
NAVIGATING FIRST AMENDMENT PROTECTIONS (CONT.)

- ! Issues to consider:
 - ! Time, place, and manner
 - ! Open forum, limited open forum, and closed forum
 - ! Confluence with academic freedom (faculty)
 - ! Unprotected speech
 - Incitement of disruption and breach of peace
 - Defamation
 - True threat
 - Obscenity
 - ! Outside speakers
 - ! Hate speech



OVERSIGHT AND COORDINATING PROMPT & EQUITABLE GRIEVANCE PROCEDURES

- ! The Process
- ! Promptness
- ! Equity
- ! Clery Act: VAWA Section 304



PROMPTNESS

- ! Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- ! Concurrent law enforcement investigation does not relieve the burden of the institution to investigate
- ! Temporary delays for “good cause” and with written notice of the delay to parties
 - ! Complexity of the investigation
 - ! Concurrent law enforcement investigation with time-dependent release of evidence (we recommend a one-to two-week delay)
 - ! Delays for administrative needs are insufficient



OVERSIGHT AND COORDINATING PROMPT AND EQUITABLE GRIEVANCE PROCEDURES (CONT.)

- ! The grievance process must be conducted according to the timelines in the Recipient's policy
 - ! Policy wording: Use "reasonable delays at the discretion of the Title IX administrator," "barring exigent circumstances," etc.
- ! Document all delays/extension and rationale therefore
 - ! e.g., unresponsive or uncooperative parties, criminal investigation, holidays, etc.
- ! Periodically update the parties throughout the process

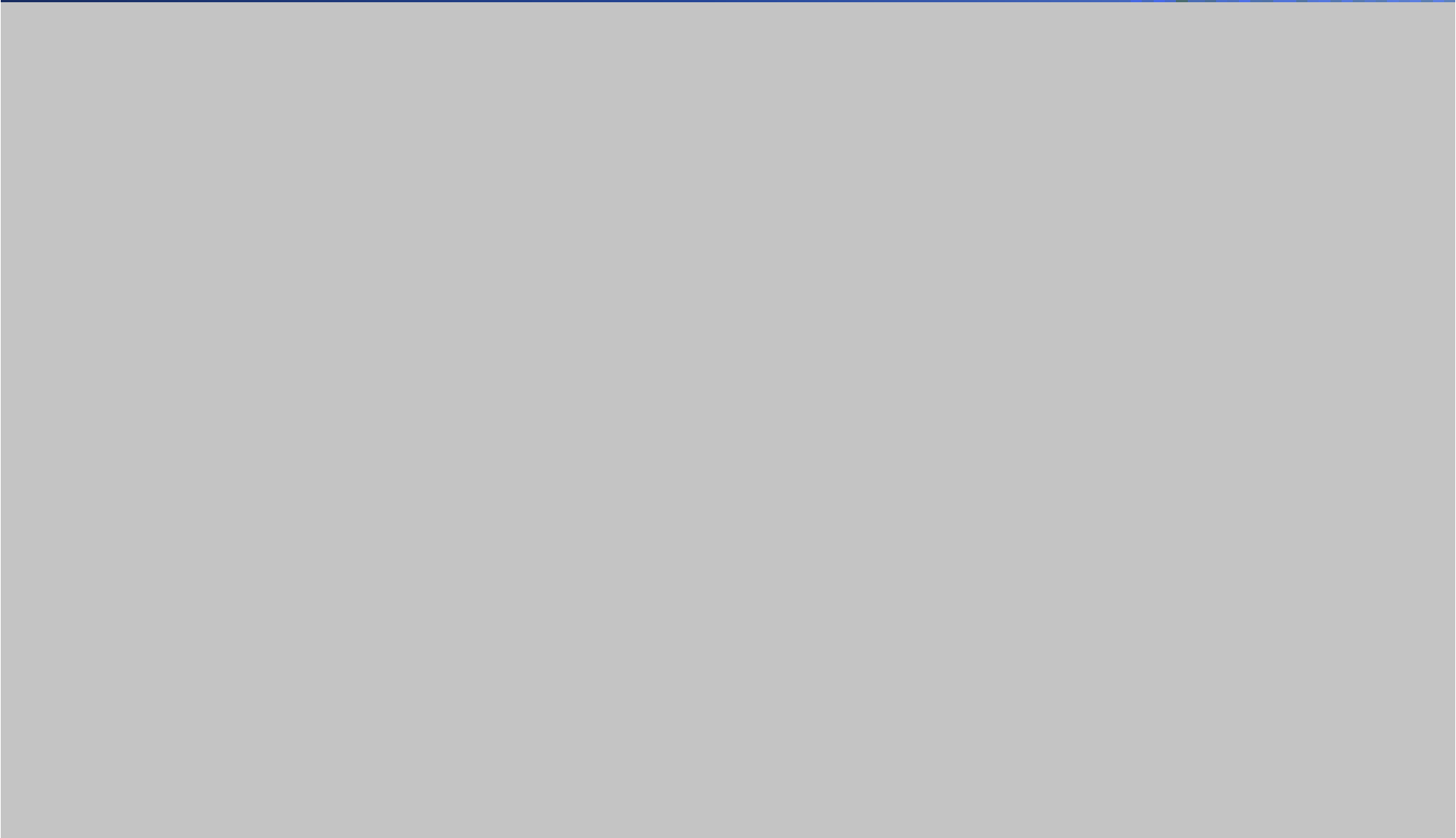


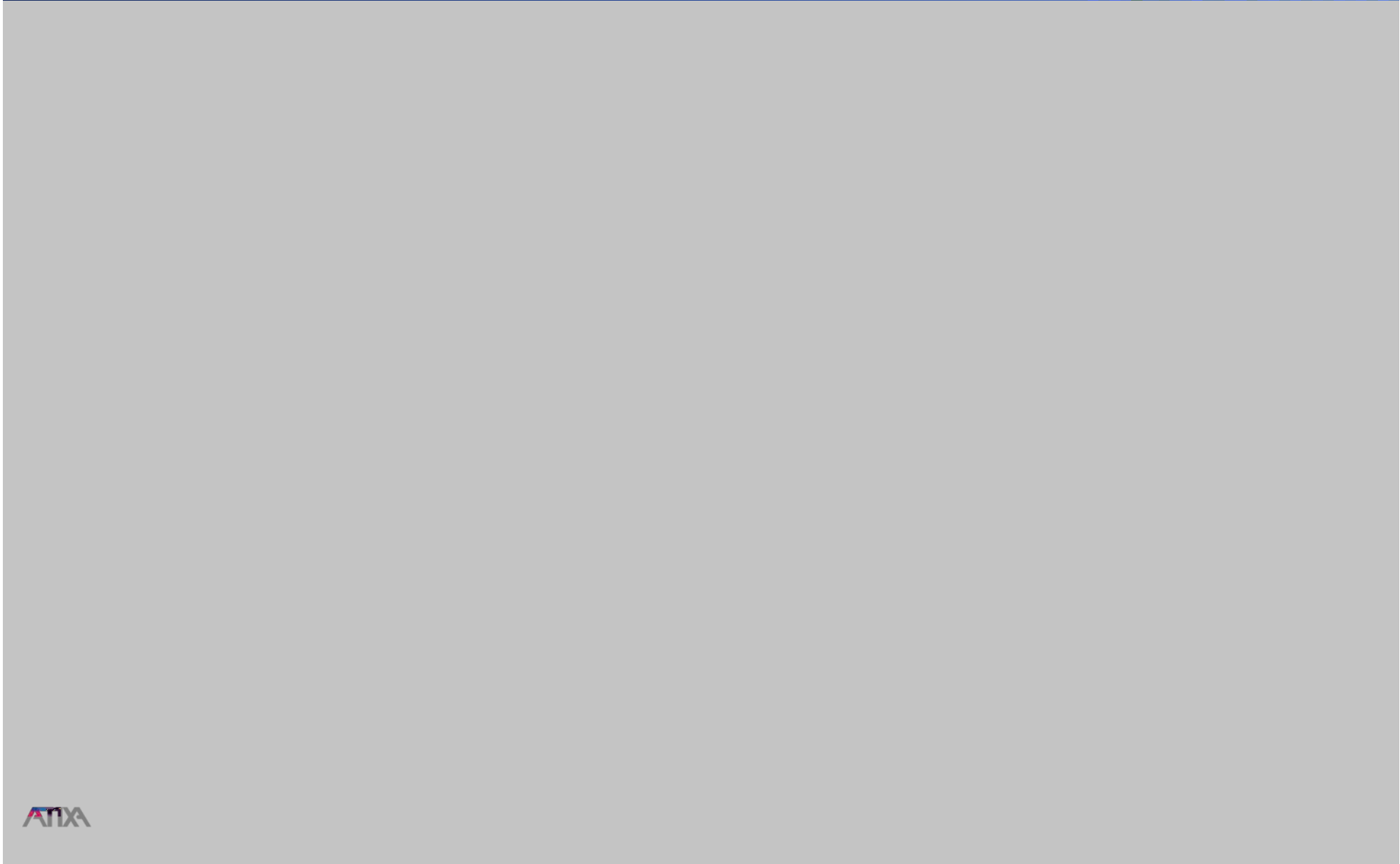
EQUITY REQUIREMENTS

- ! Various forms of notice — policies and procedures, investigation, hearing, outcome (finding and sanction), etc.
 - ! Notification of outcomes to parties permitted by FERPA and required by Clery (outcome and sanctions)
 - ! Title IX rules in conflict with FERPA
 - ! IN WRITING!
- ! Opportunities to present witnesses and provide evidence
- ! Ability to discuss the allegations without restriction
- ! Ability to inspect and review evidence and investigation report
- ! Provide the same rights for an Advisor

EQUITY REQUIREMENTS (CONT.)

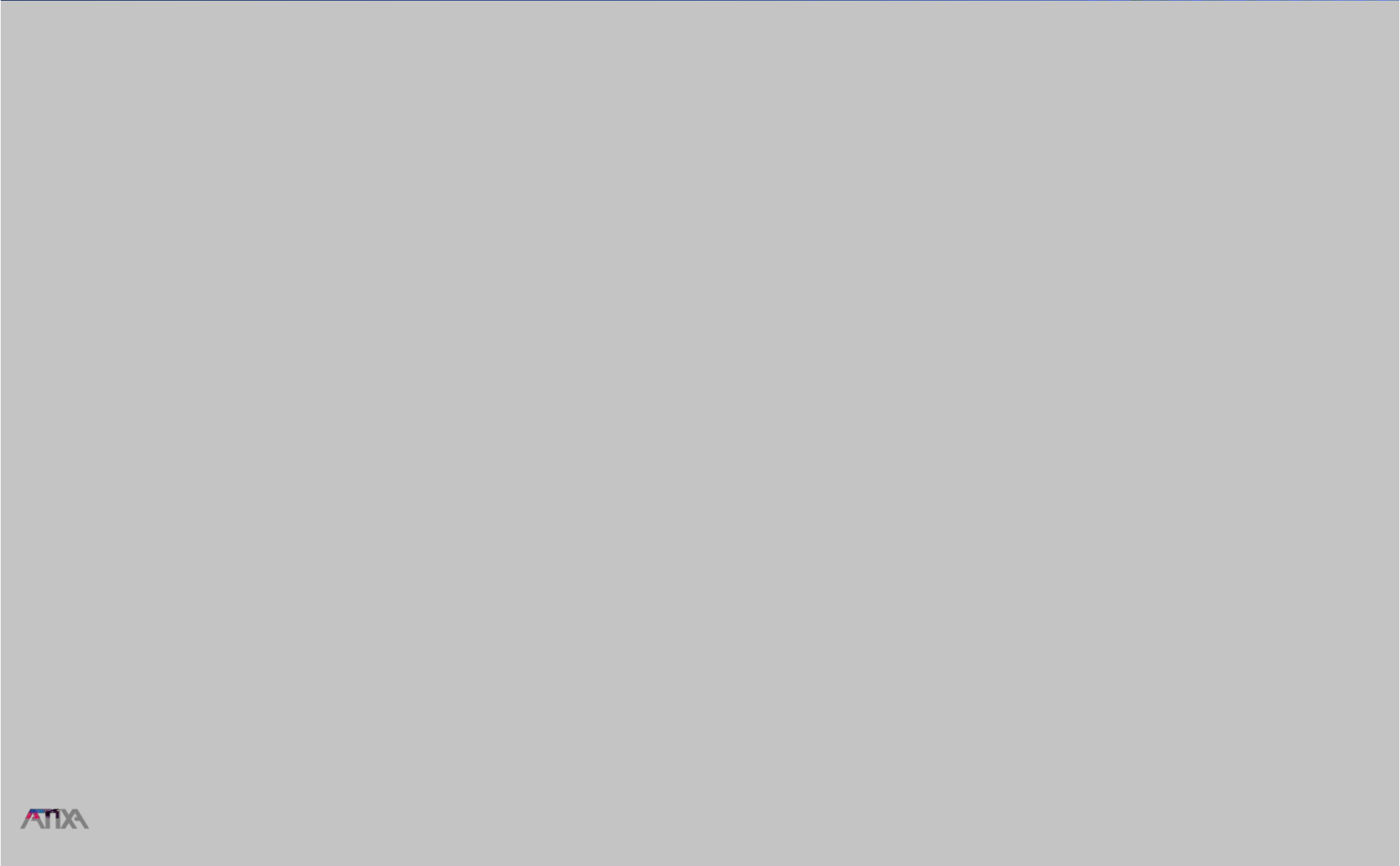
- ! Impartial Investigators, investigation, hearing, and Decision-makers
- ! Remedies
- ! All parties entitled to appeal

