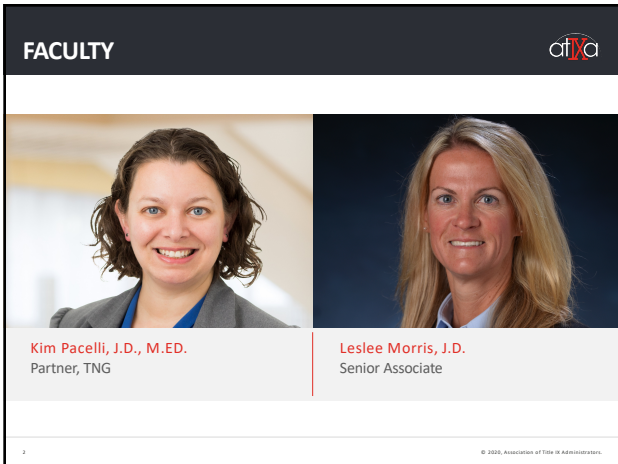





1



2



3

LEVEL 1 INVESTIGATIONS TRAINING 

Part II

- I. Investigation Details
 - i. Evidence Collection
 - ii. Interview Scheduling & Preparation
- II. Questioning
 - i. Goals of Questioning
 - ii. Types of Questions
- III. Interview Skills
 - i. Demeanor
 - ii. Process
 - iii. Feedback
 - iv. Interviewing the Parties
- IV. Trauma-Informed Interviewing
- V. Challenging Witnesses
 - i. Difficult
 - ii. Lying
 - iii. Resistant/Quiet
- VI. Helpful Investigation Documents
- VII. Investigation Report
 - i. Standard of Proof
 - ii. Review of Evidence and Report
 - iii. Hearing
- VIII. Sanctions & Appeals


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OVERVIEW OF TITLE IX

- Text of the Law
- The IX Commandments
- Equality v. Equity

5

TITLE IX
20 U.S.C. § 1681 & 34 C.F.R. PART 106 (1972) 

“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 educational program or activity receiving federal financial assistance.”

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6

THE IX COMMANDMENTS



Thorough	Reliable	Impartial
Prompt	Effective	Equitable
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community

Investigation
(prompt & fair – VAWA Sec. 304)

Process

Remedies

7

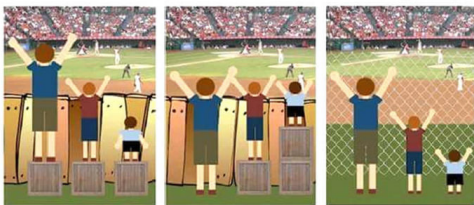
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EQUALITY V. EQUITY



EQUALITY VERSUS EQUITY



In the first image, it is assumed that everyone will benefit from the same supports. They are being treated equally.

In the second image, individuals are given different supports to make it possible for them to have equal access to the game. They are being treated equitably.

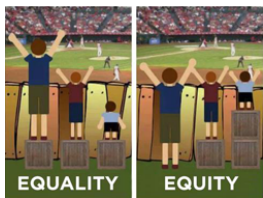
In the third image, all three can see the game without any supports or accommodations because the cause of the inequity was addressed. The systemic barrier has been removed.

8

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EQUITY BY AND THROUGH THE PROCESS



- You will get this right when you can do equity through equity.
- Each party's rights, privileges and opportunities need to be balanced.
- Not exactly parity, but equitable procedures that reach equitable outcomes that impose equitable remedies.
- Equitable = fair under the circumstances.
- What you do for one party, ask whether you need to do for the other(s).

9

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LEGAL BASIS FOR TITLE IX LIABILITY

- Significant Cases
- Other Relevant Cases
- Intersection of Title VII and Title IX
- Title IX and VII Inter-related Investigations
- Due Process

10

SIGNIFICANT CASES

- *Franklin v. Gwinnett Public Schools*
- *Gebser v. Lago Vista*
- *Davis v. Monroe County Bd. of Education*
- *Jackson v. Birmingham Bd. of Education*
- *Fitzgerald et al., v. Barnstable School Committee et al.*

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FRANKLIN V. GWINNETT PUBLIC SCHOOLS

503 U.S. 60 (1992)

- Christine Franklin alleged that during her junior year (1986), an economics teacher, Andrew Hill, engaged her in sexually explicit conversations, forced kissing, and coercive sexual intercourse on school grounds.
- District and Circuit Court of Appeals dismissed the case, finding Title IX does not allow for award of monetary damages.
- U.S. Supreme Court decided that sexual harassment constituted sex discrimination under Title IX.
- *Gwinnett* also provided a private right for recovery of monetary damages under Title IX.
- *Gwinnett* did not address issues concerning the educational recipient's liability.

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GEBSER V. LAGO VISTA INDEP. SCHOOL
524 U.S. 274 (1998) 

- Case involved teacher/student sexual harassment.
- Supreme Court created high standard that students must meet to prevail on a sexual harassment claim against recipients when an employee/student consensual relationship is basis of claim.
- Court said you cannot recover monetary damages against the school **unless** the behavior has been reported to someone with power to alter the situation (“actual notice”) and “**deliberate indifference**” has been demonstrated by the school.

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GEBSER V. LAGO VISTA INDEP. SCHOOL
524 U.S. 274 (1998) 

- 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.**”

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DAVIS V. MONROE COUNTY BD. OF ED.
526 U.S. 629 (1999) 

- Prolonged pattern of student/student sexual harassment of a fifth-grade girl by a classmate.
- Parents complained to three teachers and principal.
- The school took no action until the boy was charged with, and pled guilty to, sexual battery.
- Filed Title IX action, alleging that persistent harassment and deliberate indifference resulted in her inability to attend school and participate in activities.

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DAVIS V. MONROE COUNTY BD. OF ED.
526 U.S. 629 (1999)




- Finding in favor of Davis, the Supreme Court applied same standards to find the institution liable for damages as in 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 “clearly unreasonable in light of the known circumstances.”

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JACKSON V. BIRMINGHAM BD. OF ED.
544 U.S. 167 (2005)




- A deeply divided U.S. Supreme Court decided this landmark case in 2005.
- Involved a claim of retaliation for filing complaints of sex discrimination under Title IX.
- Roderick Jackson, a high school teacher and coach, complained to school officials about the school’s inequitable treatment of the girls’ basketball team.
- Retaliation-based case.
- The federal district court and appellate court ruled against Jackson.

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JACKSON V. BIRMINGHAM BD. OF ED.
544 U.S. 167 (2005)



- The Supreme Court overturned lower courts, stating that:
 - Private parties can seek damages for intentional sex discrimination under Title IX.
 - Retaliation against a person who complains about sex discrimination is in itself a form of “intentional discrimination,” even if plaintiff is not an “actual” recipient of gender-based discrimination.
 - It is discrimination based on gender because it is “an intentional response to the nature of the complaint: an allegation of sex discrimination.”

