WELCOME!

- Please log in to your ATIXA Event Lobby each day to access the course slides, supplemental materials, and to log your attendance.
- The ATIXA Event Lobby can be accessed by the QR code or visiting **www.atixa.org/atixa-event-lobby** in your internet browser.
- Links for any applicable course evaluations and learning assessments are also provided in the ATIXA Event Lobby. You will be asked to enter your registration email to access the Event Lobby.
- If you have not registered for this course, an event will not show on your Lobby. Please email events@atixa.org or engage the ATIXA website chat app to inquire ASAP.

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Civil Rights Investigator Two

Training & Certification Course

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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.

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.

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AGENDA

1. Title IX and Investigations Overview
2. Due Process
3. Effective Investigations
4. Statutory and Regulatory Status
5. 34 C.F.R. § 106.30 Sexual Harassment Definitions
6. Investigating Retaliation Claims
7. Other Civil Rights Offenses

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AGENDA

8 Issue Spotting

9 Consent Construct

10 Creating Timelines

11 Case Study

12 Trauma and Investigations

13 Investigation Strategy

14 Notetaking and Recordkeeping

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AGENDA

15 Meeting Considerations

16 Questioning Skills and Guidelines

17 Hit the G.A.S.

18 The Investigation Report

19 Bias and Prejudice

20 Inclusive Investigations

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TITLE IX NOTICES OF PROPOSED RULEMAKING 2022 & 2023

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TITLE IX REGULATIONS

- **1972:** Congress passed Title IX of the Education Amendments
- **1980:** the Department of Education's Office for Civil Rights (OCR) given primary responsibility for enforcing Title IX
- **November 2018:** OCR proposed the most detailed and comprehensive Title IX regulations to date, which focused on sexual harassment response
- **August 2020:** Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- **June 2022:** OCR published a Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations focused on sexual harassment response and pregnancy and related conditions

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NPRM PROCESS TIMELINE

- **July 2022:** NPRM published in the Federal Register and the 60-day comment period began
- **September 2022:** Review and comment period ended
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023
- **April 2023:** OCR published a Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations focused on gender identity and athletic participation; notice of a 30-day comment period
- Athletics Final Rule anticipated Spring 2024
- Athletics Effective Date anticipated Summer/Fall 2024

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PREPARING FOR IMPLEMENTATION

- Continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new sexual harassment and pregnancy-related Title IX regulations before the start of the 2023-2024 academic year.

Steps to Take Now:

- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings)
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach

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Remember: As an Investigator, you have no "side" other than the integrity of the process!

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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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THE IX COMMANDMENTS

INVESTIGATION (plus **prompt** & **fair** per VAWA Sec. 304) →			
PROCESS →	**Prompt**	**Effective**	**Equitable**
REMEDIES →	Act reasonably to stop discrimination		Act equitably to remedy effects

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THE PROCESS

Incident	Initial Assessment	Formal Investigation & Report	Determination (Hearing)	Appeal
• Complaint or notice to the Title IX Coordinator • Strategy development	*Following a formal complaint* •Jurisdiction •Dismissal? •Policy violation implicated? •Emergency removal? •Reinstatement to another process? •Informal or formal resolution?	• Notice to parties • Identification of witnesses • Interview scheduling • Evidence collection • Report drafted • Evidence and draft investigation report shared • Investigation report finalized and shared	• Cross-examination • Determination • Sanction? • Remedies	• Standing? • Vacate? • Remand? • Substitute?

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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 to Parties/Notice of Formal Allegation (NOIA)
5. Establish investigation strategy
6. Formal comprehensive investigation
   - Witness interviews
   - Evidence gathering

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10 STEPS OF AN INVESTIGATION

7. Draft report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence
9. Provide draft report and 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*
    - Send final report to parties for review and written response at least 10 days prior to hearing

*The 2020 Regulations permit, but ATIXA does **not** recommend, that Investigators make recommended findings or conclusions

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THE GOAL FOR INVESTIGATORS

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STAYING IN YOUR LANE

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DUE PROCESS

- What is Due Process?
- Due Process in Procedure
- Due Process in Decision

WHAT IS DUE PROCESS?

- The set of rights-based protections that accompany disciplinary action by a school, college, or university.
- Dictated by law & regulations, courts, system, district, school, or college policies and procedures.
- Private schools refer to this as “Fundamental Fairness”
  - Though courts and the OCR are increasingly using the term Due Process

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EVOLUTION OF DUE PROCESS

Evolution of Due Process in education

- Dean Wormer; Principal Strickland (1950's)
- *Dixon v. Alabama* (1961) & *Goss v. Lopez* (1975)
- Constituency-based policies and procedures
- Due Process and Student Conduct Administration
- Title VII and Human Resource Models
- Civil Rights Investigation Model and Hearings
- Current case law and 2020 Title IX Regulations

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DUE PROCESS IN PROCEDURE

- A school's process should include (at a minimum):
  - Detailed and specific Notice of Allegation and/or Investigation
  - Notice of Hearing
  - Right to present witnesses
  - Right to present evidence
  - Right to an Advisor of their choice
  - Opportunity to be heard and address the allegations and evidence
  - Right to review all relevant evidence AND the investigation report prior to a hearing
  - Right to cross-examination
  - Right to appeal

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DUE PROCESS IN DECISION

- A decision must:
  - Be based on a fundamentally fair rule or policy
  - Be made in good faith (i.e., without malice, ill-will)
  - Be unbiased
  - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence
  - Not be arbitrary or capricious
- Sanctions must be reasonable, constitutionally permissible, and should relate to the violations

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EFFECTIVE INVESTIGATIONS

- Civil Rights Investigation Hallmarks
- Terminology
- Title IX Regulatory Framework
- Promptness

CIVIL RIGHTS INVESTIGATION MODEL HALLMARKS

Investigation is a critical part of the Title IX grievance process

- Active identification and strategic gathering of evidence
- Emphasized transparency, communication, and fairness
- Grounded in the concepts of neutrality and equity
- Enhanced Due Process protections for parties
- 2020 Title IX Regulations made substantial changes and additions to grievance resolution processes

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A NOTE ABOUT TERMINOLOGY

- Formal complaint
- Grievance process
- Recipient
- Complainant
  - Individual(s) affected by alleged conduct or circumstances
- Respondent
  - Individual(s) alleged to be responsible for alleged conduct or circumstances

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A NOTE ABOUT TERMINOLOGY (CONT.)

- Sexual harassment
  - Quid pro quo
  - "Hostile environment"
  - VAWA offenses (sexual assault, domestic and dating violence, stalking)

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TITLE IX REGULATORY FRAMEWORK

- Procedures for notice and formal complaint
- Separation between investigation, hearing, and appeal
- Distinct roles for
  - Title IX Coordinator
  - Investigator
  - Decision-Maker
  - Appeal Decision-Maker
- Evidentiary review periods
- Investigation report requirements

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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 school 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
  - Delays for administrative needs are insufficient