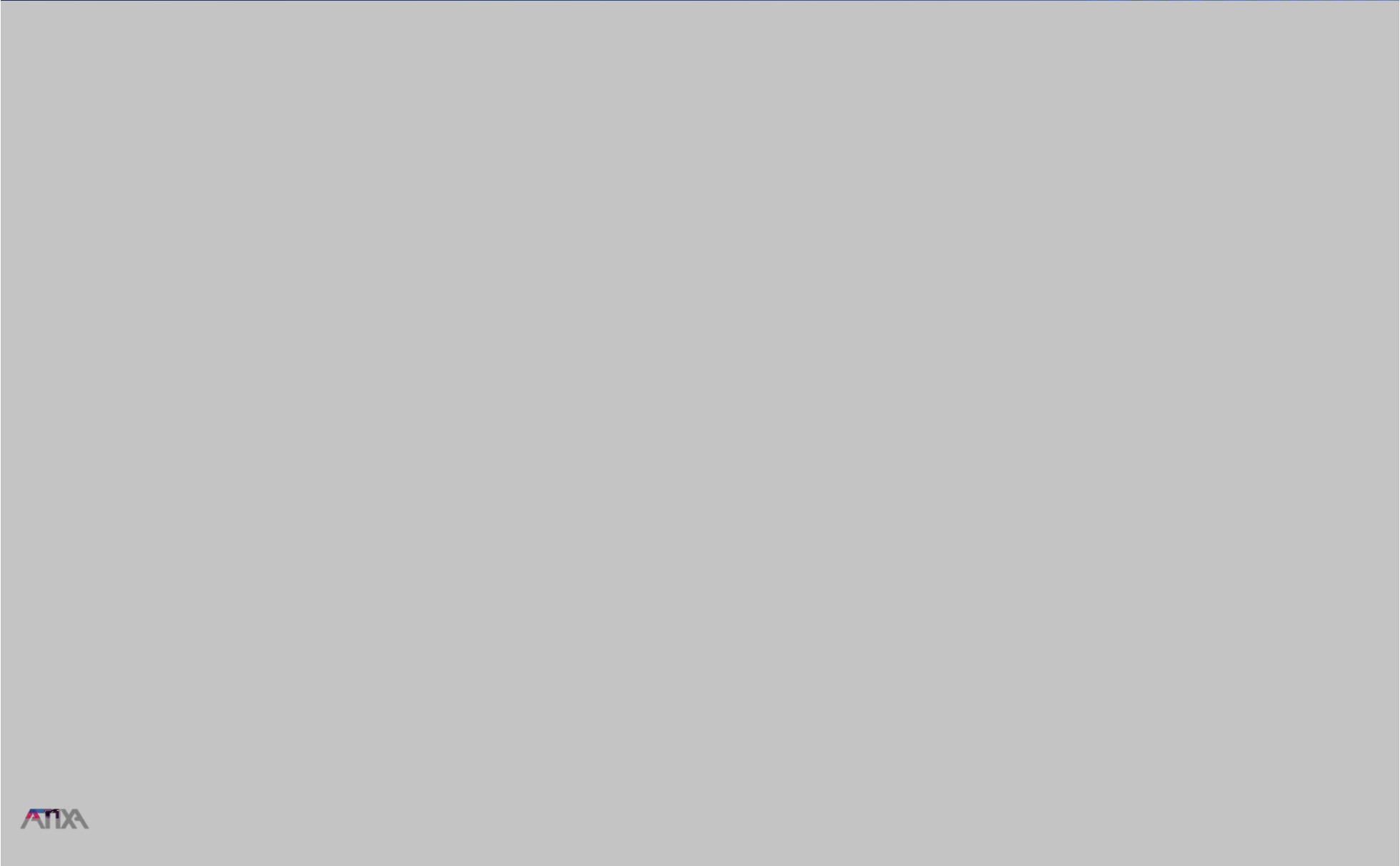




EQUITY CONCERNS

- ! Participants/stakeholders believe “equity” = “equality”
- ! Institutional policies and procedures that are constituency-based and thereby privilege certain groups more than others (e.g., faculty, staff, or students)
- ! Widely disparate procedures to remedy different forms of discrimination (e.g., race, religion, disability, sex/gender)
- ! Ensuring that remedies are equitable (in addition to resolution processes)
- ! Contact restrictions on the parties that are too broad or punitive





COORDINATING THE OVERLAP OF VARIOUS GRIEVANCE PROCESSES

- ! The Title IX Coordinator must coordinate across multiple constituency groups and procedures as necessary
- ! Potential processes:
 - ! Generalized sexual harassment procedures
 - ! General student grievance procedures
 - ! Faculty and Employee grievance procedures
 - ! Student conduct/discipline process
 - ! Faculty and Employee discipline processes
 - ! Academic appeal process
 - ! Athletic department polices/processes and “team rules”
 - ! Collective bargaining agreements

TITLE IX AND TITLE VII

- ! Must understand distinctions between Title IX and Title VII in responding and investigating
- ! Must be very familiar with all the processes
- ! Must have the ability to merge/combine/pick the investigatory and hearing processes and explain these to the parties
 - ! e.g., The difference between a student-employee and an employee-student

ONE POLICY-TWO PROCESSES (1P2P)

! A community-based policy that addresses all forms of

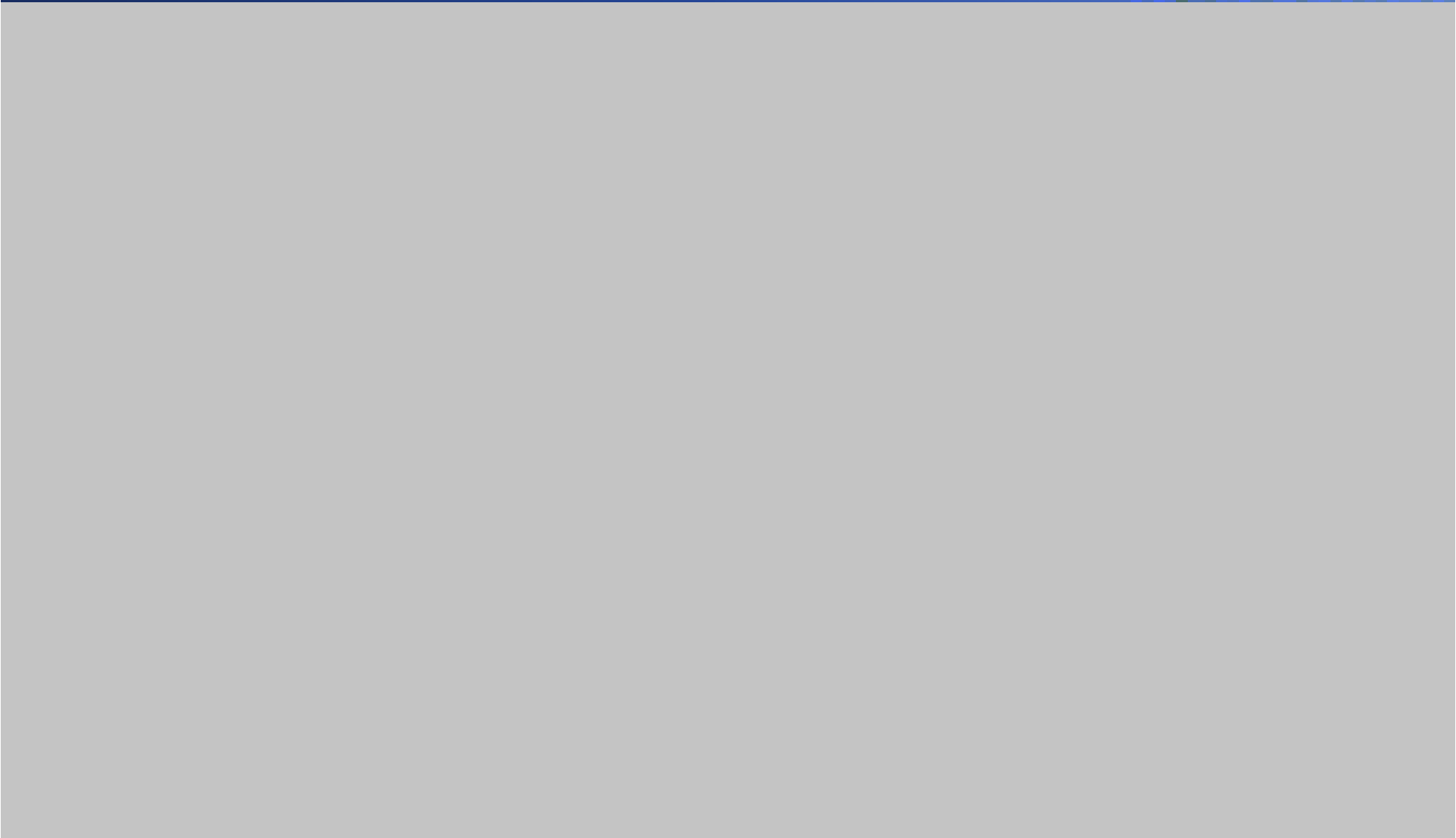


POINT PERSON FOR REPORTS AND COMPLAINTS

- ! The Title IX Coordinator will be the individual designated to ensure the Title IX protocol is implemented and therefore should be the individual to whom all complaints or notice

COORDINATION WITH LAW ENFORCEMENT

- ! Law enforcement information sharing:
 - ! The Title IX Coordinator should establish a reporting and information-sharing structure with Recipient law enforcement.
 - May wish to have a formal Memorandum of Understanding (MOU)
 - ! All Recipient law enforcement officers (whether sworn or public safety/security) are considered “officials with authority” and have an obligation to report to the Title IX Coordinator
 - ! Institutions with sworn law enforcement officers may need to negotiate timing and information-sharing based on the law enforcement’s role with criminal investigations and state laws



NOTICE, REPORTING, & CONFIDENTIALITY

- ! Notice to the Institution
- ! Mandatory Re240/TTTm5!(a)3(R)1(5)

NOTICE TO THE INSTITUTION

- ! “Actual Knowledge” is defined as a report being received by:
 - ! The TIX Coordinator; or
 - ! Any official who has authority to institute corrective measures on behalf of the Recipient (Often called “Officials With Authority” or “OWA”)
- ! This is only the standard for when OCR would deem a higher education institution to have received actual notice AND MUST investigate; it is the bare minimum requirement
 - ! What if Recipient receives notice in some other way?