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FITZGERALD V. BARNSTABLE SCHOOL CMTE.
555 U.S. 246 (2009) 

- This case represents legal challenge brought against a school district by parents of a kindergarten child subjected to student/student sexual harassment.
- Parents challenged the school did not respond adequately, under Title IX requirements, to daughter’s allegations of sexual harassment by older student.
- The parents also brought a §1983 claim against the school superintendent and the school committee.

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FITZGERALD V. BARNSTABLE SCHOOL CMTE.
555 U.S. 246 (2009) 

- Supreme Court ruled on whether Title IX provides the exclusive remedy for addressing gender discrimination in the school, or if a §1983 action could be brought as a means of enforcing the federal rights.
- It held that Title IX is not the exclusive mechanism for addressing gender discrimination, nor a substitute for a §1983 action.
- It stated that Title IX provides for both an administrative remedy (OCR) and civil damages actions against an institution, but not school officials, teachers, or other individuals.

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FITZGERALD V. BARNSTABLE SCHOOL CMTE.
555 U.S. 246 (2009) 


- However, §1983:
 - Provides means to enforce the rights of aggrieved person against school officials, teachers, or other individuals in their **personal capacity**.
 - Creates the path to hold individuals personally liable, providing for award of damages, injunctive relief, **and attorney fees**.
 - Follows that the courts apply school-focused Title IX case law similarly to colleges and universities.

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INTERSECTION OF TITLE VII AND TITLE IX 

- Title IX consciously modeled on Title VI of the Civil Rights Act of 1964 and borrowed heavily from Title VII.
- Courts generally apply standards established under Title VII for guidance in how to establish a Title IX violation.
- Title IX prohibits against sex-based discrimination to the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention, or treatment of employees.
- Individuals can use both statutes to pursue the same violations.
- OCR's 2020 Regs. create extensive due process protections for at-will employees accused of misconduct.



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TITLE IX AND TITLE VII INVESTIGATIONS 

- Consider:
 - Role of institutional equity/AA/EOP officer.
 - Human resources/faculty/teachers.
 - Coordinator of school/campus conduct.
 - Athletics.
 - Public safety/SRO/Law enforcement.
- Oversight of deputy coordinators/investigators.
- Ability to merge/combine investigatory and hearing processes.
 - Effect of OCR's 2020 Regs. definition of sexual harassment.
- Coordination of remedies in student/employee and employee/student resolution processes.
- What happens when employee is a student or student is an employee?

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DUE PROCESS FOUNDATIONS
DIXON V. ALABAMA 

Dixon v. Alabama State Board of Education
294 F.2d 150 (5th Cir. 1961)

- Due Process:
 - Notice and hearing required prior to expulsion from a state college or university.
- Rights adhered to respondents because of the posture of the case.
- All due process cases flowing from Dixon attached additional rights to respondents.
- Respondents in *Dixon* were actually civil rights victims.

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DUE PROCESS: CURRENT ISSUES 

- Due Process is at the heart of OCR's 2020 regulations.
 - Applies to both public and private institutions, which is a shift in legal paradigm
 - Standard of Proof
 - Requirements for "Emergency Removal"
 - Detailed Notice of Allegations/Investigation
 - Providing Inv. Report and Evidence for Review/Response
 - Live Hearing with Cross-Examination Mandatory for Higher Ed
 - Advisor Involvement (including possibly attorneys)
 - Bias by Investigators, Hearing Officers, Appellate Officers
 - Training: Biased Training; Insufficient Training


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TITLE IX COORDINATOR OVERSIGHT

- The Role of the Title IX Officer in the Investigation Process
 - Supervisor of the Investigation Structure
 - Supervisor of the Investigation Process
 - Trainer for Investigators


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THE TITLE IX TEAM 

- Title IX Coordinator (TIXC)
- Deputy Coordinators
- Investigator(s)
- Decision-maker(s)
- Appellate Decision-maker(s)
- Advisors

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TIXC AS SUPERVISOR OF THE INVESTIGATION STRUCTURE 

- The Title IX Coordinator is responsible for:
 - The appointment of investigators.
 - Training investigators, decision-makers, and appeals officers.
 - Supervision of investigators and investigations.
 - Strategizing investigations.
 - Coordinating supportive measures.
 - Timeline compliance.
 - Communication and coordination of investigation teams.
 - Providing institutional memory to investigators.
 - Retaining a record of all activities.
 - The TIXC may be an investigator but may not be a decision-maker.

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TIXC AS SUPERVISOR OF THE INVESTIGATION PROCESS 

- The Title IX Coordinator or designee is responsible for:
 - Documenting request for investigation.
 - Gatekeeping.
 - Determining extent of investigation.
 - Notice of allegations and investigation.
 - Notice of hearing.
 - Assurance of written determination of the outcome via the decision-maker.
 - Duty to warn.
 - Assurance of remedies.
 - Recordkeeping of all activities.

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TRAINING AREAS FOR INVESTIGATORS - OCR 2020 REGS. 

- The definition of sexual harassment
- The scope of the recipient’s education program or activity
- How to conduct an investigation and grievance process, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Understanding “relevant evidence” in order to create an investigation report that fairly summarizes all relevant evidence

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BIAS – OCR 2020 REGS. 

The Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process must not:

- Have a conflict of interest or bias for or against Complainants or Respondents generally or
- For or against an individual Complainant or Respondent

Bias and conflict of interest by investigators that impacted the outcome are grounds for appeal.


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CIVIL RIGHTS INVESTIGATIONS AND RESOLUTIONS: AN OVERVIEW

- The Process & Ten Steps
- Jurisdiction
- Who Should Investigate?
- Confidentiality & Privacy

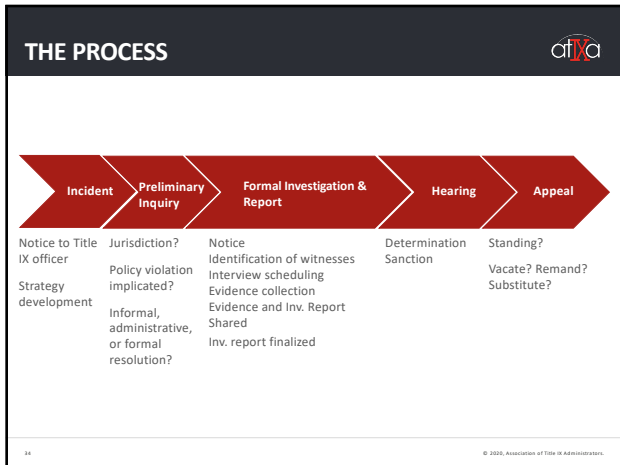
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REQUIRED DEFINITIONS – OCR 2020 REGS. 