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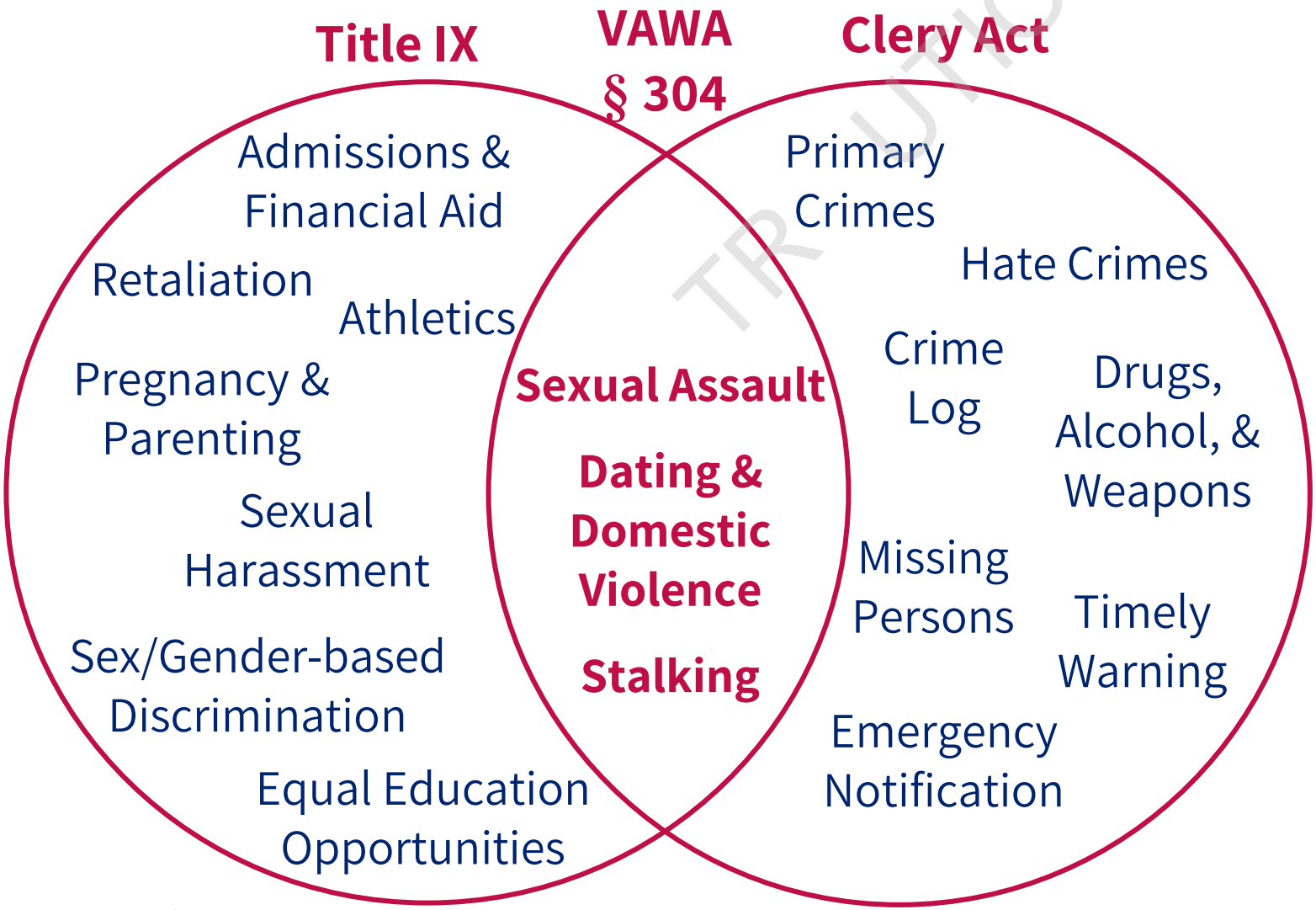
STATUTORY AND REGULATORY STATUS

- Intersection of Title IX, the Clery Act, and VAWA Section 304
- OCR Guidance

TITLE IX, CLERY ACT, VAWA SECTION 304



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CLERY ACT AMENDMENT: VAWA SECTION 304

VAWA Section 304 created extensive new policy, procedure, training, education, and prevention requirements for:

- Sexual assault
- Stalking
- Dating violence
- Domestic violence

} **The "Big 4"A**

- Prohibits retaliation
- The 2020 Title IX regulations also include new procedural and training requirements for Investigators for all forms of sexual harassment

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OCR GUIDANCE

Withdrawn:

- 2001 OCR Revised Sexual Harassment Guidance
- 2011 Dear Colleague Letter (DCL)
- 2014 Q&A on Title IX and Sexual Violence
- 2015 DCL on the role of Title IX Coordinators
- 2016 DCL on Transgender Students
- 2017 Q&A on Campus Sexual Misconduct

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OCR GUIDANCE

Still in effect:

- 1975 Regulations, as amended
- 2003 DCL on Title IX and Free Speech
- 2010 DCL on Harassment and Bullying
- 2013 DCL on Pregnant and Parenting Students
- 2020 Q&A on Final Rule
- 2021 Q&A on Title IX and Single Sex Scholarships, Clubs, and other Programs
- 2021 Notice of Interpretation and Enforcement of Title IX
- 2021 Q&A on the Title IX Regulations on Sexual Harassment (Revised July 2022)

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TITLE IX REGULATIONS

- 2020 Title IX regulations
  - Effective and enforceable August 14th, 2020
  - Amend the Code of Federal Regulations and have force and effect of law
  - Some provisions already mandated by due process case law in some jurisdictions
  - Intervening variables (litigation and legislation) may impact enforcement in the short or long term
- The regulations are significant, legalistic, surprisingly prescriptive, very due process heavy, and go well beyond what any court has required under 5th/14th Amendment case law

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TITLE IX REGULATIONS (CONT.)

- Preamble explains thought process for regulations
- OPEN Center responses provide clarification for enforcement

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GRIEVANCE PROCEDURES

Must include:

- Presumption that the Respondent is not responsible until determination is reached
- "Reasonably prompt" timeframes
  - Requirement to set specific timelines for major stages of the grievance process now gone
- Range of possible sanctions and remedies (mirrors Clery Act mandate)
- Description of standard of evidence
- Bases and procedures for appeal
  - Appeal now required, equitably, on three grounds
- Range of supportive measures available to all parties
  - Note shift from "interim measures" terminology

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JURISDICTIONAL ISSUES

- Emphasizes the *Davis* standard
  - Control over the harasser and 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
- Regulations specify "harassment…against a person in the United States"
  - Off-campus conduct, study abroad programs, or school-sponsored international trips – "nothing in these final regulations would prevent…"

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JURISDICTIONAL ISSUES (CONT.)

- The definition of sexual harassment covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the education program or activity of the Recipient with which the formal complaint is filed
  - OCR adopts a fairly broad definition of what could constitute attempting to participate

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TITLE IX REGULATORY REQUIREMENTS

- A Recipient with **actual knowledge** of sexual harassment in an education program or activity of a Recipient in the United States must respond in a manner that is **not deliberately indifferent**
- Mandatory dismissal
  - Would not constitute sexual harassment as defined, even if proven (34 C.F.R. § 106.30)
  - Does not fall within jurisdiction
    - Program or activity inside the United States
    - Complainant participating in or attempting to participate in education program
- Does not preclude action under another policy (e.g., General Non-Discrimination Policy, conduct code)

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TITLE IX REGULATORY REQUIREMENTS (CONT.)

- Discretionary dismissal
  - Complainant withdraws complaint or allegation
  - Respondent is no longer enrolled or employed
  - "specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination"
- Simultaneous notice to the parties
- Articulated rationale
- Action under another policy
  - Due process requirements for VAWA offenses in alternate process

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TITLE IX REGULATORY REQUIREMENTS (CONT.)

- Mandatory steps upon notice (34 C.F.R. § 106.44)
- Promptly contact the Complainant to discuss the availability of supportive measures
- With or without filing formal complaint, inform complainant of supportive measures and respect complainant's wishes
- Explain to the Complainant the process for filing a formal complaint
- Mandatory steps upon formal complaint (34 C.F.R. § 106.45)
  - Follow detailed grievance process requirements
  - Offer informal resolution options
  - Dismiss complaint if no jurisdiction or no prima facie sexual harassment allegation

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§106.30 DEFINITIONS – SEXUAL HARASSMENT

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

SEXUAL HARASSMENT

Title IX regulations require each Recipient to define **sexual harassment** as conduct on the basis of sex that satisfies one or more of the following:

- **Quid Pro Quo**: 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.
- **Hostile Environment**: Unwelcome conduct determined by a reasonable person to be so severe and pervasive, and objectively offensive (SPOO) that it effectively denies a person equal access to the Recipient's education program or activity
  - Education program or activity means employment, too!
- "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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HOSTILE ENVIRONMENT: “UNWELCOME”A

Unwelcomeness is subjective and determined by the Complainant (except when the Complainant is younger than the age of consent)

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HOSTILE ENVIRONMENT: “REASONABLE PERSON”A

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”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

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HOSTILE ENVIRONMENT: "SEVERE"A

- Physical conduct is more likely to be severe without need for repetition
  - Sexual assault and many dating/domestic violence incidents are almost always sufficiently severe
  - Other physical conduct that does not meet the 34 C.F.R. § 106.30 definitions for sexual assault or dating/domestic violence may also rise to the level of "severe"
- Consider the circumstances (e.g., ability for Complainant to escape the harassment)
- Assess whether accompanied by threats or violence
- Assess whether there was a degree of embarrassment or humiliation

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HOSTILE ENVIRONMENT: "PERVASIVE"A

- Widespread
- Openly practiced; occurring in public spaces
- Well-known among students or employees – reputation of a department, person, etc.
- Frequency, intensity, and duration of the conduct
- Unreasonable interference with school or job
- A "gauntlet of sexual abuse" *Meritor v. Vinson*, 477 U.S. 57 (1986)
- Incidents occurring in concert or with regularity are more likely to be considered pervasive
- Consider the specific circumstances and facts

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HOSTILE ENVIRONMENT: "OBJECTIVELY OFFENSIVE"A

- Reasonable person standard in context
- "I know it when I see it…"
- Age and relationships of Complainant and Respondent
- Number of persons involved
- Frequency
- Severity

- Physically threatening
- Humiliating
- Intimidating
- Ridiculing
- Abusive

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- Hostile environment analysis requires that you evaluate the "totality of the circumstances."
- In evaluating the totality of the circumstances, consider:
  - Frequency, nature, and severity of the conduct
  - Whether the conduct was physically threatening
  - Whether the conduct was humiliating
  - Identity of and relationship between the Respondent and the Complainant
  - Age and sex of the Respondent and the Complainant
  - Size of the school, location of the incidents, and context in which they occurred

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

- Totality of the circumstances to consider:
  - Effect on the Complainant's mental or emotional state
  - Whether the conduct was directed at more than one person
  - Whether the conduct unreasonably interfered with the Complainant's educational or work performance
  - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
  - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection
  - "Constellation of surrounding circumstances."