MANDATORY REPORTERS

- ! ATIXA recommends that all employees* report because this:
 - ! Enables institution to best support those who have experienced harassment or discrimination
 - ! Better enables tracking patterns
 - ! Ensures information gets to those trained to respond
 - ! Provides for simpler, uniform, and universal training and Reporting mechanisms
 - Institutions must ensure that all employees are trained regarding their obligation to report harassment to appropriate administrators as mandatory reporters

*Can still have a small set of designated, trained employees who are not “mandatory reporters”

THE CLERY ACT: CAMPUS SECURITY AUTHORITY (CSA)

CSA mandatory reporting:

- ! 4-part definition of a CSA noted in the Clery Act Appendix for FSA Handbook

CSA VS. MANDATORY REPORTER

- ! Mandatory reporter under Title IX is a broader/more encompassing designation.
- ! All CSAs are Mandatory reporters, but not all Mandatory Reporters are CSAs.

OTHER LAWS THAT DETAIL REPORTING REQUIREMENTS

- ! Supervisors and Managers (per Title VII)
 - ! Mandated to report harassment or other misconduct of which they are aware.
- ! Abuse or Suspected Abuse of Minors
 - ! All employees are required to report abuse or suspected abuse of minors consistent with state law. This generally includes immediately reporting to law enforcement and to the state's child welfare agency.
- ! Additional state reporting requirements (e.g., elder abuse and felony reporting)

PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

Privilege

- ! Granted by laws and professional ethics
- ! Attorneys, licensed professional counselors, medical professionals, pastoral counselors
 - ! To have privilege, these individuals must be:
 - Acting in the capacity for which they are employed,
 - Acting within the scope of their license, and
 - Receive the disclosure during the scope of that employment
- ! Key exception is child abuse reporting

PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

Confidentiality

- ! Designated by the institution
- ! Do not have to report harassment or discrimination of which they become aware
- ! Allows for provision of services and support without concern of reporting
- ! Examples: Victim advocates/sexual assault-related services, gender-based resource centers, Advisors during resolution processes, ombudspersons
- ! Must still follow state reporting laws

ATIXA recommends confidential employees report aggregate, non-identifiable data for Clery and Title IX statistical purposes

PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

Privacy

- ! Anyone who does not meet the institution's definition of a "Mandatory Reporter" can maintain privacy.
 - ! If using the OWA standard, then notice to those deemed "Private" does not constitute "Actual Knowledge" for OCR enforcement.
- ! May report incidents without identifying the parties
- ! Common Examples: Administrative Assistants, Non-supervisory employees
- ! Must still follow state reporting laws

INITIAL



INITIAL ASSESSMENT

Upon receipt of notice, the TIXC should be responsible for conducting an initial assessment to determine the following:

INITIAL ASSESSMENT (CONT.)

- ! If proceeding under Title IX:
 - ! Establish basis of investigation:
 - Incident or pattern, and/or climate/culture
 - ! Establish a preliminary timeline for the investigation
- ! If no formal action, document how Recipient's response was not deliberately indifferent
- ! Responding to anonymous reports:
 - ! Determine if a trend or pattern may be apparent
 - ! Can you identify parties?
 - ! Duty to attempt some form of remedial response, even to an anonymous report

REPORT V. COMPLAINT

- ! Distinguish between a “report” and a “formal complaint”
- ! Upon receiving a “report” (either from the would-be Complainant or a third party):
 - ! Reach out and provide support.
 - ! Provide supportive and interim measures to the person alleged to have experienced the harassment. May also offer to the would-be Respondent.
 - ! Explain process to make a formal complaint.
 - Must be in writing and signed by the Complainant but can be made in any format (on paper or electronic) and made at any time
 - Also explain option to report to law enforcement (VAWA requirement)

REPORT V. COMPLAINT (CONT.)

- ! Upon receiving a “formal complaint:”
 - ! Conduct initial assessment to determine jurisdiction
 - ! Triggers obligation to follow “grievance process” including investigation and hearing

FORMAL COMPLAINT

Formal Complaint

- ! Document or electronic submission
- ! Filed by Complainant or signed by TIX Coordinator
 - ! TIXC does not become a party to the complaint
- ! Alleging sexual harassment
- ! Requesting an investigation
- ! Complainant must be participating or attempting to participate in the Recipient's education program or activity at the time of filing
- ! Initiates mandatory grievance process (investigation and hearing)

REQUESTS FOR CONFIDENTIALITY

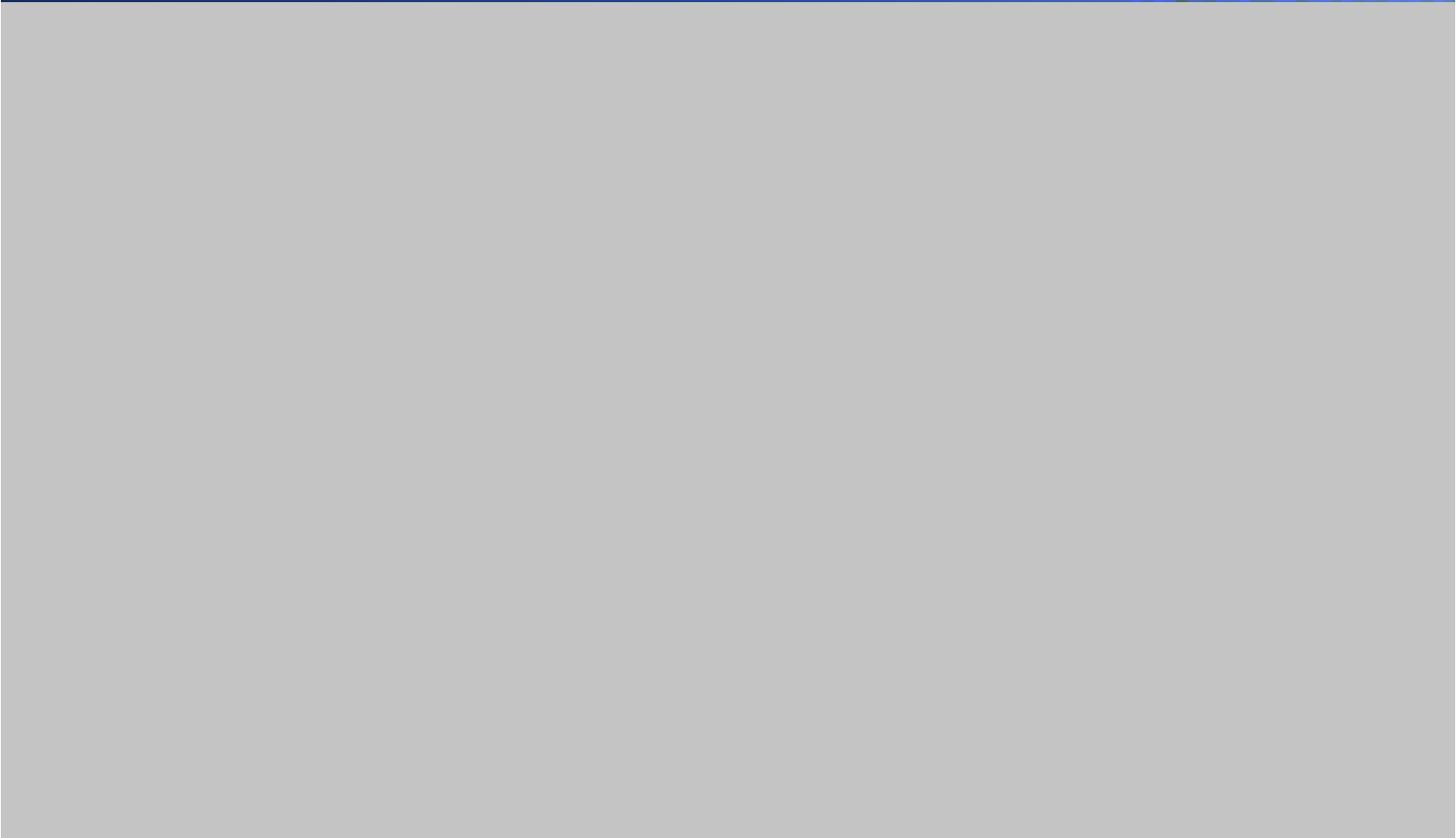
If a Complainant requests confidentiality and/or does not want the institution to investigate:

- ! The Complainant should be notified of the following:
 - ! The process will still be available to them, regardless of how long they wait
 - ! The institution can provide resources and supportive measures to limit the effect of the behavior on the Complainant
 - ! If information is brought to the attention of the institution that may involve a threat to the community, the institution may be forced to proceed with an investigation, but that the Complainant will be notified of this process



REQUESTS FOR CONFIDENTIALITY (CONT.)

- ! The institution should take all reasonable steps to respond consistent with the Complainant's request
 - ! Provided that doing so does not prevent the Recipient from responding effectively and preventing the harassment of other students or the Complainant
- ! Use the PPTVWM analysis to determine whether to honor a Complainant's request for confidentiality
- ! Proceeding without a Complainant's participation has due process implications for the Respondent



PPTVWM (CONT.)

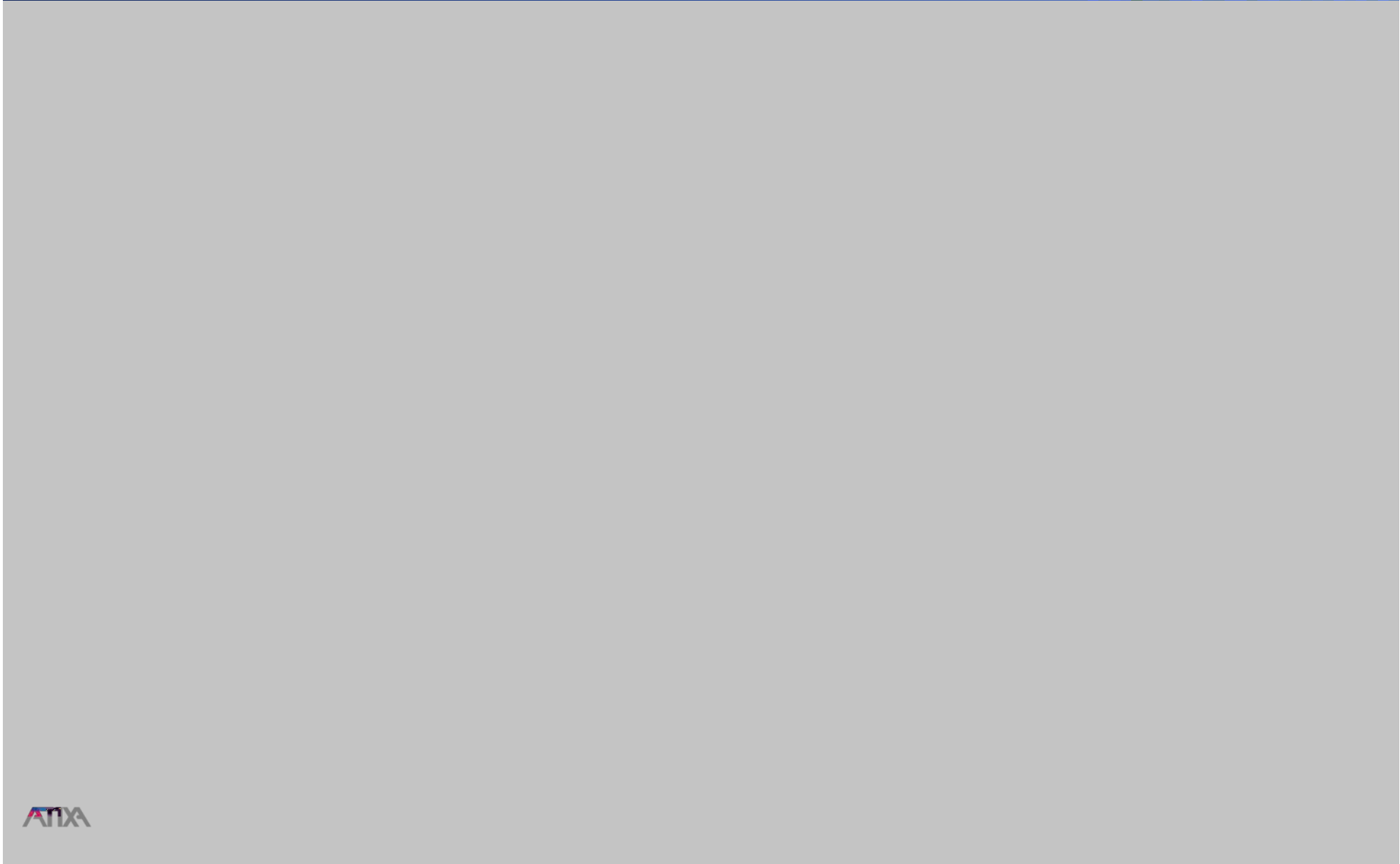
- ! Factors to consider:
 - ! Additional complaints of sexual harassment involving the same Respondent
 - ! Whether the sexual harassment was committed by multiple individuals
 - ! Whether the Respondent has a prior history of violence
 - ! Whether the report reveals a pattern of behavior at a given location or by a particular group
 - ! Whether the Respondent threatened further sexual harassment or violence against the Complainant or others
 - ! Whether a weapon facilitated the sexual harassment
 - ! Age of the Complainant (incidents involving minors will always be reported to proper authorities)