- 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)

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- ## 10 STEPS OF AN INVESTIGATION
1. Receive Notice of Allegation.
 2. Preliminary Inquiry (initial issue-spotting).
 3. Gatekeeper determination.
 4. Notice of Investigation to Responding Party and Notice of Formal Allegation ("Charge").
 5. Issue spotting by investigators (will continue as new information is added).
 6. Preliminary investigation strategy.
 7. Formal comprehensive investigation.
 - Witness interviews
 - Evidence gathering.
 8. Meet with Title IX Coordinator to review draft report & evidence.
 9. Provide all evidence directly related to the allegations to parties and their advisors for inspection and review with 10 days for response.
 10. Complete final report.
 - Synthesize and analyze relevant evidence, including making recommended findings (may vary by institution).
 - Send final report to parties for review and written response at least 10 days prior to hearing.
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- ## CIVIL RIGHTS INVESTIGATION MODEL AND STUDENT CONDUCT MODEL
- How does this model alter the current student conduct model used to address sexual assault, stalking, intimate partner violence, sexual harassment, etc.?
 - An active gathering of information by the investigator or investigators; not intended to "build a case."
 - Does not impact the implementation of informal or alternative dispute resolution approaches.
 - Characterized by an intentional effort to enhance due process protections for the parties and make procedural and support mechanisms equitable.
 - Provides a right of appeal for all parties to the report, not just the Respondent.
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WHEN DOES TITLE IX APPLY? 

- OCR Regs. require Title IX complaint must be dismissed if harassment did not occur against a person **in the U.S.**, but...
 - Contrary case law
 - May take action under another provision of your code of conduct
- **Davis** standard --Title IX applies and jurisdiction is required when the institution has:
 - **Control over the Respondent AND**
 - **Control over context of the harassment**
 - Includes any building owned or controlled by an officially-recognized student organization
 - At the time of filing a complaint, Complainant must be participating in or attempting to participate in the recipient's education program or activity

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WHEN DOES TITLE IX APPLY? 

Jurisdiction

- Covered Programs (all programs)
- Jurisdictional Limitations.
 - Geographic.
 - Temporal.
- When is a student a "student"?
 - Application-Admission-Registration-Attendance-Breaks.
- When is a Complainant "participating in or attempting to participate in the recipient's education program or activity?"
- When is an employee an employee?
 - Hourly vs. salaried?

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WHEN DOES TITLE IX APPLY? 

Jurisdiction for Off-Campus Incidents:

- For Sexual Harassment and Discrimination cases.
- If Title IX jurisdiction is not present, the behavior could still violate:
 - Institutional harassment/discrimination policies.
 - Student Handbook/Conduct policies.
 - Technology/Acceptable Use policies.
 - Employee Handbook/Policies.
 - Professionalism standards.

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JURISDICTION FOR OFF-CAMPUS INCIDENTS? 

- For the in-program effects of out-of-program misconduct, Title IX will apply if Part 106.30 definitions apply.
- Discretionary jurisdiction over incidents occurring off-campus or on non-school owned/controlled property
 - Under other policies or codes of conduct
 - Outside of the Title IX process

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WHO SHOULD INVESTIGATE? 

- Investigations of sexual harassment must be impartial, thorough, and reliable.
 - Title IX Coordinator?
 - Standing panel of investigators?
 - Human resources or student services?
 - Administrators/Staff?
 - Teachers/faculty?
 - Coaches?
 - Outside/External investigator?
 - NOT Legal Counsel
 - **Well-trained**

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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 to make a determination.
- A pool of investigators may help to ensure that your investigation meets these requirements.

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TEAM INVESTIGATIONS 

- Other benefits:
 - Who investigates may be strategic to each specific case.
 - Ability to brainstorm investigation steps and lines of questioning with co-investigators, and to co-facilitate interviews.
 - Flexibility if there is any conflict with investigators and parties.
 - Documentation.

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INVESTIGATION TEAM PROCESS OVERVIEW 

- The investigation team, in consultation with their supervisors, and/or the Title IX Coordinator, strategizes the entire investigation, including methodology, order, timeline, goals, obstacles, etc.
- Interview all witnesses.
- Gather and assess all available evidence.
- Write a report.
- Provide report and evidence to the parties for review, then edit report as needed and provide report and investigation file to the decision-maker.

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RELUCTANCE TO REPORT 

When a Complainant is reluctant to make formal complaint, or withdraws after filing one, the TIX Coordinator will determine next steps.

- A risk or threat assessment of some kind, as well as consideration of the Complainant's reasons, may affect whether the TIXC decides to proceed and file a formal complaint themselves.
- Although an investigation *could* proceed without the Complainant, it may prove difficult or impossible for the investigator to gather sufficient independent evidence.
- If a party/witness does not submit to cross-examination at the hearing, decision-makers may not rely on their statements.
- Possibility of informal resolution?

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RELUCTANCE TO REPORT 

- Privacy vs. Confidentiality vs. Privilege
- The Complainant should be notified as to their options:
 - That the process will still be available to them, regardless of how long they wait.
 - That the recipient will support them in any way it can (e.g. housing, classes, no contact orders, etc.).
 - Informal Resolution could be an option, if offered.
 - That, if information is brought to attention of the recipient that may involve a threat to community, the recipient may be forced to proceed with an investigation, but the Complainant will be notified of the process and treated as if they are fully participating, if they wish.

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REQUESTS FOR CONFIDENTIALITY 

- The recipient should explain to the Complainant that:
 - Its responsive action/remedial abilities may be limited based on the level of confidentiality or privacy requested by Complainant.
 - It cannot guarantee privacy if doing so would jeopardize the safety of the Complainant or others in cases involving: pattern, predation, violence, threat, weapons, minors, or other compelling safety risks.
 - Only those with a need to know will be informed.
 - Train those who will be informed about confidentiality
 - **If the Complainant is an employee, the recipient may need to proceed under Title VII.**
 - **If the incident involves a minor, the recipient may also need to proceed.**


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NOTICE TO THE RECIPIENT

- Actual Knowledge/ Notice
- Formal Complaint
- When do you Investigate?

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NOTICE/ACTUAL KNOWLEDGE – OCR 2020 REGS. 

Actual knowledge

- Notice of sexual harassment or allegations
- In an education program or activity
- Against a person in the US
- To a TIX Coordinator, or
 - Any official with authority to institute corrective measures on behalf of college or university
 - Any employee of an elementary or secondary school

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ACTUAL KNOWLEDGE 

- Individual notifies the Title IX Coordinator or “official with authority to institute corrective measures”
 - Deans?
 - Conduct Coordinators?
 - Campus police or campus safety?
- What about K-12?
 - All employees
- What about Responsible Employees?
 - ATIXA still recommends that recipients require all employees to report, unless confidential

! Recipients must ensure that employees are trained regarding their obligation to report harassment to appropriate administrators.

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NOTICE/ACTUAL KNOWLEDGE – OCR 2020 REGS. (CONTD.) 


What is required after **Actual Knowledge**?

A prompt response that is not “deliberatively indifferent”

- Outreach to Complainant
- Optional supportive measures
- Information about how to file a “formal complaint”

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FORMAL COMPLAINT – OCR 2020 REGS. 

Formal Complaint

- Document or electronic submission requesting an investigation
- Filed by Complainant or signed by TIX Coordinator
- Alleging Sexual Harassment
- Complainant must be participating or attempting to participate in the recipient’s education program or activity
- Initiates mandatory grievance process (investigation and hearing)

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WHEN DO YOU INVESTIGATE? 