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SEXUAL ASSAULT*

- **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 the consent of the Complainant.
- **Fondling** – The touching of the private body parts of the Complainant (buttocks, groin, breasts) **for the purpose of sexual gratification**, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental incapacity.
- **Incest** – Sexual intercourse between persons who are related to each other, within the degrees wherein marriage is prohibited by [insert state] law.

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SEXUAL ASSAULT* (CONT.)

- **Statutory Rape** – Sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

Note: Sexual Assault also includes having another person touch you sexually, forcibly, and/or without their consent.

* This definition set is not taken from the FBI Uniform Crime Reporting (UCR) system verbatim. ATIXA has substituted Complainant for "victim," has removed references to his/her throughout, and has defined "private body parts." These are liberties ATIXA thinks are important to take with respect to the federal definitions, but practitioners should consult legal counsel before adopting them.

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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.

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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].

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DOMESTIC VIOLENCE (CONT.)

- To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates.
- The people cohabitating must be current or former spouses or have an intimate relationship.

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STALKING

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to —
  - Fear for the person's safety or the safety of others; or
  - Suffer substantial emotional distress.
- For the purposes of this definition:
  - **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

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STALKING (CONT.)

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

Please, please, please, don't interpret this to violate anyone's First Amendment rights.

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INVESTIGATING RETALIATION CLAIMS

- Basic Legal Principles
- Investigating Retaliation Claims

RETALIATION: BASIC LEGAL PRINCIPLES

Title IX regulations prohibit recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX.

- Protected activity under Title IX:
  - Reporting sex discrimination, including sexual harassment
  - Filing a discrimination complaint
  - Assisting someone in reporting discrimination or filing a complaint
  - Participating in any manner in an investigation of discrimination, for example as a witness
  - Protesting any form of sex discrimination (e.g., lack of equity in athletics)

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INVESTIGATING RETALIATION CLAIMS: KEYS TO UNDERSTANDING

- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate.
- Someone's intention is rarely displayed openly. Therefore, the legal framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

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PRELIMINARY ELEMENTS OF A RETALIATION CLAIM

- The following elements establish an **inference of retaliation:**
  - Did the individual engage in protected activity?
    - Usually straightforward,
    - Unless there is a question of reasonableness of belief or manner.
  - Was the individual subsequently subjected to adverse action?
  - Do the circumstances suggest a connection between the protected activity and adverse action?
    - Did individual accused of retaliation know about activity?
    - How soon after the protected activity did the adverse action occur?
  - If these three elements are not shown, the claim fails.

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RETALIATION AND ADVERSE ACTION

Common definition of adverse action:

- Significantly disadvantages or restricts the individual as to their status as students or employees, or their ability to gain the benefits or opportunities of the program; or
- Precluded from their discrimination claims; or
- Reasonably acted or could act as a deterrent to further protected activity.

- The U.S. Supreme Court and the federal courts have defined adverse action **very broadly**.

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INVESTIGATING RETALIATION CLAIMS: REBUTTING THE INFERENCE

- What is the stated non-retaliatory reason for the adverse action?
  - Is the explanation for the action legitimate on its face?
- Is there evidence that the stated legitimate reason is a pretext?
  - This is the heart of the case – is the explanation the true reason?
- Must establish that the adverse action was motivated by retaliation by the standard of evidence

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INVESTIGATING RETALIATION CLAIMS: IS THE EXPLANATION LEGITIMATE?

Factors to consider:

- The explanation makes sense
- The action was consistent with established policy or practice
- No adverse action was taken against others who engaged in protected activity
- Complainant was treated the same as other individuals

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INVESTIGATING RETALIATION CLAIMS IS THERE EVIDENCE OF PRETEXT?

Factors to consider:

- The explanation given is not credible
- Other actions by the same individual are inconsistent with the explanation
- The explanation is not consistent with past policy or practice
- There is evidence of other individuals treated differently in similar situations

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OTHER CIVIL RIGHTS OFFENSES

- Sexual Exploitation
- Discrimination
- Threats/Intimidation
- Hazing
- Bullying

OTHER ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION

Though not part of the Title IX "Sexual Harassment" definition, other conduct could be prohibited under an institutional sexual misconduct policy, including:

Sexual Exploitation: an individual taking 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 behavior does not otherwise constitute sexual harassment.

Examples include, but are not limited to:

- Sexual voyeurism
- Invasion of sexual privacy (e.g., doxxing)
- Knowingly making an unwelcome disclosure of (or threatening to disclose) an individual's sexual orientation, gender identity, or gender expression

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- 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
- 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

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Causing or attempting to cause the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity, or for the purpose of making that person vulnerable to non-consensual sexual activity
- 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 will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity

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ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Knowingly soliciting a minor for sexual activity
- Engaging in sex trafficking
- Knowingly creating, possessing, or disseminating child pornography

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OTHER CIVIL RIGHTS OFFENSES

- Threatening or causing physical harm, extreme verbal, emotional, or psychological abuse, or other conduct which threatens or endangers the health or safety of any person
- Intimidation, defined as implied threats or acts that cause an unreasonable fear of harm in another
- Discrimination, defined as actions that deprive, limit, or deny other members of the community of educational or employment access, benefits, or opportunities
- Bullying/Cyberbullying, defined as repeated and/or severe aggressive behavior Likely to intimidate or intentionally hurt, control, or diminish another person, physically and/or mentally

TRANSITION

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OTHER CIVIL RIGHTS OFFENSES (CONT.)

- Hazing, defined as acts likely to cause physical or psychological harm or social ostracism to any person within the institutional community, when related to the admission, initiation, pledging, joining, or any other group-affiliation
- Any policy violated on the basis of the Complainant's protected characteristic, which is severe and/or pervasive/persistent enough to cause a discriminatory effect
- May not fall under Title IX jurisdiction, but requires a response with appropriate due process

TRIBUTION

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ISSUE SPOTTING

Using a case study, attendees should evaluate the available facts, identify issues and related evidence (available and still needed)

CONSIDERATIONS IN ISSUE SPOTTING

- Engaging in issue spotting based on the Complainant's statement is an important first step in development of your investigation strategy
- You will continue to identify issues as you interview others and gather evidence
- Continuing to revisit the facts gathered and identifying issues is critical to a comprehensive civil rights investigation
- Identifying the issues posed will help to identify the framework of policies in play

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TRAVIS AND JUSTIN

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TRAVIS AND JUSTIN

Travis was on the lacrosse team for three weeks. Travis reported that he was being sexually harassed by Justin, the lacrosse team captain. In the span of two weeks, Justin has asked Travis out three times. The first time Justin asked Travis out was in the locker room when they both were naked, and Justin put his hand on Travis' back. The second time Justin asked, he was pretty drunk and got in Travis's personal space at a bar. The third time, Justin walked up next to Travis in the shower and tried to grab Travis's buttocks. Travis also kissed Justin at a party the weekend before the shower interaction.

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DEB

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DEB

Deb is a faculty member working with a small team of seven student research assistants who meet each morning to check-in with each other and the status of their grant projects in the university lab. May is a student team-member who has recently announced that she is pregnant.

One morning, May texted Deb that she was going to miss the morning meeting. Deb announced to the group that they should get started because May wouldn't be joining the meeting that day. A third student researcher, Paulie, responded with a snort, and said, "I bet she has morning sickness. Too bad, her breasts are getting to be GINORMOUS and I was looking forward to having a peek this morning." Several team members laughed hard at this joke, while a couple of others chuckled uncomfortably.

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DEB

Deb was livid, and immediately began to wonder how she could work with a team of people who objectify women like this. After the meeting she stormed into the Title IX office to complain about Paulie's conduct. She explained how uncomfortable she felt by the incident, how she no longer could work with Paulie, stating that he should be terminated from the grant-funded position and that the other students who laughed should be put on probation.

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- Force
- Incapacity
- Consent

CONSENT

- Informed, knowing, and voluntary (freely given)
- Active (not passive)
- Creates mutually understandable permission regarding the conditions of sexual activity
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity
- Consent can be withdrawn at any time, so long as it is clearly communicated verbally or non-verbally

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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?

