



EMPHASIZING SUPPORT AND  
PREVENTION:

# A NEW DIRECTION FOR TITLE IX

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Director of Training

# LEARNING OBJECTIVES

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1

Critically examine proposed changes to Title IX institutional response

2

Understand the balance of Complainant autonomy and the need to prevent further recurrence of sex discrimination

3

Identify proposed options in responding to reports of sex discrimination, supporting, and providing remedies

# TITLE IX CURRENT REGS

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2020-TODAY

# TITLE IX: 2020-TODAY

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## INSTITUTIONAL RESPONSE

*"106.44(a) General response to sexual harassment. A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent."*

# TITLE IX: 2020-TODAY

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## KEY TERMS

Actual knowledge: "notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school"

Deliberate indifference: "respond[ing] to sexual harassment in a manner that is 'clearly unreasonable in light of the known circumstances'"

# TITLE IX: 2020-TODAY

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Actual knowledge: What about reports to individuals who do not have authority to institute corrective measures? (Postsecondary)



Deliberate indifference: Is it enough to simply not be deliberately indifferent?

# TITLE IX: 2020-TODAY

## TITLE IX REPORTING



K-12

Actual knowledge: ALL  
Employees



Postsecondary

Actual knowledge: TIX  
Coordinator or authority to  
institute corrective  
measures

Any person may report sex  
discrimination, including  
sexual harassment



# TITLE IX: 2020-TODAY

## WHAT DOES THIS MEAN?



K-12

Actual knowledge: ALL  
Employees

- The school has actual knowledge when ANYONE learns of potential discrimination or harassment
- This automatically obligates the school to respond

# TITLE IX: 2020-TODAY

## WHAT DOES THIS MEAN?

- Currently is no requirement for certain employees to report (may, not must)
- The obligation for an institution to respond does not activate until the TIXC or authority to institute corrective measures are notified of potential discrimination or harassment



### Postsecondary

Actual knowledge: TIX  
Coordinator or authority to  
institute corrective  
measures

Any person may report sex  
discrimination, including  
sexual harassment

# TITLE IX: 2020-TODAY

## CURRENT TITLE IX WORKFLOW

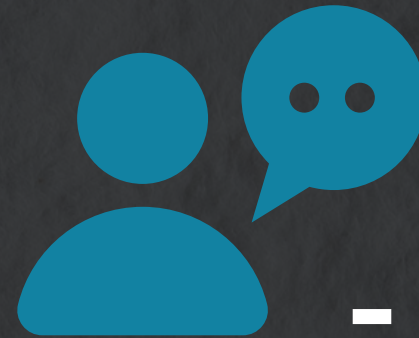


Student tells professor about sexual harassment



Professor notifies TIXC

*Actual knowledge*



Title IX Coordinator must:




Professor does not notify TIXC



- 1) Promptly contact the complainant to discuss the availability of supportive measures,
- 2) Consider the complainant's wishes with respect to supportive measures,
- 3) Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,
- 4) Explain to the complainant the process for filing a formal complaint

# TITLE IX: 2020-TODAY

 = availability of supportive measures



Student files **formal** complaint



Grievance process begins

*Informal Resolution may be available*



Informal resolution or determination achieved



Student does not file\*

\*in some cases, TIXC may file complaint on behalf



Student withdraws complaint or TIXC dismisses



# TITLE IX: 2020-TODAY

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AT THESE VARIOUS STOPPING POINTS, CAN WE SAY WE HAVE WE ENDED THE DISCRIMINATION/HARASSMENT, PREVENTED RECURRENCE AND REMEDIED EFFECTS?

# TITLE IX PROPOSED CHANGES

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2023? and Beyond

# TITLE IX: PROPOSED CHANGES

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## INSTITUTIONAL RESPONSE

*"106.44(a) General response to sexual harassment. (a) General. A recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects."*

# TITLE IX: PROPOSED CHANGES

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## LANGUAGE SHIFT

Removal of  
actual  
knowledge

Emphasis on ending  
discrimination,  
preventing  
recurrence, and  
providing remedies



# TITLE IX: PROPOSED CHANGES

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"The goal of the Department's proposed regulations is thus to fully effectuate Title IX by clarifying and specifying the scope and application of Title IX protections and recipients' obligation not to discriminate on the basis of sex."



"None of these steps\* requires the recipient to ensure continued equal access to its education program or activity for the parties and more broadly for a recipient's educational community or otherwise ensures that a recipient meets its legal duty under Title IX to operate its education program or activity free from sex discrimination."

\*Current 106.44(a): 1) Promptly contact the Complainant, 2) Discuss availability of supportive measures, 3) Explain process for filing a formal complaint

# TITLE IX: PROPOSED CHANGES

## TITLE IX REPORTING



### K-12

ALL employees, except those who have been designated as confidential, must report to the TIX Coordinator



### Postsecondary

Those with 1) authority to institute corrective measures or 2) responsibility for administrative leadership, teaching, or advising, except confidential employees, must report to the TIX Coordinator

All other employees must either notify TIXC or provide TIXC information.