- Upon receipt of a formal complaint, investigation is required
- What about rumors, gossip, social media, etc.?
 - Discretionary, but often recommended
 - OCR may not think they are, but will a court agree?

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MANDATORY DISMISSAL OF FORMAL COMPLAINT - OCR 2020 REGS. 


The TIXC must dismiss the complaint if:

- The conduct alleged in the formal complaint would not constitute sexual harassment as defined, even if proved, or
- Did not occur in the recipient’s education program or activity,
- Did not occur against a person in the United States,
- Lack of control over Respondent
- Written notice of dismissal to parties required
 - Dismissal of formal complaint may be appealed.

Upon dismissal, the TIXC may institute action under another provision of the recipient’s code of conduct.

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PERMISSIVE DISMISSAL OF FORMAL COMPLAINT - OCR 2020 REGS. 

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


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PRELIMINARY INQUIRY

- Preliminary Inquiry
- Gatekeeping
- Interim Actions

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PRELIMINARY INQUIRY 



- Has there been a formal complaint?
- Does the TIXC need to sign/initiate a formal complaint?
- Does the alleged conduct meet the required definitions?
- Does jurisdiction exist?
- Can/should we remedy informally or without discipline?
- Mandatory/Permissive dismissal considerations.
- If dismissed, should an alternate policy/process begin?

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PRELIMINARY INQUIRY 

I If proceeding under Title IX:

- Assess for pattern, threat, climate/culture.
- Establish a preliminary timeline for the investigation.
- Be able to show that a comprehensive civil rights investigation was completed and documented.
- Responding to anonymous reports:
 - Determine if a trend or pattern may be apparent.
 - You may have a duty to attempt some form of remedial response, even to an anonymous report.

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SUPPORTIVE MEASURES 

- Throughout process:
 - Non-disciplinary, non-punitive
 - Individualized
 - Restore or preserve equal access
 - Without unreasonably burdening other party
 - Protect safety of parties or environment, or deter sexual harassment
- *NOTE: Remember to provide support and resources to Respondent and Complainant throughout the process, and don't forget to remedy on behalf of community, not just parties.*

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COMMON SUPPORTIVE MEASURES 

- Providing a campus escort.
- Minimizing interaction between Complainant and Respondent (e.g.: shifting classes, work, etc.).
- Relocating to a different classroom, residence hall, work space, course group, etc.
- Providing counseling services.
- Providing medical services.
- Providing academic support services, such as tutoring.
- Transportation options.
- Offering no-contact orders.
- Arranging for the Complainant and/or Respondent to re-take a course/withdraw from a class without penalty.
- Holding school-wide training and education initiatives.
- Admin leave for non-student employee.
- Change supervisor.

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EMERGENCY REMOVALS – OCR 2020 REGS. 

- On an emergency basis
- Individualized risk and safety analysis
- Immediate threat
- Due process requires an opportunity to challenge removal
- Does not apply to non-student employee administrative leave

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BEGINNING THE INVESTIGATION

- Timeframes for resolution
- Informal or formal resolution process?
- Role of law enforcement
- Formal comprehensive investigation
- Notice to the Parties
- Strategize the investigation




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“REASONABLY PROMPT” TIMEFRAMES FOR GRIEVANCE PROCESS 

- 60 days to resolution remains a good guide for more complex cases in higher ed.
 - Timeline starts from notice, not from the incident itself.
 - No set requirement, other than to have prompt, designated timeframes in your procedures.
 - Goal is to avoid undue delay.
 - **For K-12, the timeframe will be much less.**
 - What about injunctions?
 - What about Summer break? Sabbatical? FMLA? Winter break? Studying abroad?

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TIMELINES 

- Ensure that all steps in the investigation are conducted according to the timelines in the recipient’s procedures.
 - Policy should provide some flexibility at the discretion of the TIXC.
- Parties and witnesses should be interviewed as soon as possible:
 - So that recollections are as fresh and accurate as possible.
 - To secure necessary remedies as soon as possible.
 - But not before Notice of Allegations/Investigation.
- Provide notice of extensions.

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TEMPORARY DELAYS / EXTENSIONS 

- For good cause
 - Absence of a party
 - Absence of a party’s advisor
 - Concurrent law enforcement activity
 - Language assistance
 - Accommodation of disabilities
- Provide written notice of delays and extensions to both parties.

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INFORMAL AND FORMAL RESOLUTION PROCESS 

OCR endorses and encourages informal resolution, and we believe it is a worthy practice, when voluntary.

- Following formal complaint.
- Allowed at any time prior to a final determination at discretion of TIXC.
- Voluntary, written consent of the parties.
- OCR regs preclude informal resolution of allegations that an employee harassed a student.

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STRATEGIZE THE INVESTIGATION 

- The burden of proof and the burden of gathering evidence rests on the recipient, not the parties.
- Common questions to consider:
 - Which process is appropriate?
 - Whom to interview?
 - When/In what order?
 - What information/evidence can be obtained?
 - How and when do we notify witnesses?
 - Who needs to be aware of the investigation?
 - When and how do we share evidence/information with the parties?

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ROLE OF CAMPUS LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS 

- Can district/school/campus law enforcement (or public safety) be the Title IX investigatory arm? Should it be?
 - Legal standards for criminal investigations are different.
 - Police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.
 - Conflict-of-interest with sworn officers.
 - Add value by supporting recipient’s investigation efforts.
- Establish MOUs with district/school/campus police and other local enforcement and update annually.
 - The power of the table top exercise.

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FORMAL COMPREHENSIVE INVESTIGATION 



- Commence a thorough, reliable, impartial, prompt and fair investigation.
- Determine the strategy for the investigation.
 - Witness interviews.
 - Evidence gathering.
 - Intended timeframe to complete the investigation.
 - Finding.
 - Presentation of finding.
- Complete the investigation promptly, and without unreasonable deviation from the timeline.

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NOTICE TO THE PARTIES - OCR 2020 REGS. 

Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

- Notice of the grievance process, including any informal resolution process
- Notice of the allegations with sufficient time to prepare a response before any initial interview and sufficient details known at the time, including:
 - Identities of the parties involved in the incident, if known
 - Description of conduct
 - Date and location, if known

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NOTICE TO THE PARTIES - OCR 2020 REGS. (CONTD.) 

- The Respondent is presumed not responsible and a determination regarding responsibility is made at the conclusion of the grievance process
- Parties may have an advisor of their choice, who may be an attorney
- Parties may inspect and review evidence prior to the completion of the investigation report
- Any provision from code of conduct that prohibits knowingly making false statements or knowingly submitting false information
- Update notice if additional allegations will be investigated

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WHEN TO INTERVIEW PARTIES AND WITNESSES 

- Notifying the Respondent of the complaint:
 - “Upon receipt of formal complaint”
 - Any allowance for interviewing witnesses and accumulating evidence?