PPTVWM (CONT.)

! Factors to consider:

! Whether the Recipient possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence)

!



COMMON SUPPORTIVE MEASURES

- ! Referral to counseling and/or medical/health services
- ! Referral to the Employee Assistance Program
- ! Visa and immigration assistance
- ! Community or community subgroup education
- ! Altering housing situation (if applicable)
- ! Altering work arrangements for employees
- ! Safety planning
- ! Providing school safety escorts
- ! Transportation assistance
- ! Contact limitations (no contact orders) between the parties
- ! Academic support, extensions of deadlines, or other course-related

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MANDATORY DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MUST dismiss the complaint at any time if the alleged conduct:

- ! Would not constitute sexual harassment as defined (five offenses in § 106.30), even if proved
- ! Did not occur in the Recipient's education program or activity
- ! Did not occur against a person in the United States
- ! The Complainant is not participating or attempting to participate in Recipient's program at time of complaint

DISCRETIONARY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

The TIX Coordinator MAY dismiss the complaint if at any time prior to a determination:

- ! Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations therein
- ! Respondent is no longer enrolled or employed by Recipient
- ! Specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination as to the formal complaint or any allegations therein

MANDATORY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

- ! Written notice of dismissal to parties required
 - ! Dismissal (or non-dismissal) of formal complaint may be appealed

Upon dismissal, the Recipient may institute action under another provision of the code of conduct or other policies. Due process requirements for VAWA offenses may be required in alternate processes.

EMERGENCY REMOVAL

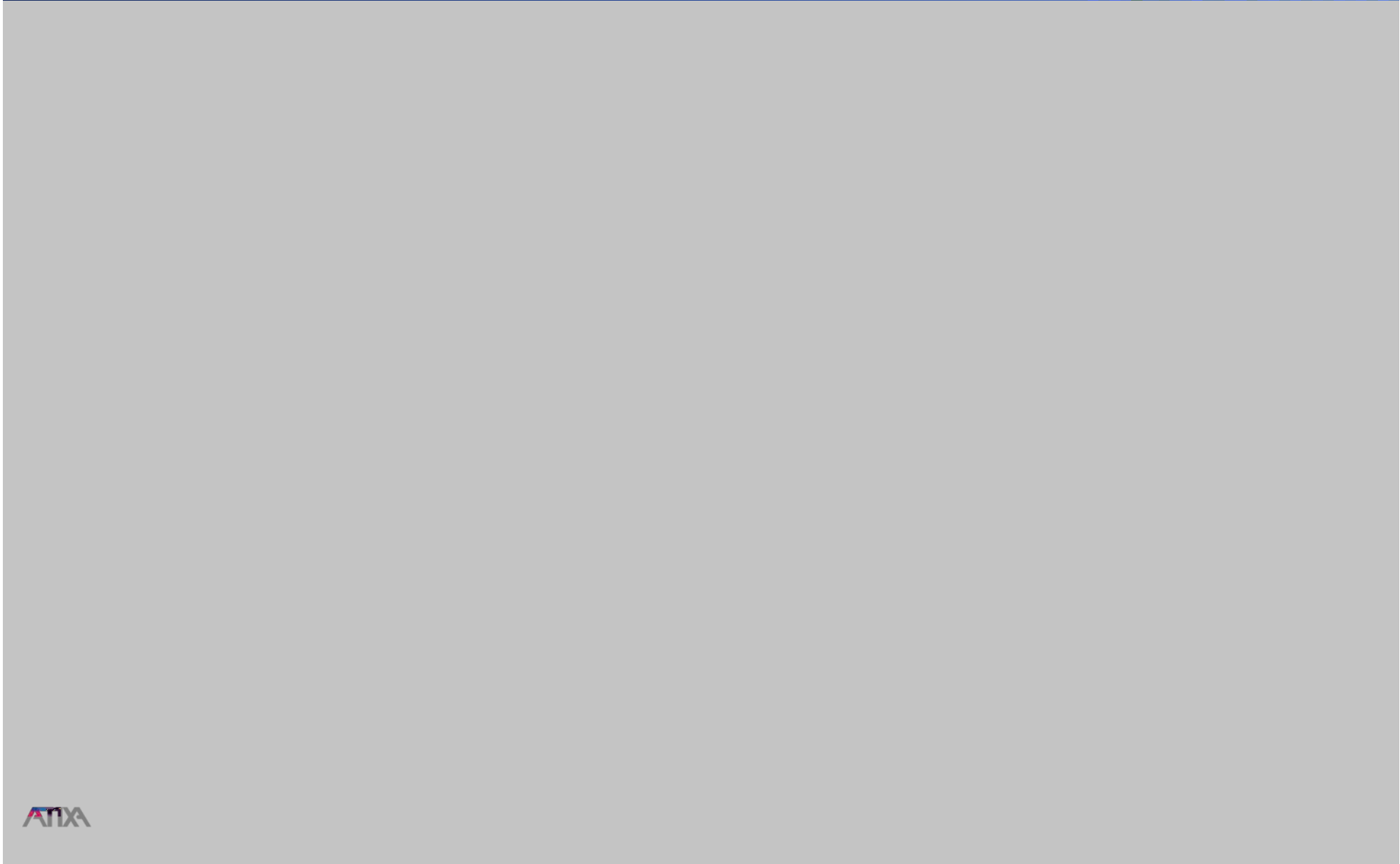
A Recipient may remove a student Respondent from the education program or activity on an emergency basis, only after:

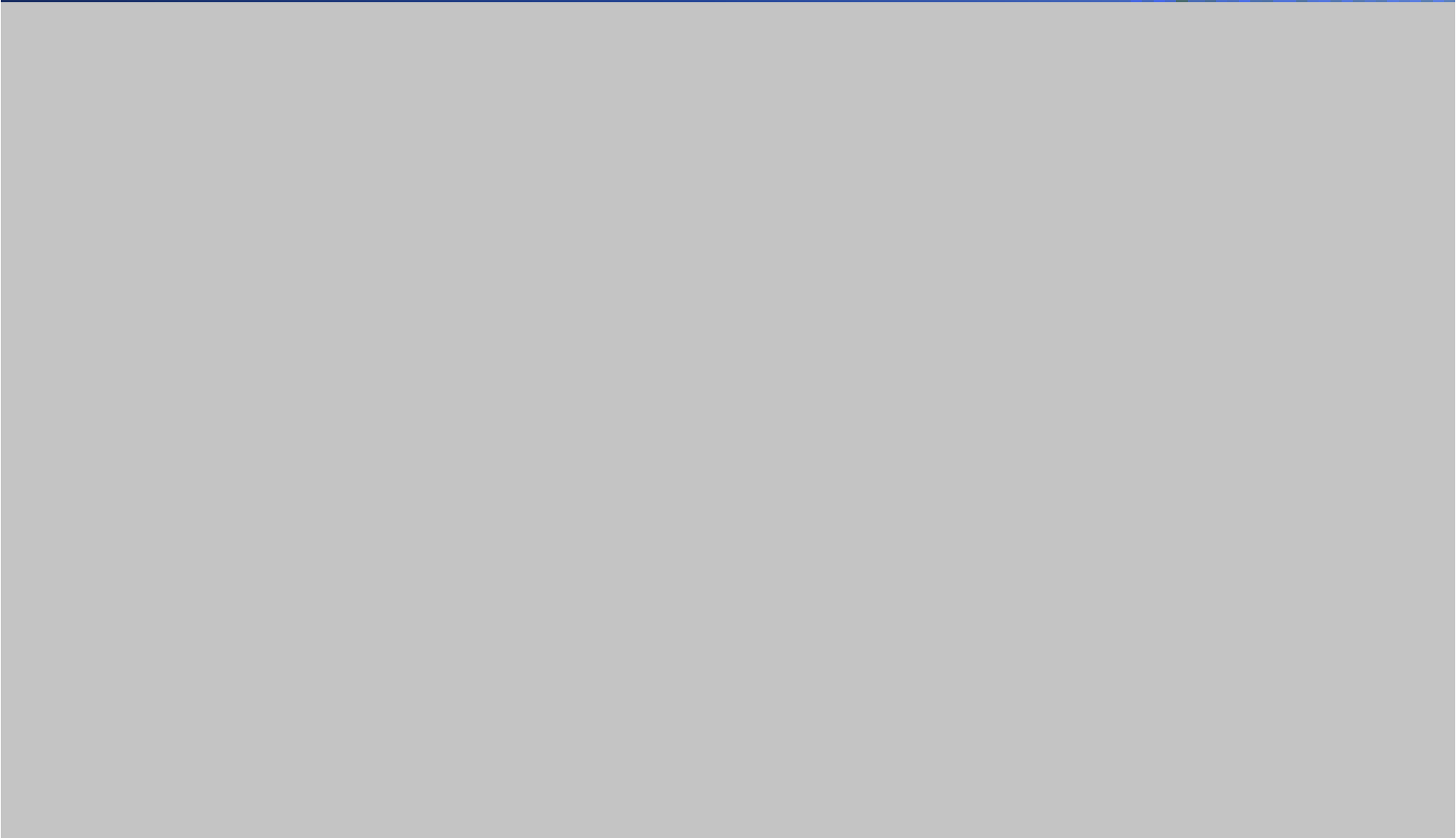
1. Undertaking an individualized safety and risk analysis
2. Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment j 134e evfr(g)-1(a)2(nt)1()v(

EMPLOYEE ADMINISTRATIVE LEAVE

- ! A Recipient may place a non-student employee Respondent on administrative leave during the pendency of a grievance process under existing procedures, without