# TITLE IX: PROPOSED CHANGES

## WHAT DOES THIS MEAN?



K-12

ALL employees, except those who have been designated as confidential, must report to the TIX Coordinator

- Though actual knowledge language has been removed, the expectation of reporting extends to all employees (except confidential)
- A new definition of who can be designated as confidential may provide clarity on these roles

# TITLE IX: PROPOSED CHANGES

## WHAT DOES THIS MEAN?

- Schools will need to designate and train individuals as to their specific reporting requirements
- All employees must do SOMETHING (even confidential must provide TIXC information)
- School must inform students who confidential employees are



### Postsecondary

Those with 1) authority to institute corrective measures or 2) responsibility for administrative leadership, teaching, or advising, except confidential employees, must report to the TIX Coordinator

All other employees must, at a minimum, provide TIXC information.

# TITLE IX: PROPOSED CHANGES

## PROPOSED TITLE IX WORKFLOW



Student tells professor about sexual harassment



Professor must notify TIXC



Title IX Coordinator must:

# TITLE IX: PROPOSED CHANGES

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- 1) Treat Complainant and Respondent equitably
- 2) (i) Notify Complainant of grievance procedures, (ii) If a complaint is made, notify Respondent of grievance procedures and notify both Parties of informal resolution options, if available
- 3) Offer and coordinate supportive measures to Complainant and Respondent to restore or preserve access to education program or activity.
- 4) In response to a complaint, initiate grievance procedures
- 5) In the absence of a complaint or informal resolution process, determine whether to initiate a complaint of sex discrimination that complies with the grievance procedures
- 6) Take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity, in addition to remedies provided to an individual complainant.

# TITLE IX: PROPOSED CHANGES



Student moves forward with complaint



Grievance process begins

*Informal Resolution may be available*



Informal resolution or determination achieved



Steps to end/prevent recurrence of discrimination



Supportive Measures/ Remedies



Student does not file complaint



Steps to end/prevent recurrence of discrimination



*Informal Resolution*



Supportive Measures/ Remedies

# TITLE IX: PROPOSED CHANGES

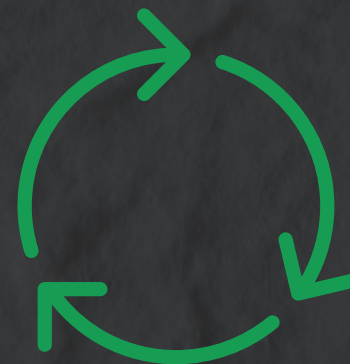
## A NEW FOCUS:

IF THE DISCRIMINATION HAS NOT ENDED, RECURRENCE HAS NOT BEEN PREVENTED, AND EFFECTS NOT REMEDIED AS A RESULT OF ANY ACTIONS TAKEN, YOU MUST TAKE NEW STEPS TO DO SO.

Harassment/  
discrimination  
ends



Harassment/  
discrimination  
continues



"...in all cases, when a recipient's response to sex discrimination is not effective to end the sex discrimination and prevent the recurrence of discrimination for the complainant or the recipient's broader educational community, under the proposed regulations, a Title IX Coordinator must reevaluate the recipient's response and implement other approaches." (p.209)



# VISUALIZING THE SHIFT

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## 2020 FINAL RULE

- Framework from private litigation for monetary damages applied to the context of administrative enforcement of Title IX (*Gebser/Davis*)
- No duty to end the discrimination without formal complaint

## PROPOSED CHANGES

- Return to administrative standard
- Duty from start to finish to end the discrimination
- Removal of formal complaint requirement

# A COMMUNITY APPROACH

PROPOSED CHANGES INCLUDE EXTENDING RESPONSE IF THE IMPACT OF THE HARM WAS FELT OUTSIDE OF THE PARTIES

"additional training for staff on how to respond appropriately to sex discrimination"

"monitor known risks of sex discrimination in programs and activities in which sex discrimination has been reported in the past"

"take steps to repair an educational environment in which sex discrimination occurred, such as within a specific class, department, athletic team, or program"

"consider providing educational programming aimed at the prevention of sex discrimination"

(p. 211)

# MONITORING

PROPOSED CHANGES INCLUDE NEW REQUIREMENT FOR TITLE IX COORDINATOR TO MONITOR FOR BARRIERS TO REPORTING

106.44(b)(1) Require its Title IX Coordinator to monitor the recipient's education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX; and (2) Take steps reasonably calculated to address such barriers.