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RELEVANCE 

- Evidence is generally considered *relevant* if it has value in proving or disproving a fact at issue
- Under the Title IX regulations, evidence of the Complainant's sexual behavior or predisposition is explicitly and categorically **not relevant** except for two limited exceptions:
 - Offered to prove that someone other than the Respondent committed the conduct alleged, or
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent

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WITNESS INTERVIEWS 

- Strategize contacting witnesses, ordering witness interviews, and preventing contact between witnesses, where necessary.
- Solicit a witness list from the Complainant.
- Solicit a witness list from the Respondent.
- Determine when you are going to question Respondent.
- **Suggested default order***: Complainant → Complainant's witnesses → Neutral witnesses → Respondent's witnesses → Respondent → Any additional witnesses identified by Respondent → Round 2 → Round 3.


*Every case is different

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EVIDENCE GATHERING 

- Engage in the active accumulation of evidence.
- Timeliness.
- Document receipt of information and other materials as they are obtained in the course of the investigation.
- Verify/authenticate evidence.
- Be thorough in your examination of factual, circumstantial, and hearsay evidence, and ensure that all evidence has been examined, and all leads exhausted.



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EVIDENCE 

- All relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory
- Credibility determinations may not be based on a person’s status as a Complainant, Respondent, or witness
- Access to privileged information requires waiver/consent
- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
 - Present witnesses
 - Present evidence
 - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence which may be offered

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PRIVACY - OCR 2020 REGS. 

Additional permissions required for:

- Records made or maintained by a
 - Physician
 - Psychiatrist
 - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege


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INVESTIGATION DETAILS

- Evidence Collection and Issues of Concurrent Criminal Action
- Interviewing the Complainant
- Interviewing the Respondent
- Interviewing Witnesses
- Difficult Witnesses


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EVIDENCE COLLECTION AND ISSUES OF CONCURRENT CRIMINAL ACTION 

- Active accumulation of evidence.
- What if law enforcement is the sole source of evidence collection?
 - And they won't release the evidence to you?
 - Does it matter if they are local or the SRO/campus law enforcement/public safety?
- What if there is a pending criminal or civil case?
- What if a party or parents threaten to call a lawyer?
- What if a party files a lawsuit or complaint with OCR?

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RIGHTS OF THE PARTIES DURING THE INVESTIGATION - OCR 2020 REGS. 

- Right to present witnesses, including fact and expert witnesses
- Right to present inculpatory and exculpatory evidence
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence without restriction
- Right to have others present during any grievance proceeding/meeting
- Right to be accompanied to any related meeting or proceeding by an advisor of their choice, who may be, but is not required to be, an attorney
- Right to written notice of the date, time, location, participants, and purpose of investigative interviews or other meetings, with sufficient time to prepare
- Right to inspect and review evidence and draft inv. report before finalized

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INTERVIEW SCHEDULING 

- Try to anticipate how long each interview will take (e.g. How many times will you interview the witness? How much time can the witness give you?). Schedule your interview slots accordingly.
- Back-to-back interviews should be avoided, if possible. Interviews often take longer than expected and may require you to reschedule interviews.
- Leave open an amount of time roughly equivalent to the length of the interview for post-interview teamwork, review of notes with your co-investigator, and to prepare for the next interview.

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ESTABLISH PRE-INTERVIEW GROUND RULES 

- Who will attend?
- How will records be kept? Recording? Access?
- Role of Advisors
- Difference between Advisor/Attorney role in interviews vs. in a hearing
- Involvement of Parents, Union Reps, Roommates, etc.
- FERPA (students)/Employment records/confidentiality

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ADVISOR OF CHOICE 

- Advisor of choice may be anyone, including attorney
- May restrict participation of advisors equally, except:
 - If a party does not have an advisor present at the hearing, the recipient must provide an advisor of the recipient’s choice to conduct cross-exam
 - If an advisor is provided, this must be done without fee or charge to the party
 - Parents, friends, teammates, coaches, witnesses?

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PROVIDING POLICY AND PROCEDURE COPIES 

- Each party should receive a copy of:
 - The specific policies alleged to have been violated (not a link), including any sub-parts or sections.
 - The procedures that will be used to resolve the complaint, including the rights that extend to the parties (not a link).
- Consider providing parties with your non-retaliation provision/policy.
- Keep copies of the applicable policies and procedures in the investigation file.

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SHARING INFORMATION WITH PARTIES AND WITNESSES DURING INVESTIGATION 

- Decide how much information you will share in advance of each interview, and have a rationale for what information will be shared and what will not be shared.
 - Remember that prior to a decision, the parties must have an opportunity to review all “directly-related” evidence.
- Explore only those facts that are relevant to the issue at hand.
- Start with broad questions, then move to narrow, more pin-point questions.
- It can be difficult for the Respondent to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport-building. Provide a detailed description of the allegations.

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PREPARE FOR EACH INTERVIEW 

- Outline your interview questions in advance, but be flexible.
- Plan the order of interviews; may be beneficial to interview Respondent last.
- Most beneficial to conduct interviews in person.
- Interviews should be conducted in a neutral, quiet, and private setting with a minimal or no likelihood of interruptions.


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QUESTIONING

- Goals of Questioning
- Types of Questions
- Questioning Exercise


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QUESTIONING 

- What are the goals of questioning?
 - Learn the facts.
 - Establish a timeline.
 - Understand each party's perception:
 - Of the event and of the process.
 - Try to learn what is more likely than not to have happened
 - Three sides to every story (or more).
- NOT the goals of questioning...
 - Curiosity.
 - Chasing the rabbit into Wonderland.
- Know your role. You are not law enforcement or prosecutors.

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QUESTIONING 

- To consider before asking questions:
 - What are the relevant issues?
 - What do I need to know?
 - Why do I need to know it?
 - What is the best way to ask the question?
 - Am I minimizing the re-traumatization potential for all parties?
 - Am I avoiding blaming or biased questions?
 - Am I the right person to ask this?

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QUESTIONING 

- Open-ended questions (tell us...who, what, how?)
- Closed-ended questions (Did you, were you?)
 - Use infrequently, but when needed to drill down on a specific issue.
- Careful with Compound Questions
 - I have two questions. First..., Second...
- Avoid asking Multiple Choice Questions
 - Were you a), b), c)
- Avoid gratuitous use of leading questions – (Isn't it the case that...?)

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QUESTIONING 

- Have a purpose for asking every question.
- Be sure to ask a question, not make a speech.
- Ask questions about the allegations and the evidence and the policy elements.
- Don't be accusing or argumentative.
- If your skepticism shows, make sure you intend it to show, otherwise keep your cards close to your vest.
- Don't make questions too long or confusing.
- If you ask a bad question, take it back.

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QUESTIONING 

- Listen carefully and adapt follow-up questions.
- Avoid evaluative responses to a person's answers unless needed to establish rapport, draw someone out, or convey empathy.
 - E.g.: "That's too bad;" "I'm glad you said that."
- Do not moralize.
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "fooled around," "had a few drinks," "was acting weird."
- Do not ask questions that invite parties to second-guess their actions, as this may be perceived as blaming.

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QUESTIONING EXERCISE 

Please critique the following questions:

- What effect did your actions (or behavior) have on others? On the community? On yourself?
- Explain what you hoped to accomplish through your actions.
- Why did you choose to drink so much if you knew it was risky?
- Did you sign the Honor Code during orientation?
- I have a couple of questions: First, do you know what incapacitated means?; Second, could you tell she was incapacitated?; and Third, why did you give her another drink when evidence from witnesses indicates she was already really drunk?