THE CLERY ACT: TIMELY WARNING & EMERGENCY NOTIFICATION

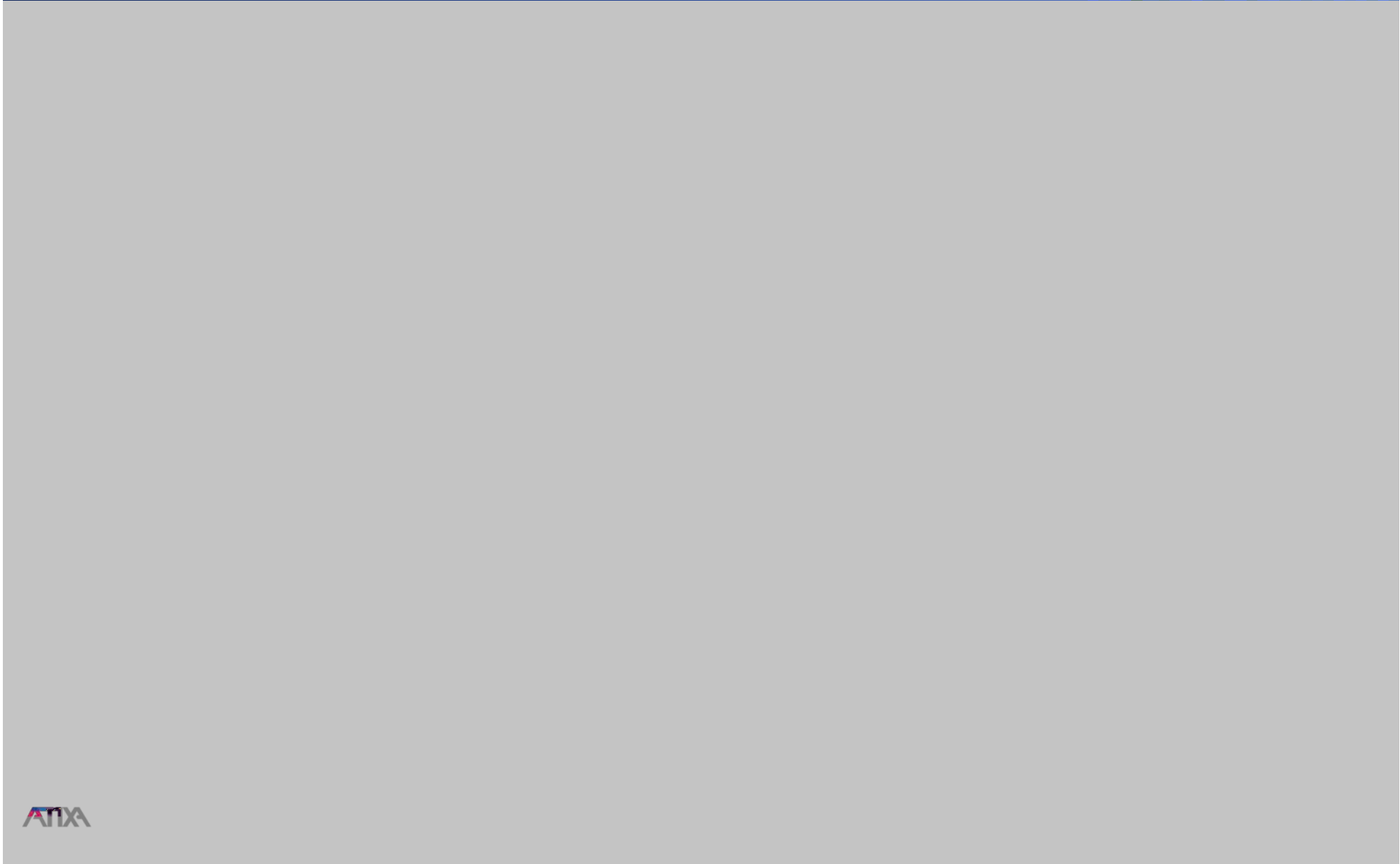






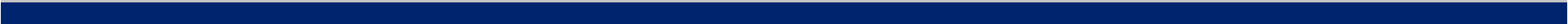
COORDINATING INFORMAL RESOLUTION

- ! Regulations Requirements
- ! Types of Informal Resolution
- ! Informal Resolution Considerations



INFORMAL RESOLUTION

- ! ATIXA has framed a process for Informal Resolution that includes three options:
 - ! A response based on supportive measures
 - ! A response based on a Respondent accepting responsibility
 - ! A response based on alternative resolution, which could include various approaches and facilitation of dialogue
- ! Alternative resolution approaches like mediation, restorative practices, transformative justice, etc., are likely to be used more often by colleges and universities
- ! ATIXA does not endorse these approaches as better or worse than other formal or informal approaches

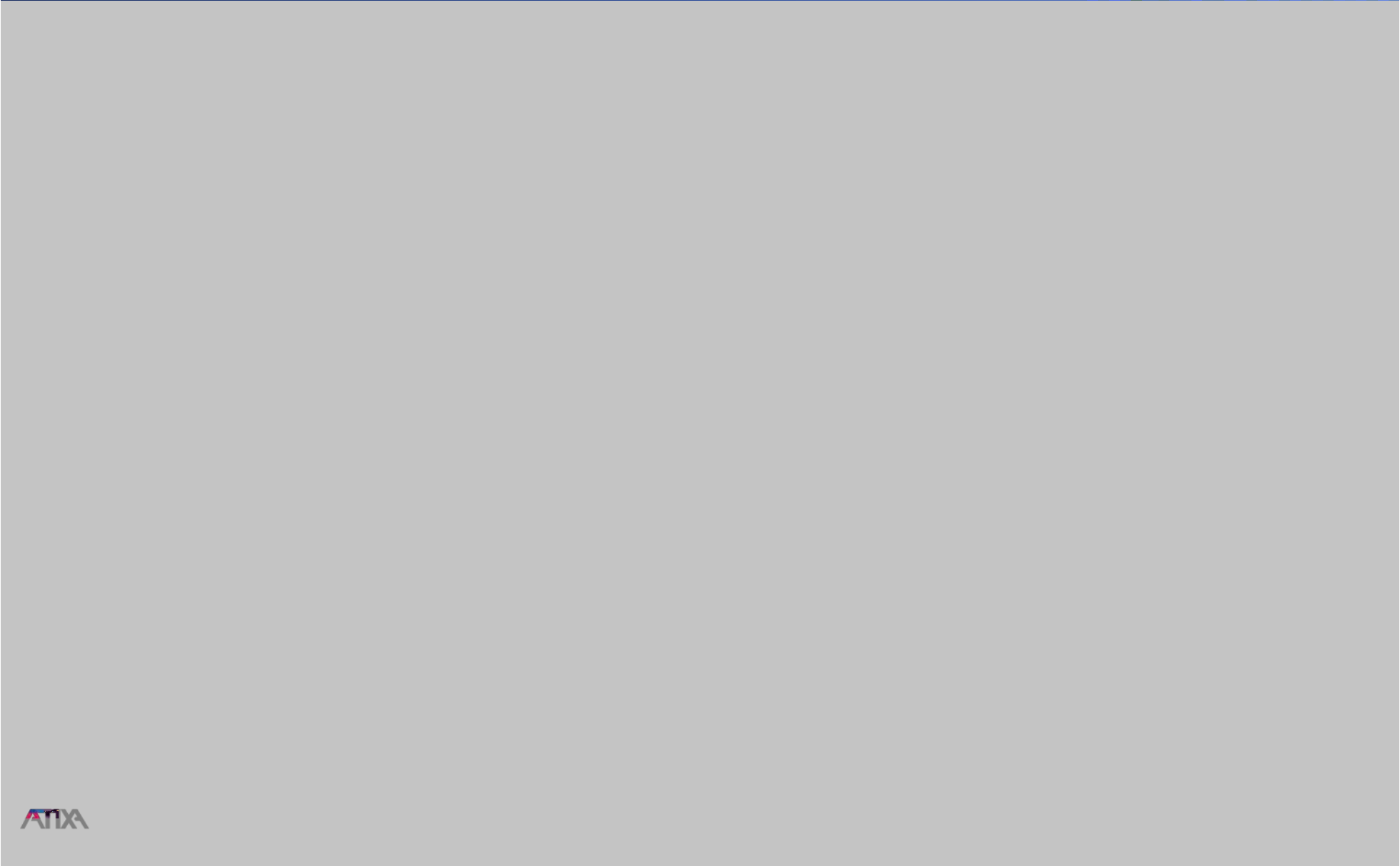


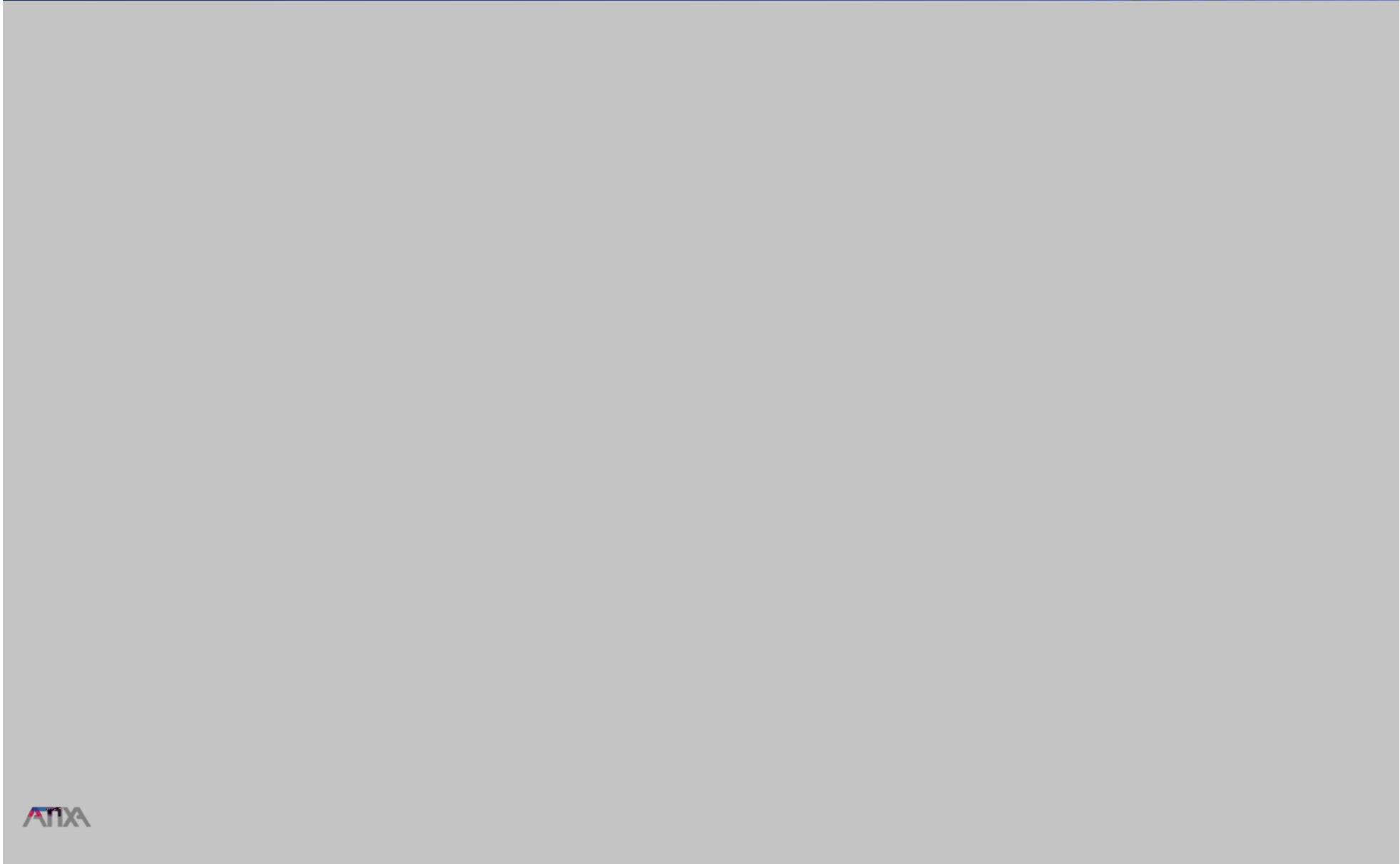




SUPERVISING INVESTIGATIONS

- ! Title IX Coordinator's Role
- ! When to Investigate
- ! Who Should Investigate
- ! Role of Law Enforcement





WHEN DO YOU INVESTIGATE?