Climate  
Surveys

Targeted  
Feedback

Anonymous  
Mechanisms

Public  
Awareness  
Events

# MONITORING

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## Lack of Confidence

"You didn't help my friend with his problem, so..."

## Fear

"That is a powerful group on campus. I can't speak up about this."

## Lack of Information

"I didn't know where or how to report this."

## Perceptions of Title IX

"That process is going to take too long. I don't want to deal with it."

# PUBLIC AWARENESS EVENTS

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PROPOSED CHANGES REQUIRE SCHOOLS (POSTSECONDARY) TO USE INFORMATION LEARNED AT PUBLIC AWARENESS EVENTS TO INFORM PREVENTION EFFORTS

"106.44(e) ...in all cases the postsecondary institution must use this information to inform its efforts to prevent sex-based harassment, including by providing tailored training to address alleged sex-based harassment in a particular part of its education program or activity or at a specific location when information indicates there may be multiple incidents of sex-based harassment."

# PUBLIC AWARENESS EVENTS

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EXAMPLES INCLUDE:

Increased  
Security at  
Physical  
Locations

Targeted  
Training

Schools will  
have discretion  
as to how they  
integrate this  
information  
into its  
prevention plan

# COMPLAINANT AUTONOMY

2020

"respecting an alleged victim's autonomy, giving alleged victims control over how official systems respond to an alleged victim, and offering clear options to alleged victims are critical aspects of helping an alleged victim recover from sexual harassment." (p. 60\*)

"the Department aims to respect the autonomy of complainants and to recognize the importance of a complainant retaining as much control as possible over their own circumstances following a sexual harassment experience, while also ensuring that complainants have clear information about how to access the supportive measures a recipient has available (and how to file a formal complaint initiating a grievance process against a respondent if the complainant chooses to do so) if and when the complainant desires for a recipient to respond to the complainant's situation." (p.63\*)

*\*2020 Title IX Final Rule*

# COMPLAINANT AUTONOMY

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2020

Narrowing of  
mandated  
reporters

No action taken  
without formal  
complaint\*

Provision of  
information  
regarding  
supportive  
measures

Option for  
informal after  
formal complaint  
filed

\*in some cases, TIXC  
may file complaint



# COMPLAINANT AUTONOMY

2022 proposed

"The Department remains committed to these objectives: respect for freedom of speech and academic freedom; respect for complainants' autonomy; protection of complainants' equal educational access while respecting the decisions of recipients to determine appropriate supportive measures, remedies, and disciplinary sanctions; consistency with constitutional due process and fundamental fairness; and clear legal obligations that enable robust administrative enforcement of Title IX violations" (p. 158)

"As explained in the discussion of proposed § 106.44(c), the Department continues to recognize the importance of complainant autonomy in decision-making about whether to request that the recipient initiate its grievance procedures or participate in the recipient's grievance procedures. Therefore, the Department currently believes a recipient should honor a complainant's request not to proceed with a complaint investigation when doing so is consistent with a recipient's obligation to ensure it operates its education program or activity free from sex discrimination." (p. 203)

# COMPLAINANT AUTONOMY

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2022 proposed

Expansion of  
mandated  
reporters\*

Informal  
resolution may  
be offered at any  
point

Coordination of  
supportive  
measures

Focus on restoring  
or preserving  
access to  
education program  
or activity

\*with extensive  
education about the  
designations

# PREGNANCY, PARENTING, LACTATION

Student  
discloses  
pregnancy

ANY employee  
must provide  
TIX  
Coordinator  
information

If student  
contacts TIX  
Coordinator,  
Coordinator  
must:

- 1) Inform the student of the school's obligation to prohibit sex discrimination
- 2) Provide the student with the option of reasonable modifications to the recipient's policies, practices, or procedures afforded by Title IX
- 3) Allow the student to take a voluntary leave of absence from the recipient's education program or activity to cover, at minimum, the period of time deemed medically necessary by the student's physician or other licensed healthcare provider
- 4) Ensure the availability of a lactation space, which must be a space other than a bathroom

# PRACTICAL APPLICATION

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# A CASE STUDY

Jacob



- Jacob went on a date with another first-year student who lives in his residence hall, Kayla. He had a nice time, but declined seeing her further.
- Kayla continued to text Jacob multiple times throughout the next week, sending him sexually explicit messages and nude photos. She showed up at his door unannounced, kissed him without his consent, and told him she wanted to sleep with him.
- Jacob told her no, firmly, to which Kayla said, "What are you, gay? You're supposed to like this."
- Jacob started sleeping on a couch at the student center after Kayla continuously cornered him on his floor.
- When he was a week late turning in a major assignment for Sociology 101, he told his professor he was exhausted and shared what had been going on.