TR UTION

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FORCE

1. **Was force used by the Respondent to obtain sexual or intimate access?**

- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force
- Consider the impact of power dynamics

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FORCE (CONT.)

Types of force to consider:

- **Physical violence:** hitting, restraint, pushing, kicking, etc.
  - This may also involve alleged violations of other policies (e.g., harms to persons, violation of law)
- **Threats:** anything that gets someone to do something they wouldn't ordinarily have done absent the threat
  - This requires an analysis as to the viability of the threat and whether a reasonable person would believe the Respondent could or would carry out the threat

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FORCE (CONT.)

Types of force to consider:

- **Intimidation:** an implied threat that menaces and/or causes reasonable fear.
  - This requires the same threat analysis as above
- **Coercion:** the application of an unreasonable amount of pressure for sexual access
  - Consider isolation, frequency, intensity, and duration

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INCAPACITY

2. Was the Complainant incapacitated?

- Incapacity ≠ impaired, drunk, intoxicated, or under the influence.
- What was the status of the Complainant in terms of:
  - Situational awareness
  - Consequential awareness
- What was the reason for incapacity?
  - Alcohol or other drugs (prescription or non-prescription)
  - Mental/cognitive impairment
  - Injury
  - Asleep or unconscious

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INCAPACITY (CONT.)

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they **lack the capacity** to give knowing consent
  - unable to understand who, what, when, where, why, or how
- Incapacitation is a determination that will be made after the incident **in light of all the facts available**
- Assessing incapacitation is very fact-dependent
- Blackouts are frequent issues
  - Blackout ≠ incapacitation (automatically)
  - Blackout = working memory functional; short-term memory not retained, not stored long-term; long-term memory from before blackout can be accessed
  - Partial blackout must be assessed as well

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BEHAVIORAL CUES

Evidence of incapacity context clues:

- Slurred speech
- The smell of alcohol on the breath in combination with other factors
- Shaky equilibrium; stumbling
- Passing out
- Throwing up
- Appearing Disoriented
- Unconsciousness

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BEHAVIORAL CUES (CONT.)

Evidence of incapacity context clues:

- Known blackout
- Although memory is absent in a blackout, verbal and motor skills are still functioning
- Outrageous or unusual behavior (requires prior knowledge)

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PRIOR KNOWLEDGE CONSTRUCT

- These answers should be in the investigation report if the primary consideration is the out of norm behaviors of the Complainant as a determination of incapacity:
  - Did the Respondent know the Complainant previously?
  - If so, was Complainant acting very differently from previous similar situations?
  - Evaluate what the Respondent observed the Complainant consuming (via the timeline)
  - Determine if Respondent provided any of the alcohol for the Complainant
  - Other relevant behavioral cues

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SOME FACTS ABOUT ALCOHOL

- Most abused drug on college campuses
- Most commonly used date rape drug
- Time – the only sobering tool
- One “drink” per hour
- “Myth of puking”
- Pace of consumption
- Food in the stomach
- Carbonation and alcohol
- Medications and alcohol

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COMMON FACTORS

- Rate of consumption
- Strength of drink
- Food in the stomach
- Body weight
- Body type – body fat percentage
- Gender
  - E.g., enzymes, hormones, body fat, and water in body
- Functional tolerance
- Medications
- Illness and dehydration
- Fatigue
- Caffeine
- Genetics
- Ethnicity

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INCAPACITY ANALYSIS

- If the Complainant **was not** incapacitated, move on to the Consent Analysis.
- If the Complainant **was** incapacitated, but:
  - The Respondent did not know it, **AND**
  - The Respondent would not have reasonably known it = policy not violated. Move to Consent Analysis.
- If the Complainant **was** incapacitated, and:
  - The Respondent **knew it or caused it** = policy violation Sanction accordingly
  - The Respondent **should have known it** = policy violation Sanction accordingly
  - The Respondent's own intoxication cannot be used as a defense

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CONSENT ANALYSIS

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?**

- Is there any sexual or intimate pattern or history between the parties?
- What verbal and/or non-verbal cues were present during any acts that the parties agree were consensual?
- This is where getting detail and specifics of intimate behaviors is critical

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CREATING TIMELINES

- Timeline Construct

CREATE A TIMELINE

First evaluate if the Complainant was incapacitated

- This inquiry may be triggered by statements such as:
  - "The next thing I remember was . . . "
  - "I woke up and . . ."
  - "I don't remember anything after . . ."
- This is your cue to start a timeline of the events during the incident to collect the evidence to assist the Decision-maker(s) in making their analysis as to whether the Complainant was incapacitated

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TIMELINE CONSTRUCT

- Begin the timeline at the time the incident began, starting at the time the Complainant began using alcohol/drugs
- Ask (but perhaps in a different way):
  - What were you drinking (e.g., wine, beer, or hard liquor)?
  - Quantity? (e.g., shot glass, large Solo cup, 12 oz. can)
  - How many drinks did you have?
  - Were you using any drugs?
  - When did you eat? What did you eat?
  - Are you taking any medications?
  - Functional tolerance questions

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TIMELINE CONSTRUCT (CONT.)

- If Complainant did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. You will need to ask:
  - Where were you when you were drinking?
  - Did you leave your drink at any time then resume consuming?
  - Did anyone provide drinks for you?

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TIMELINE CONSTRUCT (CONT.)

- Determine what the Respondent observed about the Complainant's behaviors. Do not ask these questions directly as written below:
  - Slurring words?
  - Stumbling?
  - Acting unusual (e.g., not making sense, appearing drunk)?
  - Falling asleep?
  - Throwing up?
  - Disoriented?
  - And, if Respondent knows Complainant, were they acting different from the way they usually act?

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TIMELINE CONSTRUCT (CONT.)

- The Decision-maker will need to make an assessment if, based on the standard of evidence, the Complainant was incapacitated
- If the answer is “No,” proceed to the Consent analysis
- If the answer is “Yes,” move to part two of the Incapacity analysis
- Conduct the same timeline for the Respondent, superimposed on the Complainant’s timeline

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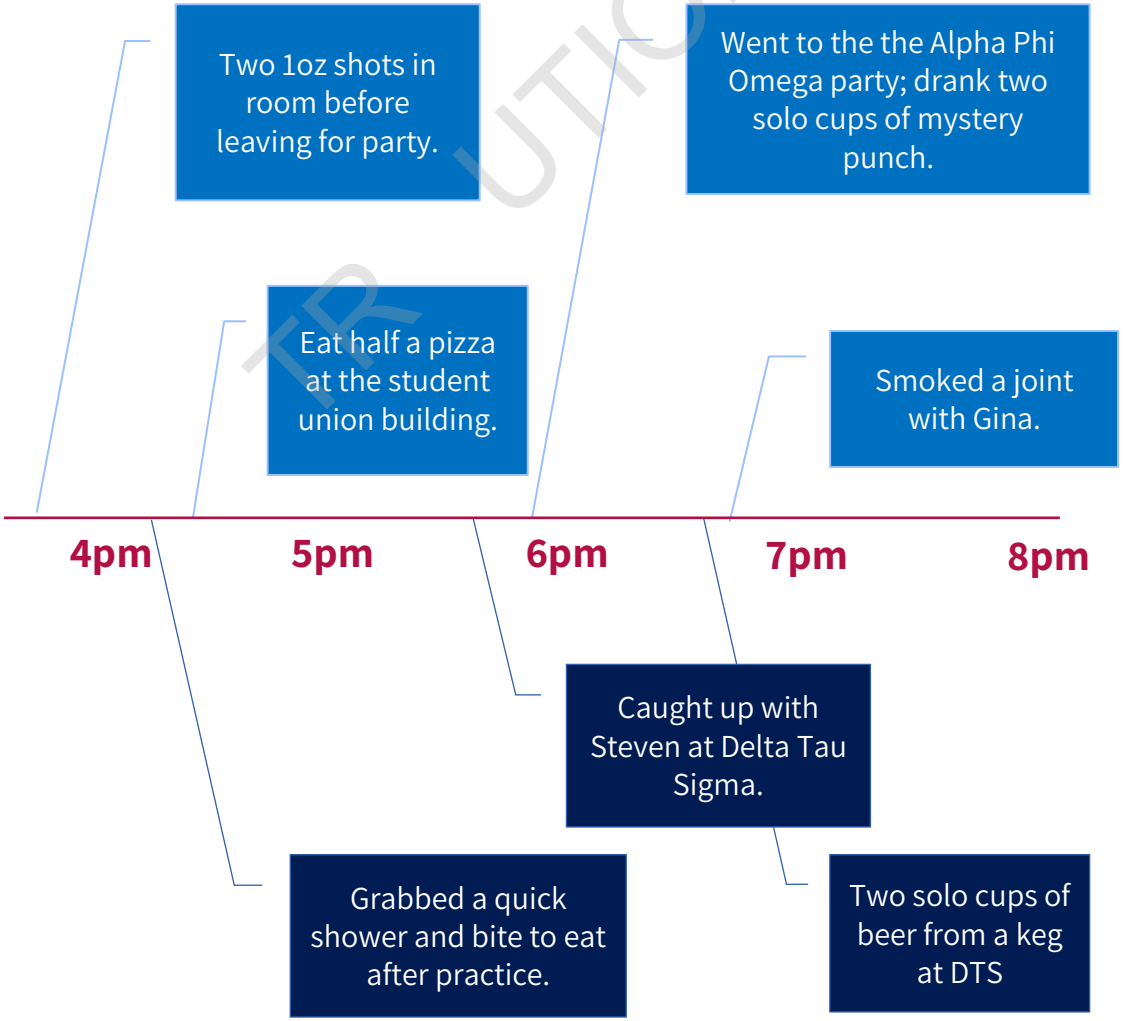
CREATING A TIMELINE EXAMPLE

- Use documentary evidence (e.g., texts) to establish where, why, when, how, and who
- Match up as many times and locations as possible
- What did the other party observe?