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QUESTIONING EXERCISE 

Please critique the following questions:

- What other options were there for you in this situation?
- What was the purpose of your behavior?
- How would you feel if others were engaged in comparable behavior?
- What would be the consequences to the community if everyone engaged in comparable behavior?
- How does your responsibility for living within community standards apply to your actions in this situation?
- How might you react if such a situation were to come up again?

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INTERVIEWING SKILLS

- Demeanor of Investigator(s)
- Interview Skills
- Rapport Building
- Setting Up Reasonable Expectations
- Feedback to Witnesses
- Case Study

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Remember: As an investigator, you have no “side” other than the integrity of the process!

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DEMEANOR OF INVESTIGATOR(S) 

- Work to establish a baseline of relaxed conversation.
- Maintain good eye contact.
- Listen carefully to the answers to your questions.
 - Avoid writing while party/witness is talking, if possible.
 - Do not be thinking about your next question while party/witness is talking.
- Ask questions in a straightforward, non-accusatory manner.
- Nod affirmatively and use active listening skills to prompt or keep party/witness talking.

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INTERVIEW SKILLS 

- Explain process, your role as a neutral fact-finder, and applicable privacy protections and limitations.
- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out (i.e. alcohol/drug use). Explain amnesty policy (if applicable).
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Ascertain who the individual is and their relation to the other parties in the case.
- Document whether individual is cooperative or resistant.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.

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INTERVIEW SKILLS 

- Take the allegations from start to finish through a process of broad to narrow questions and issues that need to be addressed.
- Ask questions about the allegations, the evidence, and the policy elements.
- Focus on areas of conflicting evidence or gaps of information.
- Drill down on timelines and details.
- Don't leave a question or gap unanswered.
- Pay attention to alcohol/drug consumption and timing of consumption, if relevant.

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INTERVIEW SKILLS 

- Be cognizant of the difference between what is “believed” (conjecture) and what was “witnessed” (facts).
- Ask who else you should talk to and ask for any relevant documentation (i.e. texts, emails, etc.).
- Let parties/witnesses know you may need to follow up with them as the investigation progresses.
- Suggest that the parties consult their advisors before discussing the investigation with others, without placing restrictions on doing so.

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RAPPORT BUILDING 

- Understand the goals of an “interview” versus an “interrogation.”
 - An interview is a conversation designed to elicit information in a non-accusatory manner.
 - Shifting to an interrogation approach should not be done lightly; you cannot go back – not recommended.
- Is person comfortable that you will conduct the investigation fairly and objectively?
 - Team or peer-led investigations can help create a rapport much more easily.

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SETTING UP REASONABLE EXPECTATIONS 

- People who conduct investigations with skill rest secure in the knowledge that all those involved, including witnesses, were treated objectively and fairly.
- Be sure Complainant and Respondent understand parameters of the policy, what it does and does not cover, how the process plays out, and what the process can and cannot accomplish.
- Provide ample opportunity for the Complainant and the Respondent to ask questions.
- Keep parties informed of steps in process.

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FEEDBACK TO WITNESSES 

- Witnesses may ask or say:
 - Am I being investigated?
 - What are you really investigating?
 - How will you use the information you are given?
 - Is it confidential?
 - Will I get into trouble by giving you this information?
 - I don't want to cooperate.
 - Do I need my parents/lawyer present during interview?
- Anticipating these questions and/or covering them in advance can help to ensure that you establish good rapport, which should help you get the truth.


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CASE STUDY




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INTERVIEWING THE COMPLAINANT 

- Acknowledge difficulty of reporting and thank them.
- Acknowledge that they may have told this story multiple times already.
- Explain why you are taking notes and/or ask for permission to record, if applicable.
- Provide a copy of your policies and procedures.
- Ask them to share a complete account of what occurred.
 - Have them give full narrative without asking questions, then drill down on details.
- Ask about outcry witnesses and possible documentation such as blogs or journals.
 - What will witnesses likely say/know?

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INTERVIEWING THE COMPLAINANT 

- Ask about those they spoke to and told about the incident.
- Ask what the Complainant’s motivation is for reporting and what they hope to see as a result.
- Find out if their academics and/or work have been affected.
- Ask how this has affected them emotionally and/or physically.
- Advise that the allegations will be discussed with the Respondent and witnesses.
- Let the Complainant know next steps and when you will be in touch.

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INTERVIEWING THE RESPONDENT 

- Acknowledge difficulty of the situation and thank the Respondent for meeting with you.
- Provide a copy of your policies and procedures.
- Ask them to share a complete account of what occurred.
- Question the Respondent as to the allegations – ask a combination of open-ended and closed-ended questions.
- Get detailed – do not leave a question unanswered.
- Ask about witnesses and any other relevant information.
 - What will witnesses likely say/know?
- Ask about possible motivation for allegation(s).

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INTERVIEWING THE RESPONDENT 

- Provide support and resources throughout the process as needed.
- Let the Respondent know next steps and when you will be in touch.
- Discuss counseling options and other supportive measures if they are not already connected.
- Discuss non-retaliation and any steps such as no-contact orders, housing moves, and emergency removals.
- If emergency removal is in place, review the terms and provide a timeframe.
- Suggest that the Respondent consult their advisor before discussing the investigation with others, without placing restrictions on doing so.

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INTERVIEWING WITNESSES 

- It may be helpful to not label the allegations as “sexual misconduct” or “sexual harassment” but to describe the behavior, neutrally.
- Ascertain relation to the other parties in the matter.
- Address the need for complete truthfulness.
- Ask relevant questions.
- Ask for opinions.
- Ask if either party spoke about the incidents after they happened.
 - Did they see any change in behavior?

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INTERVIEWING WITNESSES 

- Ask if they have been contacted already by one of the parties.
- Ask if they have made any previous statements, such as to law enforcement.
- Ask if there is anything you should know that has not been covered or if there is anyone else they think should be contacted.
- Discuss non-retaliation and give examples.
- Discuss privacy and FERPA guidelines.
- Ask all interviewees to contact you if they remember anything else or want to add to their interview.


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TRAUMA-INFORMED INTERVIEWING

- Considerations for Interviewing


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IMPACT OF TRAUMA ON FUNCTIONING 



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THE BRAIN'S RESPONSE TO TRAUMA 


In response to the anticipated trauma of sexual assault or other violence, hormones can be released into body that impact:

- Ability to react physically.
- Ability to think rationally.
- Ability to consolidate or group memories.

This is a neurobiological response, not a choice.

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TRAUMA-INFORMED RESPONSE 

- Promotes safety.
- Recognizes the possible impact of trauma on a cognitive, physical, psychological, emotional, and neurobiological level.
- Understands how trauma can impact someone's academics/work/social life.
- Recognizes the need for support/positive relationships.
- Honors choice with the goal of empowerment.
- Is respectful and considers boundaries and privacy.
- It does NOT mean that you cannot or do not question the credibility of the interviewee.