- ! Upon receipt of a formal complaint
- ! When the Coordinator deems an investigation is warranted (and signs the formal complaint)
- ! Rumors, gossip, social media, etc. can be notice, but not under the OCR regulations
 - ! Investigating on these bases is discretionary, particularly considering the regulations
- ! Once a formal complaint is filed, the duty to investigate is absolute
 - ! At a minimum, an initial assessment (formerly preliminary inquiry) must be completed

WHO SHOULD INVESTIGATE?

- ! Investigations of sexual harassment must be impartial, thorough, and reliable. Investigators must be well-

SHOULD THERE BE MORE THAN ONE INVESTIGATOR?

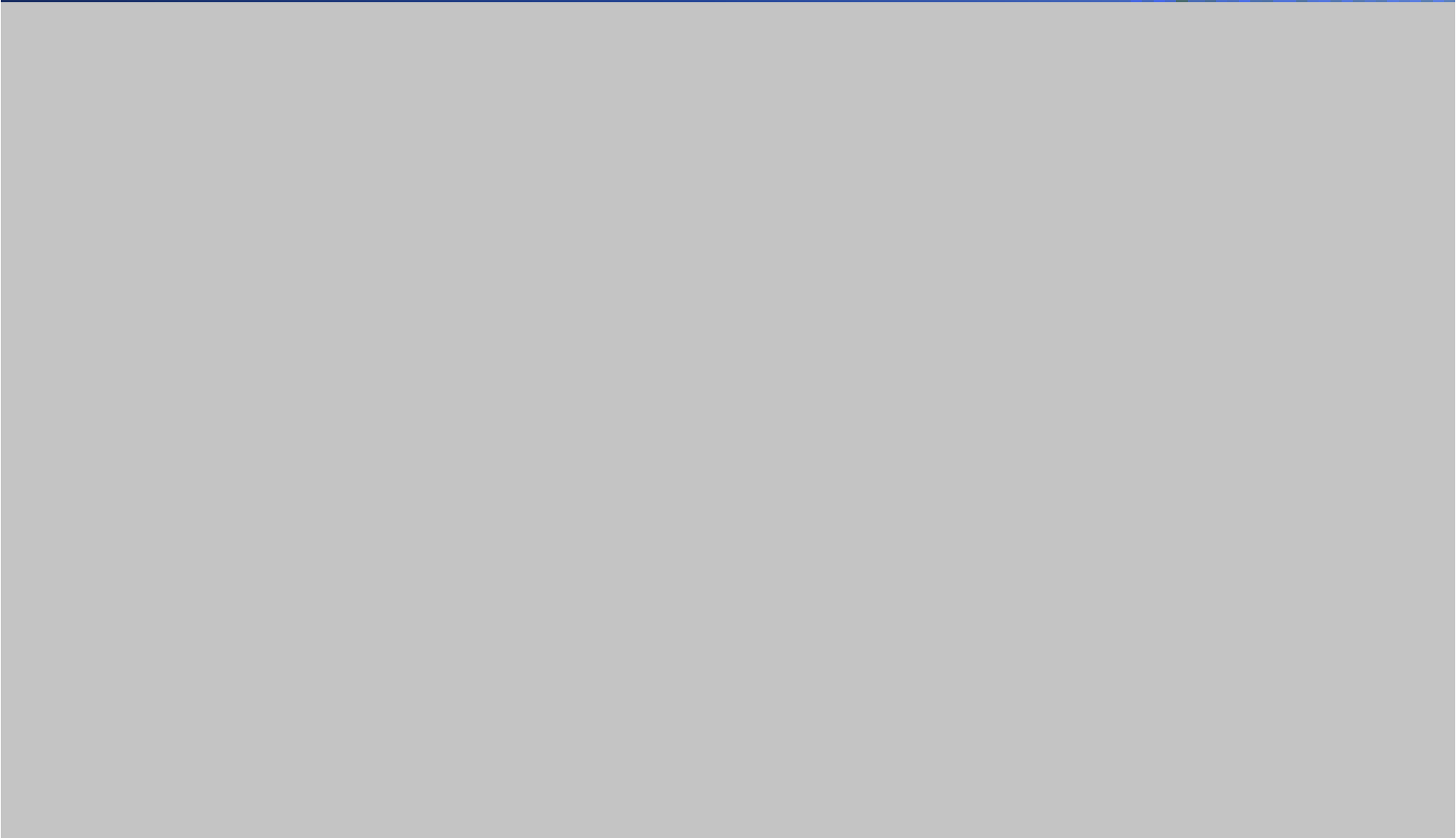
No specific requirement, but:

- ! Investigation must be prompt, thorough, and impartial
- ! Investigator must collect the maximum amount of relevant information available
- ! A pool of Investigators may help to ensure that investigations meet these requirements
- ! Who investigates may be strategic to each specific complaint
- ! Team = ability to brainstorm investigation steps and lines of questioning with co-Investigators and co-facilitate interviews
- ! Flexibility if there is any conflict with Investigators and parties



10 STEPS OF AN INVESTIGATION

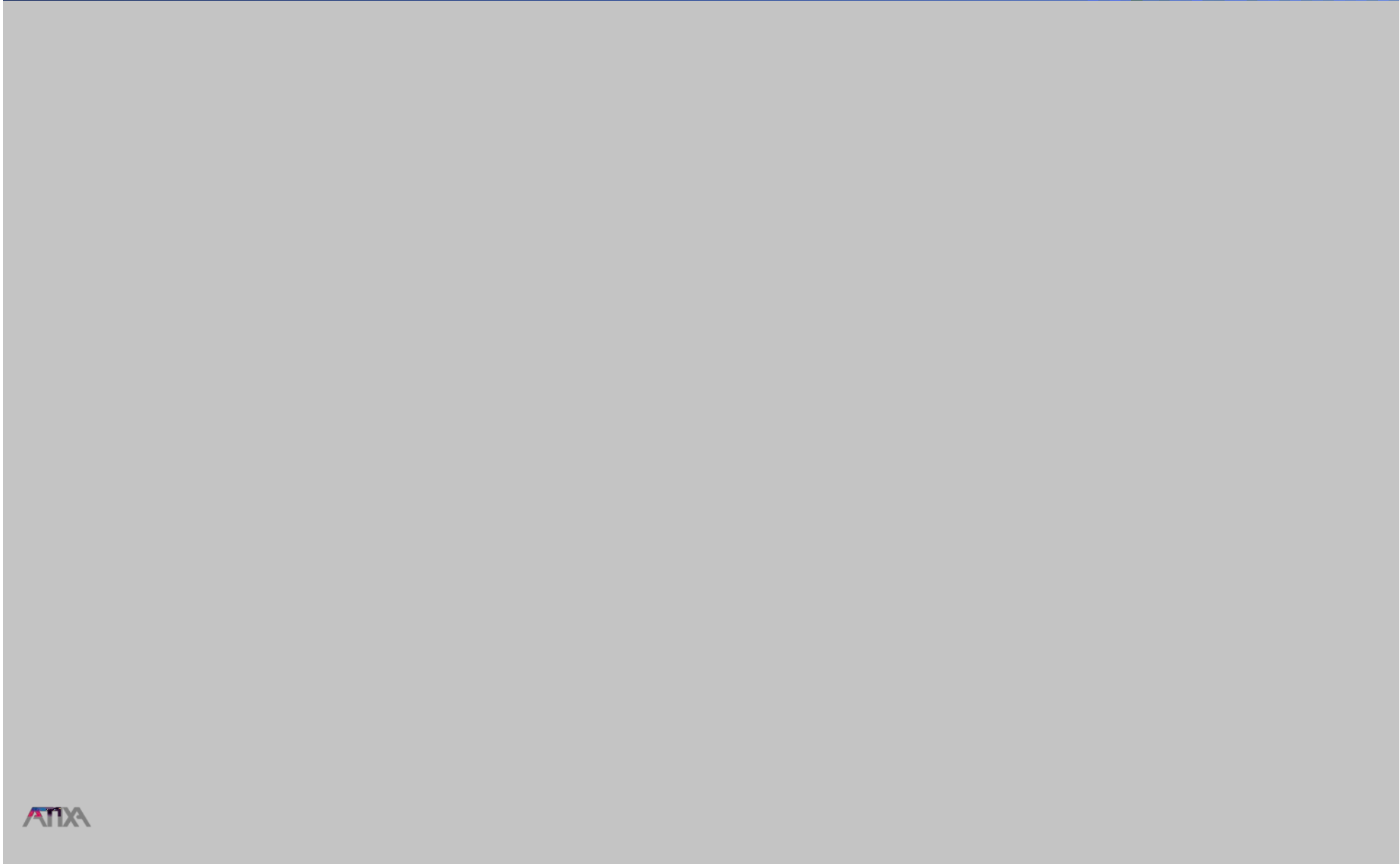
1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation and Allegations (NOIA) to Parties ("Charge")
5. Establish investigation strategy
6. Formal comprehensive investigation
 - ! Witness interviews
 - ! Evidence gathering



RIGHTS OF THE PARTIES DURING THE INVESTIGATION

Complainants and Respondents have the right to:

- ! Present witnesses, including fact and expert witnesses
- ! Present inculpatory and exculpatory evidence
- ! Discuss the allegations under investigation without restriction
- ! Gather and present relevant evidence without restriction
- ! Be accompanied to any related meeting or proceeding by Advisor of their choice, who may be, but is not required to be, an attorney
- ! Written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- ! Inspect and review directly related evidence and investigation report