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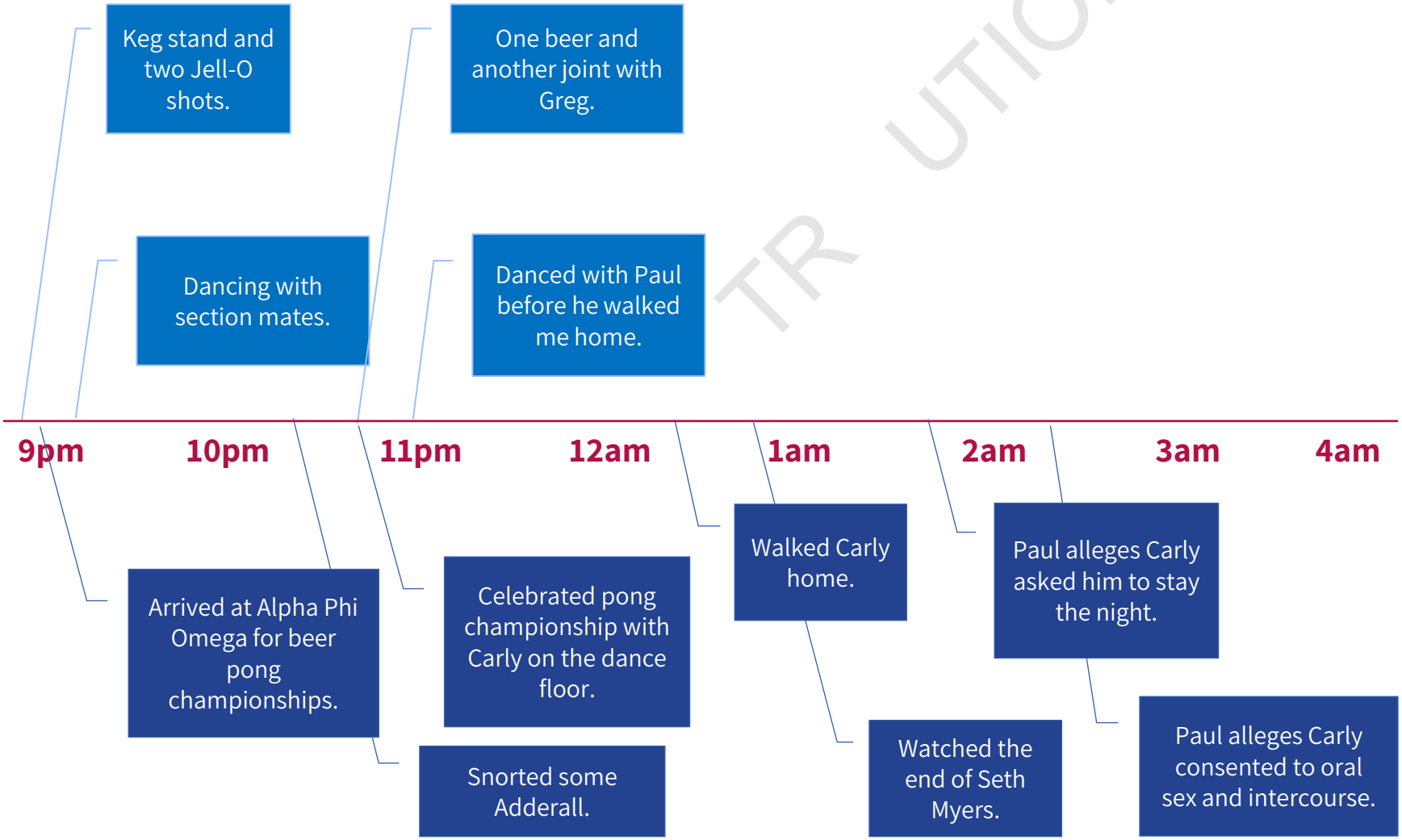
CREATING A TIMELINE EXAMPLE (CONT.)



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CASE STUDY

Using a case study, attendees should evaluate the available facts, identify issues and evidence (available and still needed), and assess compared to policy prohibitions.

AMY AND TODD

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AMY

On Friday, April 23, I went to an on-campus party. I was doing a lot of drinking and dancing and getting to know people. I had at least four drinks in the first few hours I was there. Then, I met Todd. I remember that he came up to me on the dance floor and started to dance with me. He was really good-looking, and so was the other guy he was with, Jeff, whom I had met at a different party the week before.

We danced and had a lot of fun, and I remember drinking some more and Todd getting me some Jell-O shots, which were really strong and nasty. I wasn't feeling well and went into the bathroom, thinking I might throw up. The bathroom was really crowded, so I went outside for some fresh air instead. I sat on the stoop, feeling sick. Todd came over and helped me out. I remember walking home with him but nothing else.

TRIBUTION

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AMY

When I woke up the next day, his name and number were scrawled on a pad by my sofa, and there was a used condom in the toilet. I got scared and called him to find out what had happened. I remembered most of what he said about the party, but when he told me that we came back to my room and had sex, I started to cry. I didn't remember any of it and was afraid I might be pregnant. Todd assured me that he wore a condom and asked me out again. I hung up and cried.

I told everything to my roommate, Sarah, who was sitting on the sofa when I called Todd. She suggested that I call the campus police, but I felt more comfortable talking to you.

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TODD

On the night of Friday April 23, I went to an on-campus party. There was a band and a lot of alcohol. I got to the party at about 11:00 p.m. and slammed about three beers in the first hour I was there. It was very crowded, and people were dancing. A lot of people already seemed to be drunk. I hung out around the dance floor with my friend Jeff Kwik for a while, until I noticed Amy Craft dancing. She was really cute, and I had noticed her on campus a few times. I went up to her and we started talking. She seemed a little tipsy and in a pretty loose mood. We talked for a while, and I think I got her about two or three beers over the next hour. I didn't have anything more to drink because the three beers I slammed were doing the trick just fine.

TRADITION

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TODD

Around 1:00 a.m., somebody started passing out Jell-O shots spiked with grain alcohol. I didn't want to mix beer and liquor, but Amy had a few shots. We danced a lot, and then I got her a few more Jell-O shots. She went off to the bathroom, and after that I couldn't find her, which really bummed me out. I waited around to see if she would show up again, but she didn't. I took off and started to walk back to my residence hall. As I left the party, I looked over and saw Amy. She seemed to be in pretty bad shape. I offered to take her home, and she told me her dorm and leaned on my arm.

When we got to her residence hall, I helped her inside, and was about to leave, but she asked me to come up to her room, just to make sure she got there.

TRIBUTION

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TODD

I took her upstairs, opened the door for her, and let her in. She asked me to get her a glass of water, and I did. I started to take off again, but she asked me not to go. When I turned around, she kissed me, hard. We kissed for a while, but she wasn't feeling well and went into the bathroom again. When she came out, she said she felt better, but tired. She lay down and we kissed some more. I started to massage her back, and she passed out. She came to about 20 minutes later and started to kiss me and fondle me. She took off her shirt, and all of my clothes. I started to kiss her all over, and she said she wanted to lay down again. I asked her if she was OK, and she said she was. I asked her if she had a condom, and she said she had one in her dresser. I went to get it, and when I got back to the couch, she was out again.

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TODD

She woke up after about 20 minutes, and I suggested that she just go to sleep. But she said she felt much better and started to give me oral sex. After a while, she put the condom on me and we had sex. It was great. She was really wild and liked to be on top. Afterward, we talked until the early morning, and I gave her my number and left. The next day, she called me to ask me why my name was on the pad by her sofa. I told her about meeting her at the party and about our evening together. She seemed to get upset, and said she remembered meeting me at the party, but nothing else. I asked if she ever wanted to get together again, and she hung up on me.