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TRAUMA-INFORMED INTERVIEWING 

- Prioritize developing rapport and building trust.
- Emphasize transparency and predictability.
- Physical aspects of interview (light, access, comfort, etc.).
- Be cognizant of why someone may have responded in a “counterintuitive” manner.
- Be mindful that recall is often difficult and slow.
- Use non-judgmental/non-blaming language.
- Avoid re-traumatization (but must still ask necessary questions).
- Use Cognitive Interviewing techniques to aid recall.

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TRAUMA-INFORMED INTERVIEWING 

- Avoid:
 - Unsupportive responses
 - Taking control any more than you have to.
 - Escalating the situation.
 - Defining or labeling a party’s experience.
 - Asking why questions (i.e. “Why did you . . . ?”).
 - Verbalizing judgment in the moment.
 - Using trauma as a substitute for evidence or basis to assess credibility.


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CHALLENGING WITNESSES

- Difficult Witnesses
- Lying Witnesses
- Resistant and/or Quiet Witnesses


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DIFFICULT WITNESSES 

- Set the tone:
 - Thank them.
 - Review your role as a neutral fact-finder.
 - Put them at ease – ask about them without being phony.
 - Acknowledge any hesitation/awkwardness as normal.
 - Review retaliation against a witness.
 - Review immunity.
 - Review confidentiality.
 - Review expectation of truthfulness.

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LYING WITNESSES 

- In a non-accusatory way, explain how their statements don't "make sense."
- Allow opportunity for witness to restate.
- Try to gauge why they are lying – Fearful? Embarrassed? Protective? Try to address their motivation individually, with understanding.
- If they continue to lie, confront and explain the repercussions for lying in an investigation.
- Calmly bring them back to the questions.
- If needed, leave the door open for follow up.

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RESISTANT AND QUIET WITNESSES 

- Gauge their resistance or hesitation and try to address their motivation individually.
- Answer their questions about the process.
- Back up when needed.
- If they open up, be responsive.
- Explain expectations of the school and rationale for the duty to participate, if applicable.
- Advance preparation will help when open-ended questions don't work.

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OTHER CONSIDERATIONS 

- Consider carefully who should lead the interview.
- Ask open-ended questions first.
- Allow time.
- Use breaks.
- Remain calm and professional.
- If you ask a bad question, simply apologize, restate, correct, etc.
- Allow for flexibility.


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HELPFUL INVESTIGATION DOCUMENTS

- Incident Timeline
- Post-interview Documents
- Witness Lists and Flowcharting


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INCIDENT TIMELINE 

- Discuss timeline of event/s with all parties/witnesses.
- Obtain as much detail as possible.
- What times can be established from phone calls, email, texts, and receipts.
- Identify any “gaps” and address them – may lead to information not previously shared.
- Timing highly relevant to alcohol/drug consumption.

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INCIDENT TIMELINE 

- Timing also highly relevant in cases involving physical evidence such as bruising, bite marks, etc.
- In stalking and/or verbal, online sexual harassment cases, times of communication between parties may be important.
- Establishing a reliable timeline useful when questioning witnesses such as bartenders and Uber/Lyft or cab drivers, and when searching for video footage.

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DOCUMENTS TO CREATE POST-INTERVIEW 

1. Interview Transcript in Final Form (to be verified by interviewee).
2. Future Pointers Document.
 - New Witnesses.
 - New Evidence.
 - Future Questions to Ask.
 - Witnesses to Go Back to With New Information.
3. The "Drips" Document.
4. Bulleted Key Takeaways from the Interview.

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WHAT TO DO WITH POST-INTERVIEW DOCUMENTS 

- The interview transcripts go into the report, as appendices, and also into the file.
- The future pointers document is kept in the file, as a final checklist of investigation completeness.
- The drips documents are kept in the file or later destroyed, based on school policy.
- The bulleted takeaways are included in the report; no need to keep that document, but it can be kept in the file.

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DOCUMENTING SUGGESTED QUESTIONS 

Questions suggested by parties should be documented and included as an appendix:

- Were they asked “as is”
- Were they re-phrased?
- Were they rejected?
- If rejected, why?

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INVESTIGATION RECORDS AS SMOKING GUNS IN LITIGATION 

- “The File”:
 - The Respondent’s file.
 - The Complainant’s file.
 - The investigation file (including investigation report).
 - Personal case notes.
 - Witness education records.
- Subpoenas:
 - If you get one, call your general counsel!
- Understand the court process and your role in it.

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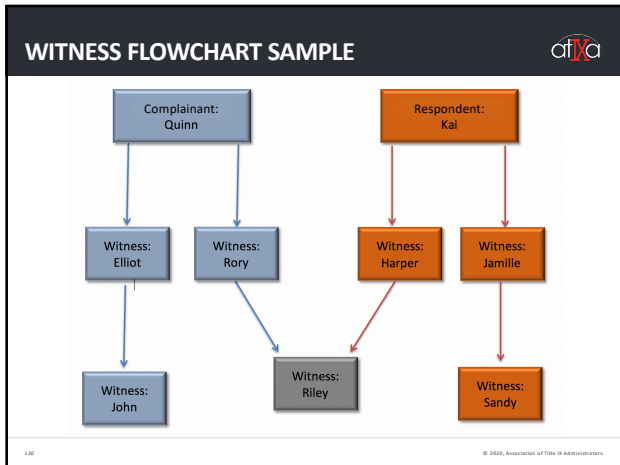
128

WITNESS LIST AND FLOWCHARTING BEST PRACTICES 

- Keep freshly updated list of your witnesses as you learn of them.
- Identify which parties or witnesses led you to other witnesses.
- Keep track of whether witnesses are neutral, loyal and biased, or loyal but objective. Include reasoning.
- In complex cases, use a flowchart to track witnesses the Complainant leads you to, the witnesses Respondent leads you to, and the witnesses who are neutral.
- Note in the flowchart where witnesses intersect in terms of relationships to each other and/or potential loyalties to parties.

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THE INVESTIGATION REPORT

- The Investigation Report
- Standard of Proof
- Assessment of Credibility/Synthesis
- Referral to Decision-maker


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THE INVESTIGATION REPORT

- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Results of interviews with parties and witnesses.
 - Unbiased summary or compilation of other information collected
 - E.g.: copies of texts, emails, and social networking messages, information from law enforcement, medical exams, video surveillance and photographs, etc.

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**EVIDENCE AND REPORT REVIEW BY PARTIES,
PART 1 - OCR 2020 REGS.** 

Prior to the completion of the report...

- Evidence directly related to allegations must be sent
 - To each party and advisor
 - In electronic format or hard copy
 - Including evidence upon which the Recipient does not intend to rely
 - Including exculpatory and inculpatory evidence
 - Allow 10 days for written response
 - Consider response prior to completion of report
 - Make this evidence available at hearing

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**EVIDENCE AND REPORT REVIEW BY PARTIES,
PART 2 - OCR 2020 REGS.** 

At least 10 Days Prior to Hearing...