THE INVESTIGATION REPORT

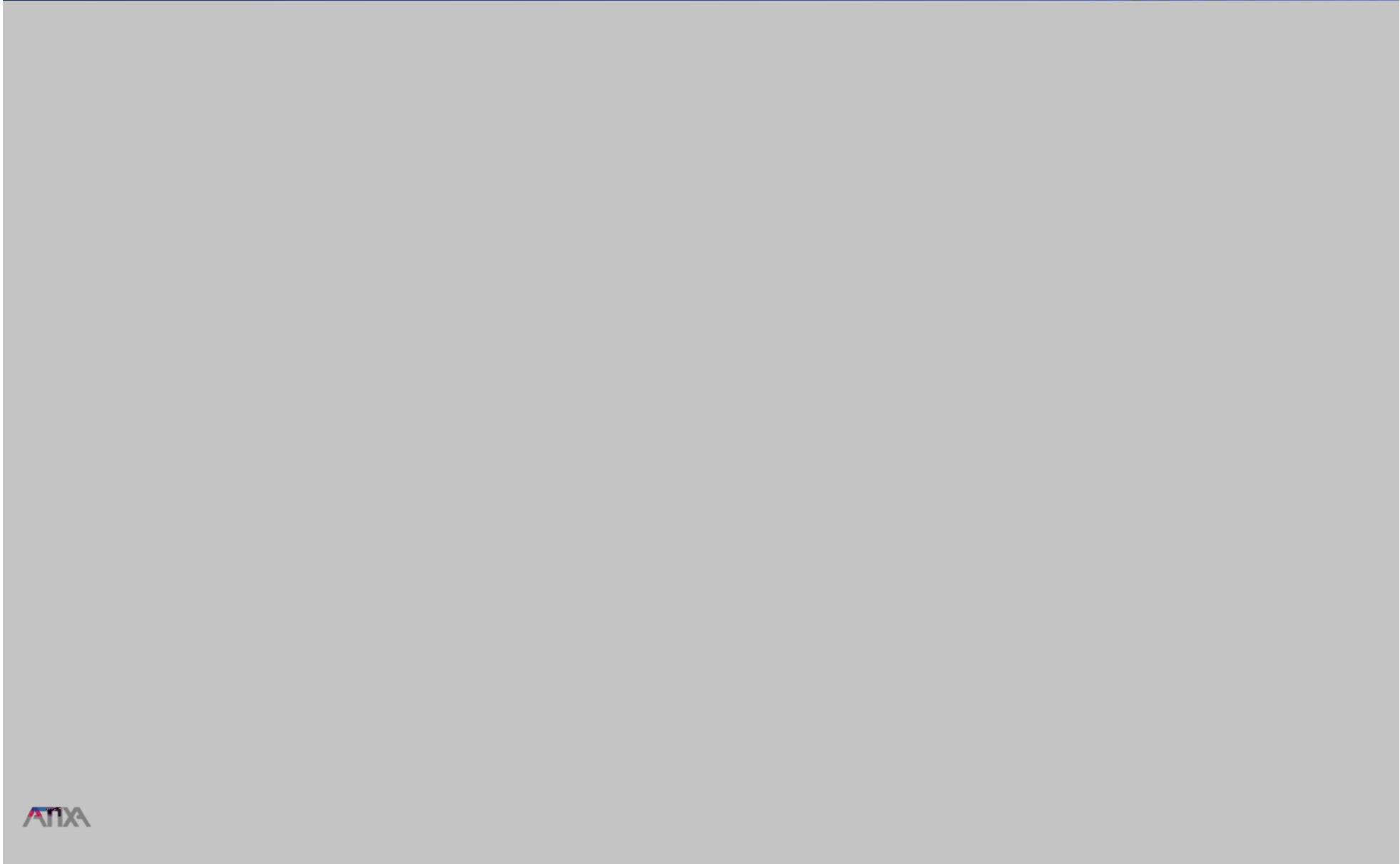
- ! Comprehensive document summarizing the investigation
 - ! Results of interviews with parties and witnesses (including experts)
 - ! Summary of other information collected (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs; copies of text, email, and social networking messages)
- ! G.A.S. Framework
 - ! Gather evidence; Assess credibility and evidence; Synthesize areas of dispute/agreement and all questions asked
- ! The supplemental “bucket” to the report

EVIDENCE AND REPORT REVIEW BY PARTIES

PART 2

At least 10 days prior to making a determination regarding responsibility:

- ! The final Investigation Report summarizing relevant evidence must be sent:
 - ! To each party and Advisor
 - ! In an electronic format or hard copy
 - ! For the parties' review and written response
 - !



DECISION-MAKERS IN TITLE IX PROCESSES

- ! The Title IX Coordinator cannot be the Decision-maker but may need to coordinate with Decision-makers:
 - ! Coordinating hearings, Hearing Panel/Decision-Maker
 - !





EQUITY: PREPONDERANCE STANDARD

- ! The only equitable standard
- ! ATIXA maintains that preponderance of the evidence is the appropriate standard
- ! Articulate the standard throughout institutional policy, procedures, investigations, and hearings
- ! Educate the parties and their Advisors
- ! Use language the community understands:
 - ! 50.1%
 - ! “More likely than not”
 - ! The “tipped scale”
 - ! Try NOT to use just the term “preponderance of the evidence” – it is not common language

DECISION-MAKERS: MAKING A FINDING/DETERMINATION

- ! Review applicable institutional policies
- ! Parse the policy
 - ! Provide specific findings for each alleged violation and for each Respondent
- ! Review the evidence and what it shows (relevance)
- ! Assess the credibility of evidence and witness statements as factual, opinion-based, or circumstantial
- ! Determination whether a policy violation occurred based on standard of evidence
- ! Concretely cite the reasons for this conclusion
- ! Move to sanctioning (if applicable)



ENSURING COMPLIANCE WITH FINAL SANCTIONS

SANCTIONING CONSIDERATIONS

- ! Title IX Coordinator does not issue sanctions but oversees the process
- ! Investigation alone is not sufficient to overcome a deliberate indifference claim

Title IX and case law require resolutions which:

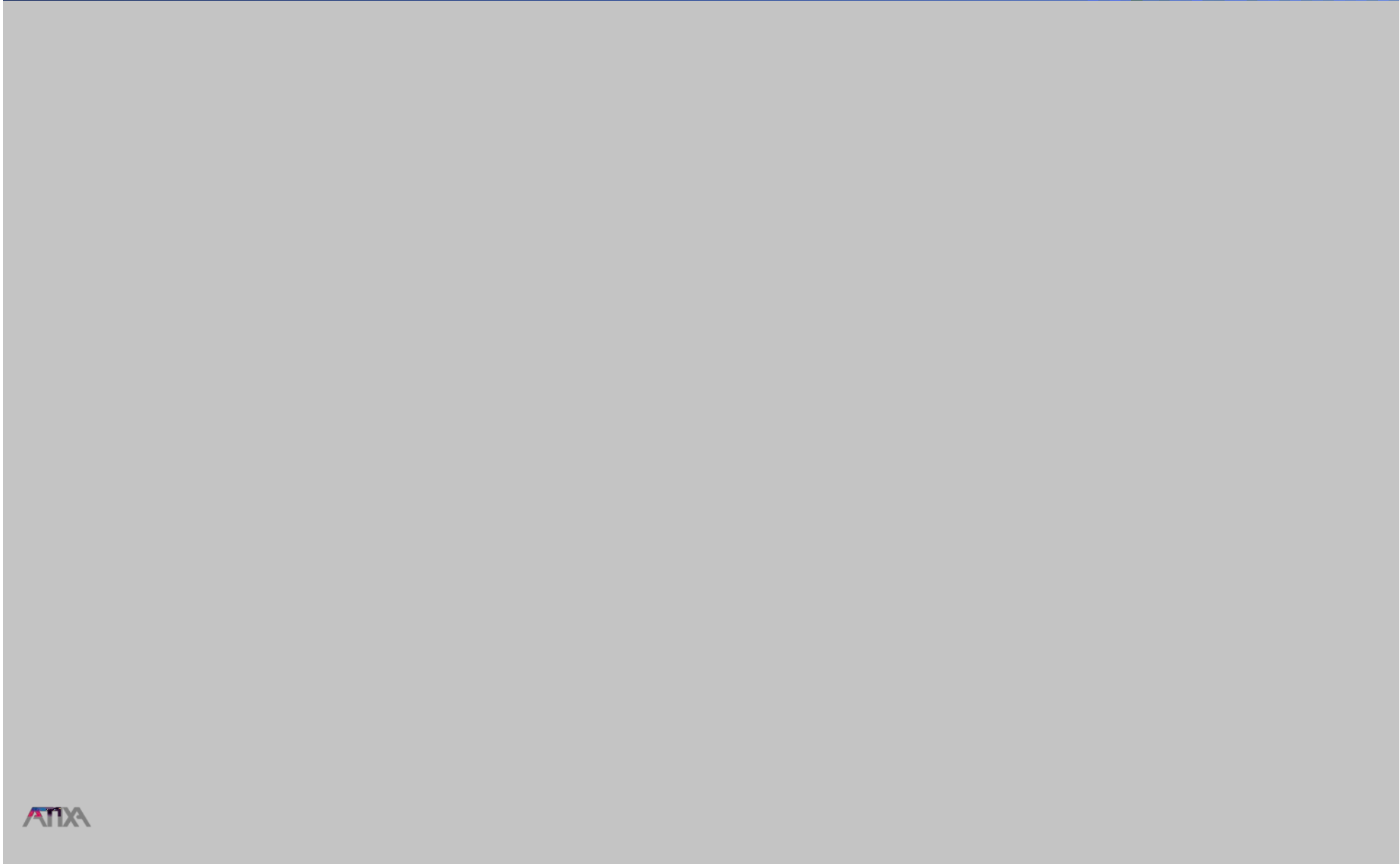
- ! STOP

SANCTIONING CONSIDERATIONS (CONT.)

!







COMMON STUDENT SANCTIONS

! W10r0 0 0 10 0.2ns

COMMON EMPLOYEE SANCTIONS

- ! Warning – verbal or written
- ! Probation
- ! Performance improvement/management process
- ! Training (e.g., sensitivity training)
- ! Counseling
- ! Loss of privileges
- ! Reduction in pay
- ! Loss of annual raise
- ! Discretionary sanctions
- ! Loss of supervisory or



COORDINATING THE APPEAL PROCESS

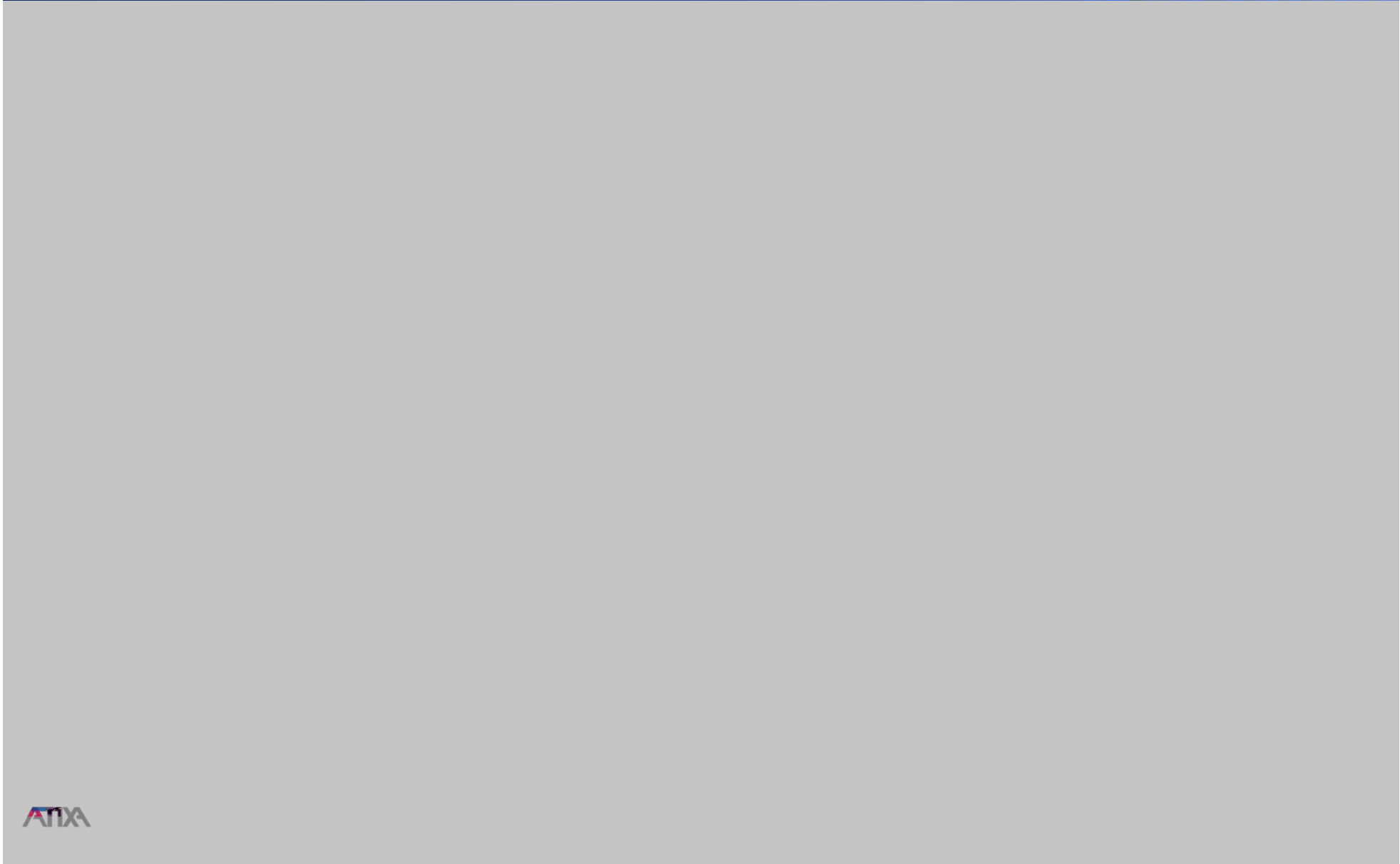
- ! Appeals
- ! Appeal Grounds
- ! Appeal Process