TRIBUTION

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TRAUMA AND INVESTIGATIONS

- Introduction to Trauma
- Neurobiological Impact of Trauma
- Trauma and Interviewing
- Trauma and Credibility

WHAT IS TRAUMA?

- Exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity
- May result from war, natural disasters, severely distressing events
- When the brain senses a threat, releases hormones or chemicals throughout the body to help react to the threat and/or trauma
- The brain does not distinguish between “types” of sexual assault
  - Interprets stranger or acquaintance equally as threats to survival

TRAUMA-INFORMED

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WHAT IS TRAUMA? (CONT.)

- The brain also does not typically differentiate between an actual threat and a perceived or subjective threat
  - Sometimes also a function of prior experiences, rather than the immediate situation

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MEMORY AND TRAUMA

- Memory is formed in two steps:
  - Encoding: organizing sensory information coming into brain
  - Consolidation: grouping into memories and storing the stimulus
- Trauma can interfere with the encoding and/or the consolidation of memory
- May create fragmented memories
- Recall can be slower and more difficult
- Alcohol may interfere further with memory
- However, sensory information (smell, sound, etc.), may still function properly

TR UTION

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TRAUMA & INTERVIEWING

- Expecting a Complainant to give a linear account in the days after an incident, or after having been triggered, is not always realistic
- Memory fragmentation can occur
- Having "inconsistent" memory, pausing, and stumbling to provide an account are not outside the bounds of what one could expect from a person who has experienced trauma
- Considerations for credibility?

TR UTION

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TRAUMA & INTERVIEWING (CONT.)

- Allowance for sleep cycles prior to interviews (if within 96-120 hours)
- A non-linear account, with jumping around and scattered memories is not uncommon
- If alcohol is an additional factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress
- Use open-ended questions
- Don’t interrupt or barrage with questions
- Use strategies that pull out fragmented memories
- Be patient during the interview and allow time

TR UTION

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TRAUMA & INTERVIEWING (CONT.)

- Empathy is critical
  - However, remember to remain **impartial**
- Tell me more about…
- Help me understand your thoughts when…
- What was going through your mind when…
- What are you able to remember about…?
  - 5 senses
- What were your reactions to this experience?
  - Physically
  - Emotionally
- What, if anything, can you not you forget about this experience?

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TRAUMA & CREDIBILITY

- Trauma may help explain elements that negatively impact a party's credibility
  - Inconsistencies in a party or witness's statement
  - Lack of linearity in a party or witness's account or statement
  - Lack of memory about an incident
  - Memory errors by a party or witness
  - Demeanor or affect
  - Brief answers, or answers lacking in detail

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TRAUMA & CREDIBILITY (CONT.)

- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them
  - An assessment of credibility must focus on issues such as the reliability, consistency, and believability of the parties
  - If, for example, a party's account is inconsistent or variable, lacking in detail, or has material memory gaps, it typically lacks credibility
  - An understanding of trauma and its impact will provide insight as to why some credibility deficits exist, but a trauma-informed understanding should not materially impact a credibility assessment
- Use caution because actual or perceived trauma may have little or nothing to do with consent

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INVESTIGATION STRATEGY

STRATEGY IS KEY

- The investigation team, in consultation with the Title IX Coordinator or designated Deputy, strategizes throughout the entire investigation. This includes:
  - What are the issues presented?
  - Are there undisputed facts? Which ones are significant to the investigation?
  - Are there facts in dispute? Which ones are significant to the investigation?
  - What policy(s) elements may have been violated?
  - Who do you need to interview?
  - What should be the order of the interviews?

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OTHER ELEMENTS TO CONSIDER IN STRATEGY

- Strategize when to interview Complainant and Respondent
- What are the key issues involved?
  - What additional strategies do you need to address key issues?
- What additional documentary evidence will be important to the investigation?
- Discuss your methodology for this case (which approach will you use?)
- Timeline (within 30-60 days will vary by case)

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WHEN TO INTERVIEW PARTIES AND WITNESSES

- Impact of new Title IX regulations on clear and timely notice of the allegations and investigation to the parties
- Parties and witnesses should be interviewed as soon as possible:
  - So that recollections are as fresh and accurate as possible
  - To secure necessary remedies in a timely manner
  - Should not conduct interviews until parties have received their written notice of the allegations and investigation

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STRATEGY EXERCISE

- Use your issues list
- Develop your strategy
  - Is there undisputed information? Is it relevant to explore?
  - Is there disputed information? Is it relevant to explore?
  - Are there any key issues that aren't policy violations?
  - Are there possible policy violations that were not included in the notice of investigation/allegation?
  - Who do you want to talk with (order of interviews?)
  - What represents your next steps?

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NOTETAKING AND RECORDKEEPING

- What Kinds of Notes Should Be Kept?
- Notetaking
- Recordkeeping

WHAT KINDS OF NOTES SHOULD BE KEPT?

- Assemble an investigation file and keep it in a secure location
- Keep a timeline of the steps in the process, including dates of all meetings and interviews
- Interviews – notes vs. recording
  - Recording is becoming more common
- Notes – handwritten vs. computer
- **Interviewee verification**
- Records of all contacts, including emails and phone calls with all parties

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NOTETAKING

- Taking notes may slow down the interview in a good way
- Use pre-prepared numbered questions as a framework but be flexible
- Notetaking should occur throughout the entire interview, not just when a Respondent makes a pertinent disclosure or an “incriminating” remark
- Documentation is critical to creating the record of the complaint
- Remember that students have the right to inspect their education record under FERPA

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NOTETAKING (CONT.)

- Notes should be complete and detailed
  - Important for assessing credibility
  - Decision may turn on small details
- Where possible, include verbatim statements on critical issues – use their words, not yours
- Keep notes regarding what the Complainant, Respondent, and witnesses are told
- You may want to summarize perceptions of credibility
  - Recognize, however, that notes and evidence may be subject to review

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NOTETAKING (CONT.)

- Remember that the “sole possession” FERPA exception is very limited
- Date all records and include who was present at any meetings; number pages
- Review your notes before the interview concludes
- Clarify anything about which you are unclear
- Document any refusal to answer, evasion, or refusal to participate
- Capture key quotations
- Review and finalize notes immediately upon completion of interview

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RECORDKEEPING

- Certain records must be maintained 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 conclusion, Recipient must document the rationale for its determination
- Recipient must document measures taken to preserve/restore access to education programs/activity

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RECORDKEEPING (CONT.)

- Considerations for Investigator notes
  - Fact-based observations
  - Avoid conclusions or determinations
- "Maintain" applies to what is kept
- Develop and maintain minimalistic note-taking style
- Overwritten notes
- Think about who could potentially read – parties, attorneys, judge, jury, public

FOR DISTRIBUTION

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MEETING CONSIDERATIONS

- Environment
- Investigators
- Managing Expectations

THE ENVIRONMENT

- Where will the interview be conducted?
  - Personal office?
  - Conference room?
- Videoconference, phone, and email interviews
- Important aspects:
  - Neutral environment
  - Minimize distractions
  - Sit in their chair
  - Check the lobby/waiting area for distractions and "hidden messages"
  - Privacy (visual and auditory)

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THE INVESTIGATORS

- Maintain professionalism, but balance with relaxed atmosphere
  - Attire
  - Demeanor
- The Investigator is an extension of the environment
- Investigator neutrality is key but should be balanced with compassion
- Maintain good eye contact and comfortable, open body language

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OTHER CONSIDERATIONS

- Consider who should conduct the interview and who should be taking notes
- Allow time (What if there isn't enough?)
- Use breaks strategically
- Remain calm and professional

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MANAGING EXPECTATIONS

- No one is happy at the end of these processes
- People who conduct investigations with skill rest secure in the knowledge that all involved, including witnesses, are treated objectively and fairly
- **Be sure the parties understand parameters of the policy, what it does and does not cover, how the process plays out, and what process can and cannot accomplish**
- Provide ample opportunity for interviewee (especially the Complainant and the Respondent) to ask questions

TRIBUTION

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QUESTIONING SKILLS & GUIDELINES

A review from Investigator One

- Questioning Guidelines
- Conducting Interviews
- Interview Guidelines
- Impact of Non-Participation

QUESTIONING GUIDELINES

Take the complaint from start to finish through a process of broad to narrow questions and issues that need to be addressed.