- The final Investigation Report summarizing relevant evidence must be sent:
 - To each party and advisor
 - In electronic format or hard copy
 - For the parties' review and written response
 - Best Practice: Provide the investigative report to the TIXC to review for completeness prior to being shared with the parties
- For K-12 schools without a hearing, this must occur 10 days prior to time of determination regarding responsibility
- For K-12 schools with or without a hearing, this review is followed by exchange of relevant written and responses questions facilitated by decision-maker.

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THE INVESTIGATION REPORT 

- Reference or contain all applicable policies and procedures
- Provide timeline of investigation steps
- Describe the allegations
- Describe and include evidence gathered, including statements and interviews
- Explain unsuccessful attempts to collect information and/or interview witnesses

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THE INVESTIGATION REPORT – G.A.S. 

- **Gather evidence**
 - Organize the evidence so it is useful to the decision-maker who applies the policy elements
- **Assess credibility of parties and witnesses without making ultimate conclusions**
 - Point out areas of corroboration and issues that may bear on credibility
- **Synthesize areas of agreement/areas that are disputed**

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WHAT IS THE APPROPRIATE STANDARD OF PROOF? 

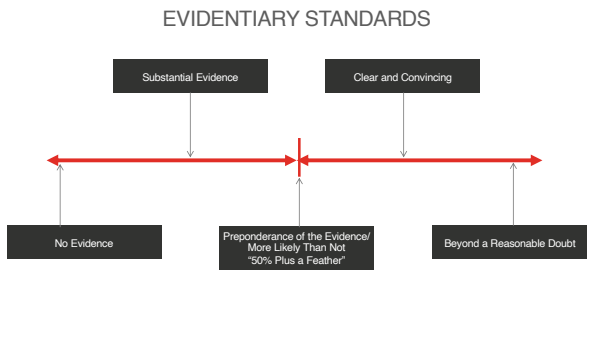
- **Different Standards: What do they mean? Why do they exist?**
 - Beyond a reasonable doubt
 - Clear and convincing evidence (C&C)
 - **Preponderance of the evidence (POTE)**
- **ATIXA prefers POTE as the most equitable standard.**
- **If you use C&C, be able to clearly articulate and define it.**
 - See: *ATIXA Guide to Choosing Between Preponderance of the Evidence and Clear and Convincing Evidence*, located at <https://atixa.org/wp-content/uploads/2017/03/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf>

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UNDERSTANDING EVIDENCE THRESHOLDS 

EVIDENTIARY STANDARDS



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MORE THAN FACT-GATHERING 

- Review the institutional policies that apply.
- Conduct G.A.S.
- Refer report for hearing (or to the decision-maker, for K-12 schools without a hearing).

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WHO RENDERS THE DETERMINATION? 

- Decision process:
 - Investigator refers investigation report to decision-makers without determination.
 - Investigator ≠ Decision-maker.
- Importance of investigation report.
 - How much credibility assessment and analysis to include?

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LIVE HEARING 

- A live hearing, whether with a panel or a single administrator, is required by OCR for higher ed.
 - K-12 hearing optional.
- Hearings facilitate the parties ability to review all available evidence and ask questions of witnesses and each other.
- Can the hearing be waived?

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WHAT ROLE DOES THE INVESTIGATOR PLAY IN A HEARING? 

- The investigator is often the key witness at any hearing.
- The investigation report is admitted as evidence.
- The investigator may be questioned and subjected to cross-examination by both parties' advisors.
- If credibility must be assessed, it needs to be assessed by the decision-maker(s).
- The investigator's opinions regarding a determination should not influence the hearing, so questions about the investigator's opinions should be avoided.


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SANCTIONS & APPEALS

- Common Sanctions
- Sanctioning in Sexual Misconduct Cases
- Communicating Outcomes
- Basic Overview of Appeals


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SANCTIONS AND REMEDIES UPON DETERMINATION OF RESPONSIBILITY 

- Disciplinary sanctions for Respondent.
- "Remedies" to Complainant.
- Any sanction must be reasonable and proportionate to the severity of the behavior.

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COMMON STUDENT SANCTIONS 

- Warning.
- Probation.
- Loss of privileges.
- Counseling.
- No contact.
- Residence hall relocation, suspension or removal.
- Limited access to school/campus.
- Service hours.
- Online education.
- Parental notification.
- Alcohol and drug assessment and counseling.
- Training/Education
- Discretionary sanctions.
- Alternative Placement
- In-school suspension (PreK-12).
- Suspension.
- Expulsion.

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COMMON EMPLOYEE SANCTIONS 

- Warning – verbal; 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 oversight responsibilities.
- Paid or unpaid leave.
- Suspension.
- Termination.

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SANCTIONING IN SEXUAL MISCONDUCT CASES 

- Investigation alone may not be sufficient to overcome a deliberate indifference claim.
- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s).
- What is appropriate?
 - Separation/expulsion.
 - Suspension.
 - Lesser sanctions.
- Engage in strategic education and training as remedies.
- Conduct a risk assessment audit and mitigation process.

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CONSIDERATIONS POST-FINDING 

- Ensure remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- Where applicable, take immediate steps to preserve access to education even before the final outcome of investigation (e.g. no contact orders, etc.).
- Ensure that long-term actions/remedies are equitable.
- Monitor for retaliation; respond immediately to allegations.
- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, industry standards, and state and federal case law.

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COMMUNICATING OUTCOMES 

- Title IX requires recipients to apprise parties of the status of investigations, **determinations, sanctions** (or remedial actions) **and supporting rationale**.
 - Provide this information in writing and place no conditions on receiving or sharing it.
- Clery Act/VAWA and OCR 2020 Regs. are the primary sources of mandates for outcome notification. FERPA also permits disclosure in certain circumstances.
 - Clery/VAWA disclosure of sexual assault outcomes/sanctions.
 - FERPA re-disclosure restrictions lifted in 2008.
 - FERPA cannot be construed to conflict with or prevent compliance with Title IX.

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VAWA REAUTHORIZATION UPDATES TO THE CLERY ACT 

Institutional disciplinary procedures shall “provide a prompt, fair and impartial investigation and resolution.”

- Complainant and Respondent are entitled to the **same opportunities** to have a support person/advisor of their choice at **any** proceeding or related meeting.
- Parties must be simultaneously informed in writing of:
 - **The outcome...**that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking.
 - The recipient’s procedures for appeal.
 - Any change to the results that occurs prior to the time that such results become final.
 - When such results become final.

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THE APPEALS PROCESS 

- Appeals mandatory under OCR's 2020 Regs.
- Equitable.
- Clearly communicated to parties.
- One level of appeal is best practice.
- Defined window of time to request appeal.
- Clear grounds for appeal.
- Committee versus individual determination preferred.
- Deference to original hearing authority.
- Remand.

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FINALITY OF DETERMINATION 

- If an appeal is filed, the determination regarding responsibility becomes final on the date that the recipient provides the parties with the written determination of the results of the appeal.
- If an appeal is not filed, the determination regarding responsibility becomes final on the date on which an appeal would no longer be considered timely.

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QUESTIONS?

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