APPEALS

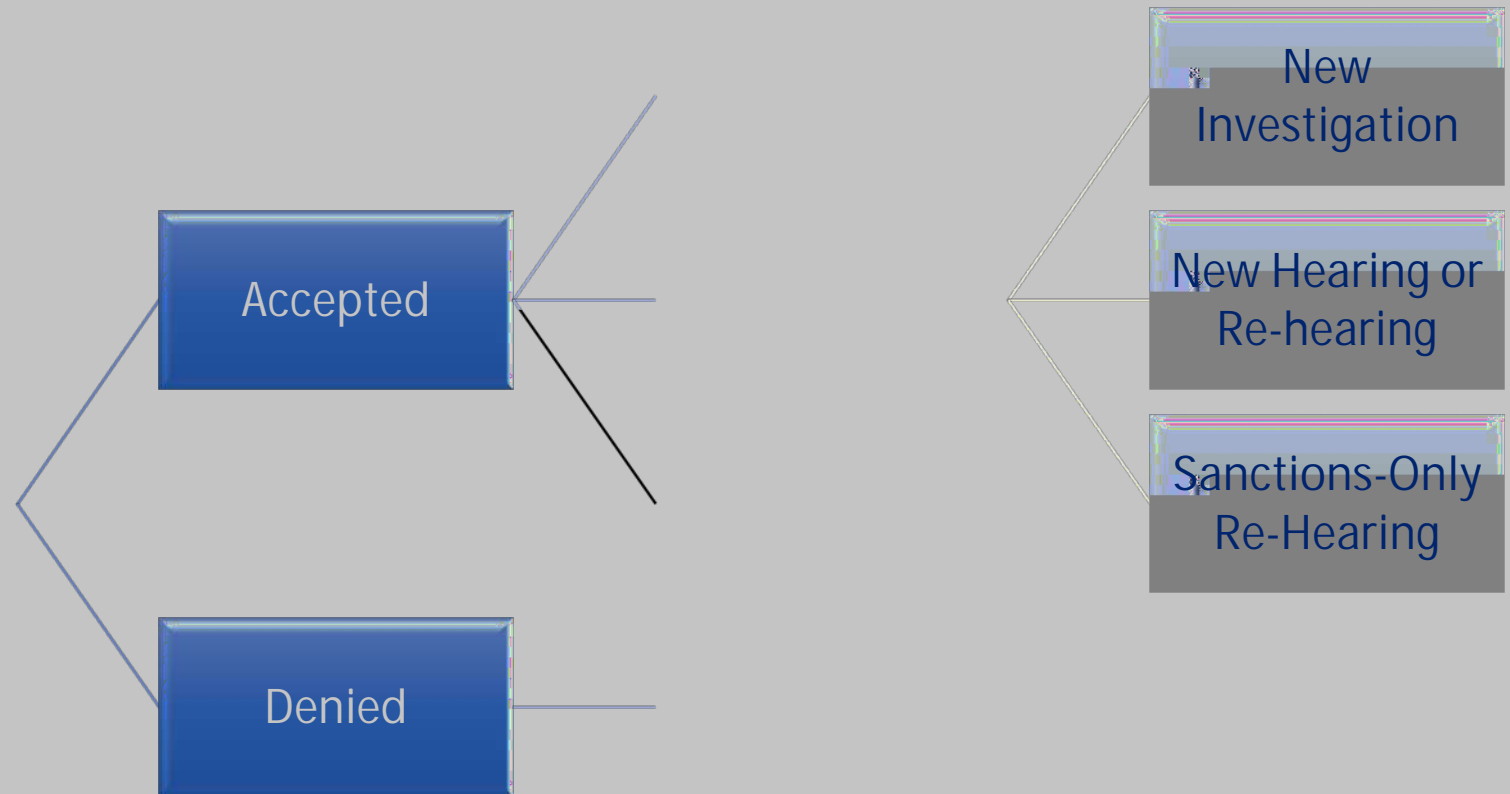
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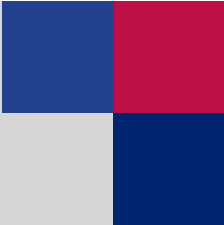
APPEALS (CONT.)

- ! “Reasonably prompt” timeframe for producing appeal decision
- ! One level of appeal is best practice
- ! Defined window of time to request appeal
- ! Short window to request an appeal
 - ! Can always grant an extension if necessary
- ! Three mandatory grounds for appeal; may add others
- ! Committee versus individual determination preferred
- ! Deference to original Decision-maker
- ! Remand
- ! Document-based review
 - ! NOT *de novo*



APPEAL PROCESS

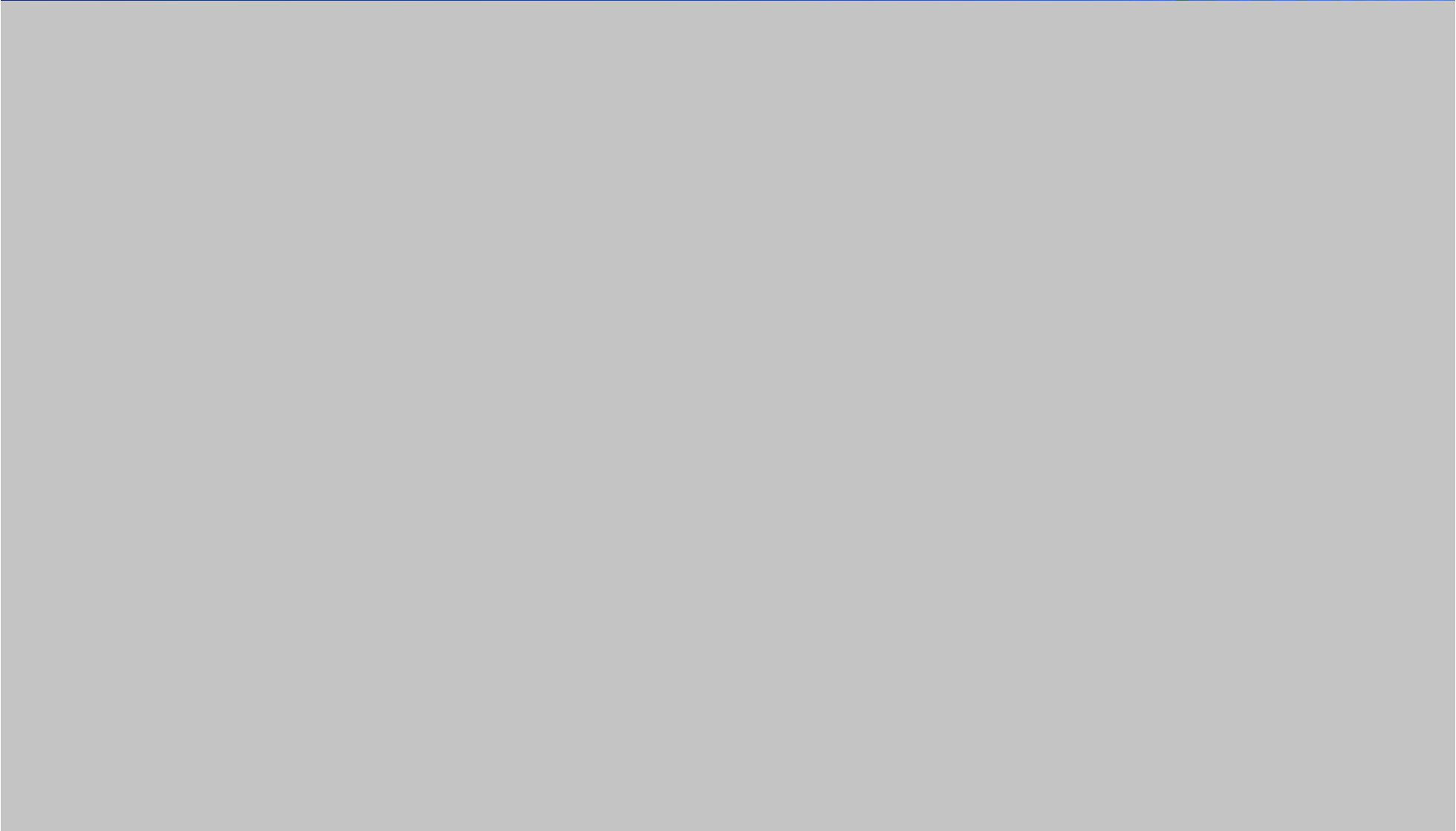




GENERAL TITLE IX COMPLIANCE OVERSIGHT

- ! Stop, Prevent, & Remedy
- ! Athletics Gender Equity
- ! Assessing Compliance
- ! Recordkeeping & Documentation





ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Prevent Recurrence:

- ! Identify patterns and systemic problems
- ! Issue school/campus-wide policy statements, informational campaigns, and other messages that harassment and assault will not be tolerated
- ! Provide regular training on sex/gender-based misconduct for students and employees
- ! Conduct periodic surveys of campus climate
- ! Establish a system for monitoring future incidents and patterns
- ! Provide technical assistance to school/campus law enforcement on Title IX compliance

ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Prevent Recurrence (Cont.):

- ! Consider the effect of educational sanctions
- ! The potential next Complainant is potentially both a Title IX and negligence concern

ENSURING COMPLIANCE WITH REQUIREMENTS TO STOP, PREVENT, REMEDY

Remedy the Effects:

- ! Designed to make Complainant whole and return them to the pre-deprivation status
- ! Take timely steps to confirm and document that the appropriate remedies were implemented
- ! Make sure the Complainant knows that they should report any difficulties obtaininb[(de)4scn752-1(fh Tc100 0 0 10a1 Tf0.008

OVERSIGHT OF ATHLETICS GENDER EQUITY

- ! The oversight of gender equity compliance in athletics remains the responsibility of the Title IX Coordinator
- ! There should be a compliance officer in the athletics department

ASSESSING COMPLIANCE

- ! Active, internal reviews/audits/assessments
 - ! Reporting and resolution processes
 - ! Policies and procedures up-to-date and compliant
 - ! Athletics
 - ! Training content and requirements
 - ! Policy and non-discrimination notice dissemination
 - ! Materials, website, and resource guide
- ! Compliance checklist
 - ! Departmental self-study audit at regular intervals
- ! Case/investigation debriefing

ASSESSING COMPLIANCE (CONT.)

- ! Active professional development on issues related to compliance; oversight of compliance plan implementation
 - ! For Title IX Coordinator and/or Deputy Coordinators
- ! Climate surveys
 - ! Online, in-person, focus groups, institution/system committee feedback, etc.

RECORDKEEPING AND DOCUMENTATION

- ! Certain records must be created, retained, and available to the parties for at least seven years:
 - ! Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
 - ! Any appeal and related result(s)
 - ! Any informal resolution implemented
 - ! Any supportive measures implemented
 - ! For each formal complaint, must document the basis for why the Recipient's response was not deliberately indifferent

RECORDKEEPING AND DOCUMENTATION (CONT.)

- ! Rationale for each determination
- ! Measures taken to preserve/restore access to education programs/activity





Association of
Title IX Administrators

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