- Prepare an outline of your questions in advance
  - Ask questions about the allegations and the evidence and the policy elements
  - Focus on areas of conflicting evidence or gaps in information
  - Drill down on timelines and details
  - Review your questions before ending interview

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RESTATE/REFRAME

- Restate/summarize what is said - helps validate that you are listening
- Do not sanitize the language
  - Report what is said; rephrase with caution
- Helps ensure you understand what is being said
- Consider using these phrases
  - “So, it sounds like…”
  - “Tell me more…”
  - “Walk me through”
  - “Help me understand”

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CONDUCTING INTERVIEWS

- Explain that you will be taking notes or recording and why
- Acknowledge that they may have told others what happened multiple times already and determine who that may be
- Ask if they or others they are aware of have written about this in any fashion:
  - Blog
  - Facebook/Twitter/Social Media
  - Journals or other writings
  - Texts
  - Video journals

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INTERVIEW GUIDELINES

- Pay attention to alcohol/drug consumption and timing of consumption (the “horizontal timeline”)
- Be cognizant of the difference between what was “heard” (rumor) and what was “witnessed” (facts)
- Ask who else you should talk to and ask for any relevant documentation (i.e., texts, emails)
- Discuss non-retaliation
- Discuss FERPA issues

TRADITION

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CONDUCTING INTERVIEWS (CONT.)

- In an interview
  - Let them talk
  - Give them a starting point if they don't have one
  - Drill down later
  - Interrupt for questions only when you must
- **Note**: some strategies may change based on the interviewee's demeanor
  - Expressive
  - Angry
  - Resistant
  - Hesitant

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CONDUCTING INTERVIEWS (CONT.)

- Reverse chronological order
- Asking unexpected questions
- Asking the individual to recall information in unexpected ways, e.g., sketch
- Asking interviewees for details that the Investigator can check
  - Truth tellers generally add more “checkable” details
  - Liars provide details that are difficult to verify
- The Funnel technique (broad to narrow questions)

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CONDUCTING INTERVIEWS (CONT.)

At the end:

- What else do you think might be important for us to know?
- What other questions are there that you thought we might ask that we didn't?
- Ask who else you should talk to and ask for any relevant documentation (i.e., texts, emails, etc.).
- Is there anything you want me to ask the other party (or any witness)? ("Appendix C" – covered in Investigator One)
- If you have not ascertained this, try to determine what Complainant's motivation is for reporting and what Complainant hopes to see as a result – BE CAREFUL HERE.

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IMPACT OF NON-PARTICIPATION

- Engagement expectations
  - What happens if a party declines to be interviewed?
    - Requests for written questions
    - Refusal to answer questions
    - Refusal to engage in process
  - If a party or witness does not appear at the hearing, the Decision-maker may rely upon their earlier statements and assess their credibility and weight based on the totality of the information provided*
    - A party or witness may choose to not answer one or more questions

*Public institutions in the Sixth Circuit may not be able to find a policy violation if a Complainant does not attend the hearing and their credibility is at issue

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IMPACT OF NON-PARTICIPATION (CONT.)

- The Decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

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HIT THE G.A.S.

- Gather Evidence
- Assess Credibility
- Synthesize the Information

GATHER THE EVIDENCE

- Collect the evidence from all sources
- Organize it according to the investigation strategy and allegations
  - Chronology
  - Geography
  - Policy prohibitions
  - Alleged violations
- Summarize evidence in a written report
- This is the fact-gathering function. It's a function all Investigators have performed since at least 2011, and it's not new or different as a result of regulations.

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ASSESS CREDIBILITY

- Accuracy and reliability of information
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading may impact
- Primary factors: corroboration and consistency
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Trauma-informed approach should be consistent

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COMMON ERRORS IN ASSESSING CREDIBILITY

- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
  - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about memory
  - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes

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COMMON ERRORS IN ASSESSING CREDIBILITY (CONT.)

- Misplaced focus on the status of the parties
  - No scientific studies support the notion of neurobiological response differences between perpetrators and victims
- Bias in interviews
  - Presumptions of guilt can influence credibility assessments

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CREDIBILITY OVERVIEW

Corroboration

- Aligned testimony and/or physical evidence.

Inherent Plausibility

- "Does this make sense?"
- Be careful of bias influencing sense of "logical."

Motive to Falsify

- Do they have a reason to lie?

Past Record

- Is there a history of similar behavior?

Demeanor

- Do they seem to be lying or telling the truth?

Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors

EEOC (1999)

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence

- Strongest indicator of credibility
- Independent, objective authentication
  - Party says they were in class, teacher confirms
  - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

- Can include contemporaneous witness accounts
  - More "separate" the witness, greater the credibility boost
- Outcry witnesses
  - Does what party said then line up with what they say now?
- Pay attention to allegiances
  - Friends, teammates, group membership
  - This can work both directions (ex. honest teammate)

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility

- Does what the party described make sense?
  - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- "Plausibility" is a function of "likeliness"
  - Would a reasonable person in the same scenario do the same things? Why or why not?
  - Are there more likely alternatives based on the evidence?

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

- Is the party's statement consistent with the evidence?
- Is their physical location or proximity reasonable?
  - Could they have heard what they said they heard?
  - Were there other impediments? (darkness, obstructions)
- How good is their memory?
  - Temporal proximity based on age of allegations
  - "I think," "I'm pretty sure," "It would make sense"

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FACTORS TO CONSIDER FOR CREDIBILITY

Motive to Falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
  - Think academic or career implications
  - Personal or relationship consequences
- What if the allegations are false?
  - Other pressures on the Complainant– failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

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FACTORS TO CONSIDER FOR CREDIBILITY

Past Record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
  - Even if found "not responsible," may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship

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FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

- Is the interviewee uncomfortable, uncooperative, resistant?
- Certain lines of questioning – agitated, argumentative
- BE VERY CAREFUL
  - Humans are excellent at picking up non-verbal cues
  - Human are terrible at spotting liars (roughly equivalent to polygraph)
- Look for indications of discomfort or resistance
- Make a note to dive deeper, discover source

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CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

- Indicate where to focus for the Decision-maker without rending conclusions or making findings related to credibility
- NOT GOOD
  ~~"The Decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons..."~~
- GOOD
  "Mark's testimony about X contrasts with Mariana's testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana's testimony, not Mark's, during the investigation."

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SYNTHESIZE AREAS OF DISPUTE

- Examine only actions that have a direct relation to the situation under review or a pattern of incidents
- Narrow the scope to areas in dispute or disagreement between the parties
  - Two lists: contested and uncontested facts
- Use evidentiary and report review periods to clarify disputed facts
- Present evidence in report organized around facts relating to alleged policy violations
- Contested facts will form the bulk of the Decision-maker's work in making a determination

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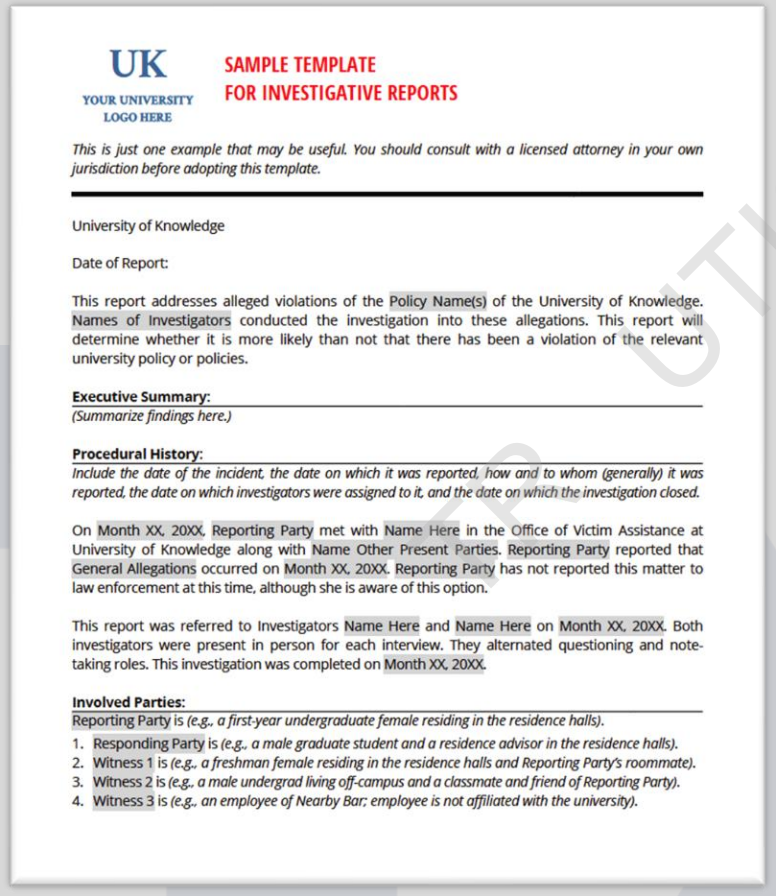

UK

YOUR UNIVERSITY LOGO HERE

SAMPLE TEMPLATE
FOR INVESTIGATIVE REPORTS

This is just one example that may be useful. You should consult with a licensed attorney in your own jurisdiction before adopting this template.