# A CASE STUDY

Jacob



## Response under current Title IX Regs:

- Possibility that the concern never makes it to the TIX office
- If it does, the TIXC would inform Jacob on how to file a formal complaint, as well as the availability of supportive measures
- If Jacob does not file a formal complaint and the harassment continues, there is no obligation for the TIXC to end the harassment, potentially no follow-up
- If Jacob pursues supportive measures (e.g. moving his residence) and the harassment does not end, there is no obligation for the TIXC to end the harassment

# A CASE STUDY

Jacob



Ending harassment could be dependent upon:

**Professor's  
decision to  
report  
(or not to report)**

**Jacob's  
decision to  
file a formal  
complaint**

**TIX  
Coordinator's  
explanation  
of supportive  
measures**

# A CASE STUDY

## Response under proposed Title IX Regs:

- The professor would be responsible for informing the TIXC of the concern
- The TIXC would have a more involved role in providing options and coordinating them
- If Jacob does not respond to the TIXC and the harassment continues, the TIXC would still need to take what steps they can end the harassment
- If Jacob pursues supportive measures (e.g. moving his residence) and the harassment does not end, the TIXC would need to try something else
- Jacob could look at informal options without the grievance process being initiated

Jacob





# A CASE STUDY

Jacob



Ending harassment is a must and will happen with the following in mind:

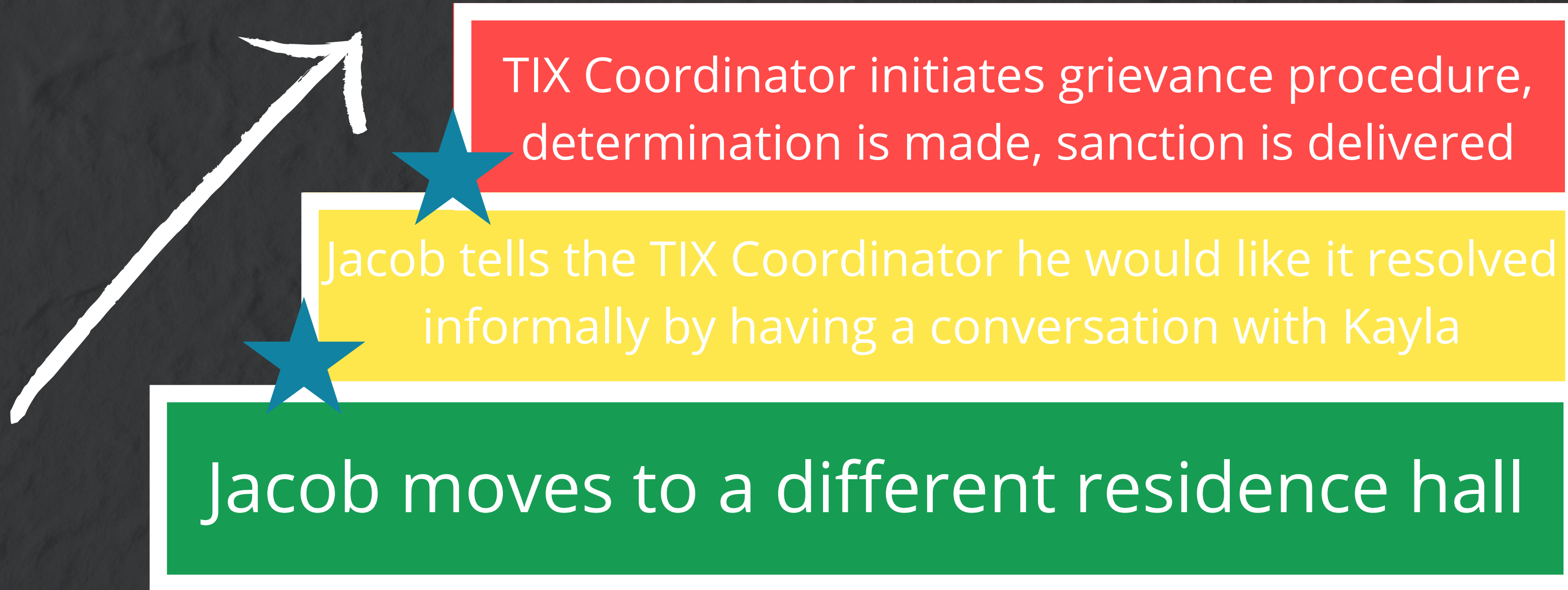
**Complainant's  
desires to  
address the  
issue**

**TIX  
Coordinator's  
explanation  
of options**

**Escalation or  
differentiation  
when other  
methods don't  
solve the issue**

# A CASE STUDY

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# RANGE OF OPTIONS

In short, what  
will stop the  
harassment or  
discrimination?

Consider totality of the  
circumstances,  
Complainant's wishes,  
information known,  
possibility for continued  
harm to Complainant or  
campus community



Grievance procedure  
w/sanctions

Informal resolution

Education

Supportive measures

# QUESTIONS?