University of Knowledge

Date of Report:

This report addresses alleged violations of the Policy Name(s) of the University of Knowledge. Names of Investigators conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the relevant university policy or policies.

Executive Summary:
(Summarize findings here.)

Procedural History:
Include the date of the incident, the date on which it was reported, how and to whom (generally) it was reported, the date on which investigators were assigned to it, and the date on which the investigation closed.

On Month XX, 20XX, Reporting Party met with Name Here in the Office of Victim Assistance at University of Knowledge along with Name Other Present Parties. Reporting Party reported that General Allegations occurred on Month XX, 20XX. Reporting Party has not reported this matter to law enforcement at this time, although she is aware of this option.

This report was referred to Investigators Name Here and Name Here on Month XX, 20XX. Both investigators were present in person for each interview. They alternated questioning and note-taking roles. This investigation was completed on Month XX, 20XX.

Involved Parties:
Reporting Party is *(e.g., a first-year undergraduate female residing in the residence halls).*

1. Responding Party is *(e.g., a male graduate student and a residence advisor in the residence halls).*
2. Witness 1 is *(e.g., a freshman female residing in the residence halls and Reporting Party's roommate).*
3. Witness 2 is *(e.g., a male undergrad living off-campus and a classmate and friend of Reporting Party).*
4. Witness 3 is *(e.g., an employee of Nearby Bar; employee is not affiliated with the university).*

THE INVESTIGATION REPORT

ELEMENTS OF THE INVESTIGATION REPORT

- Case identification information:
  - Case number, Investigator(s), date of notice, date assigned to Investigator(s), and date investigation closed
- Source of initial complaint/allegation:
  - Source of initial report, information regarding the formal complaint; name and contact information of Complainant, and status; record same for Respondent
- Details from initial report/complaint:
  - Nature of incident(s)
  - How initial report and/or formal complaint was received (e.g., security incident report, hotline, in person, web form)

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ALSO INCLUDE IN THE INVESTIGATION REPORT

- Results of interviews with parties and witnesses
- Results of interviews with experts
- Roles of the parties and witnesses, and any relations between them
- Summary of other information collected (i.e., information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages)
- **TIP:** A skeleton report template is helpful

The investigation report is the one comprehensive document summarizing the investigation

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FOCUS ON WHAT IS NOT KNOWN, RATHER THAN IS KNOWN

- Find an opportunity to let your subconscious work on the gaps in information
- If you are too busy analyzing what you know, you won't focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them.
- Look for evidence that should be there that is not, for some reason.

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BIAS, PREJUDICE, AND CONFLICT OF INTEREST

- What are Bias and Prejudice?
- Common Forms of Bias and Prejudice
- Impacts of Bias and Prejudice
- Conflicts of Interest
- Mitigating Bias, Prejudice, and Conflicts of Interest

WHAT ARE BIAS AND PREJUDICE?

Bias

- A preference or tendency to like or dislike
- A cognitive process
- A thought process developed over time through repeated personal experience
- Implicit or explicit
- Formed from stereotypes, societal norms, cultural experience, expectations of the people around you

Prejudice

- A preconceived opinion that is not based on fact, reason, or actual experience
- Can be classified as cognitive prejudice, affective prejudice, and conative prejudice
- Can include injury or damage as a result of some judgment or action of another in disregard of one's legal rights

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COMMON FORMS OF BIAS WITHIN INVESTIGATIONS

- Gender Bias
  - Showing favoritism toward one gender identity/expression over another
- Racial Bias
  - Showing favoritism toward one race over another or associating negative traits toward one race over another
- Confirmation Bias
  - Interpreting ambiguous evidence to support one's own opinions or existing position
- Affinity Bias
  - The unconscious tendency to gravitate toward those who have similar identities to us

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IMPACTS OF BIAS WITHIN INVESTIGATIONS

- Effects Investigator's perception of parties and witnesses
- Impacts the ability to build rapport, connect, and create safe/neutral spaces for all participants throughout the investigation
- Creates risk of *flawed* decision-making when collecting evidence and questioning participants
- Written materials become subjective and include biased language
- Presents moments for assumptions not based on evidence to be made during the investigation
- Increases opportunity for a party to successfully litigate
- Reticence to ask needed questions, pursue evidence, or witnesses who should be questioned

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COMMON FORMS OF PREJUDICE WITHIN INVESTIGATIONS

- Cognitive Prejudice
  - What people believe is true based on stereotypes
  - Can include expectations, impressions, criticisms, and assumptions
- Affective Prejudice
  - What people dislike and like
  - Considered an emotional form of prejudice
- Conative Prejudice
  - Refers to how people tend to behave toward another person or group of people (often driven from first impressions or impulsive conclusions)
  - Directly related to cognitive and affective prejudices

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IMPACTS OF PREJUDICES WITHIN INVESTIGATIONS

- Creates tension within the investigation and the process
- Presents risk of discriminatory actions/behaviors toward parties
- Ability to stop, prevent, and remedy diminished
- Can create a hostile environment
- Threatens equal access to the institution's educational program, activity, or employment
- Problematic and damaging to institutional culture

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BIAS AND PREJUDICE
COMMON IDENTITIES IMPACTED

- LGBTQIAA2SP+
- Gender identity/Expression
  - Example: Nonbinary identities
- Race
  - Example: BIPOC
- Ethnicity
  - Example: International students/employees
- Religion
  - Example: Muslim
- Athletes
- Fraternity and Sorority Members

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CONFLICTS OF INTEREST

- Conflicts of interest create role confusion that can compromise impartiality and objectivity
- Types of conflicts:
  - Situational conflicts
    - Wearing too many hats in the process; making more than one substantive decision in the same matter
  - Positional conflicts
    - Divided loyalties; lack of independence
  - Legal Counsel as Decision-Maker
  - Non-impartial Decision-Maker(s) or Appeal Decision-Maker(s)
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest; the question is whether the knowledge/familiarity compromises objectivity
- Previously disciplining a student or employee is often not a conflict of interest, inherently

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MITIGATING BIAS, PREJUDICE & CONFLICTS OF INTEREST IN INVESTIGATIONS

- Establish a process for self-recusal
- Recommend the TIXC provide oversight of investigation and hearing
  - Strategy meetings
  - Regular check-ins
  - Report review
  - Insulation against internal/external pressures
- Allow parties the opportunity to challenge Investigators and Decision-makers
  - Replacement of personnel
  - Redo portions of grievance process

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MITIGATING BIAS, PREJUDICE & CONFLICTS OF INTEREST IN INVESTIGATIONS (CONT.)

- Anticipate questions about Investigator credentials/bias at the hearing
- When bias is disqualifying, fix it right away. Don't let it fester.

- Develop an appeal process that can address bias

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INCLUSIVE INVESTIGATIONS

- Bias-free Writing
- Tips for Inclusive Investigations
- Considerations for Inclusive Investigations
- Importance of Visibility

BIAS-FREE WRITING

- Words communicate ideas, but also reflect power, status, and privilege
- Language can reflect social capital
- Conscious and purposeful use of language can promote equity, justice, and inclusion
- The use of bias-free language ensures the content does not exclude, demean, or offend groups
- Bias-free communication attempts to include all identities of people in a way that doesn't make assumptions about the receiver of the communication
- Bias-free writing does not discriminate

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TIPS FOR INCLUSIVE INVESTIGATIONS

- Know your own biases
  - Have your writing proofread by others
  - Read your own work to recognize language that is part of your everyday speech
- Focus on what's relevant
  - Only include information on identities when applicable
- Recognize and acknowledge differences
  - Not supposed to imply differences don't exist
- Think small
  - Be as specific as possible
  - Specificity is preferred over generalization
    - Example: Avoid using "students of color" generally when you are really referring to a specific racial group

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CONSIDERATIONS FOR INCLUSIVE INVESTIGATIONS

- Educate members of the Title IX Team
  - Avoid labels
  - When in doubt, ask
- Be mindful of power dynamics and targeting within the process
- Don’t make assumptions
  - Describe identities and group connections as they have been described by parties
  - Avoid using language that refers to people in objectifying ways
- Provide a safe, non-judgmental, and respectful environment

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IMPORTANCE OF VISIBILITY

- People trust what they see and what they know
  - Limited visibility equates to limited trust
  - Includes trust in policy and procedures
  - Includes trust in the investigation
- Visibility Bias
  - Directly impacts the effectiveness of the work
  - Regularly assess the prevalence of visibility bias as it relates to the Title IX office and program
  - Visibility does not always equate to bias or impartiality
  - Be cautious, too much targeted visibility can create a different type of bias

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Questions?

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