



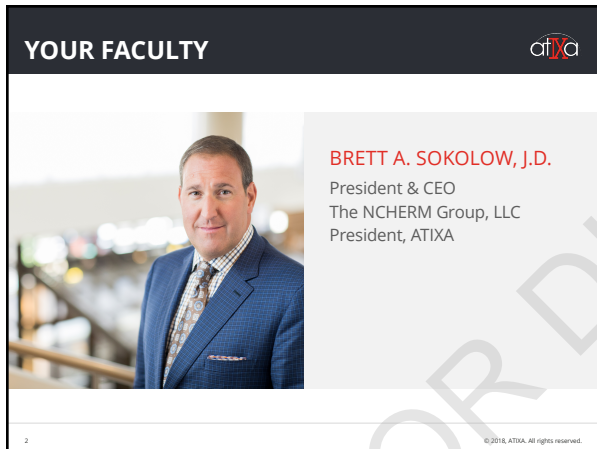
CIVIL RIGHTS INVESTIGATOR TRAINING & CERTIFICATION LEVEL ONE COURSE

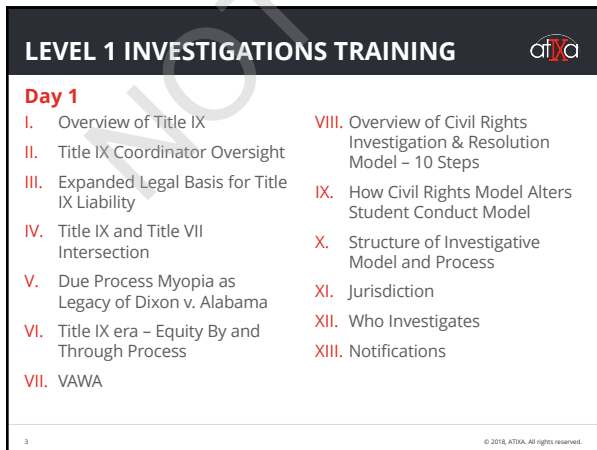
COURSE SLIDE PACKET

This training manual is intended to provide assistance for achieving best practices with respect to campus sexual misconduct, but is not given and should not be taken as legal advice.

Before acting on any of the ideas, opinions or suggestions in this publication, participants should check first with a licensed attorney in their own jurisdiction.







OVERVIEW OF TITLE IX

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

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."


IX

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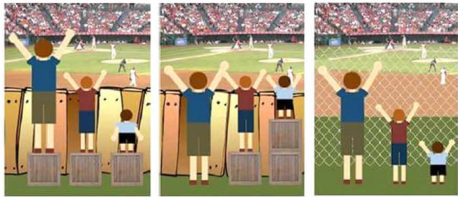
THE IX COMMANDMENTS

Thorough	Reliable	Impartial	Investigation (prompt & fair – VAWA Sec. 304)
Prompt	Effective	Equitable	
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

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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.

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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

SUPERVISOR OF THE INVESTIGATION STRUCTURE 


- The Title IX officer is responsible for:
 - The appointment of investigators.
 - Training investigators, hearing boards, and appeals officers.
 - Supervision of investigators and investigations.
 - Strategizing investigations.
 - Assurance of initial remedial actions.
 - Timeline compliance.
 - Communication and coordination of investigation teams.
 - Providing institutional memory to investigators.
 - Recordkeeping of all activities.

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SUPERVISOR OF THE INVESTIGATION PROCESS 

- The Title IX officer or designee is responsible for:
 - Notice of investigation.
 - Gatekeeping.
 - Determining extent of investigation.
 - Notice of charge/allegation.
 - Notice of hearing.
 - Notice of outcome.
 - Duty to warn.
 - Assurance of remedies.
 - Recordkeeping of all activities.

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TRAINER FOR INVESTIGATORS 

- Frequency of training for investigators.
- Internal and/or external trainers.
- Who can be an Investigator?
 - Staff.
 - Faculty.
 - NOT students
- External investigations/outsourcing oversight.

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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 Myopia
- Equity By and Through The Process
- VAWA Reauthorization Updates to the Clery Act



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.*

13

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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 institution's liability.

14

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GEBSER V. LAGO VISTA INDEP. SCHOOL

U.S. SUPREME CT. (JUNE 22, 1998)



- Case involved faculty/student sexual harassment.
- Supreme Court created high standard that students must meet to prevail on a sexual harassment claim against institutions 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.

15

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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."**

16

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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.

17

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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."**

18

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JACKSON V. BIRMINGHAM BD. OF ED.
U.S. SUPREME CT. (MARCH 29, 2005)



- A deeply divided U.S. Supreme Court decided this landmark case in 2005.
- This case 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.
U.S. SUPREME CT. (MARCH 29, 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 COMMITTEE
U.S. SUPREME CT. (JAN. 21, 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 COMMITTEE U.S. SUPREME CT. (JAN. 21, 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 COMMITTEE U.S. SUPREME CT. (JAN. 21, 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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OTHER RELEVANT CASES 

- **DeJohn v. Temple University**, 3rd Circuit Court of Appeals, Aug. 2008.
- **Holcomb v. Iona**, 2nd Circuit Court of Appeals, April 2008.
- **Jennings v. University of North Carolina at Chapel Hill**, 4th Circuit Court of Appeals, April 2007.
- **Williams v. University of Georgia System et al.**, 11th Circuit Court of Appeals, Feb. 2007.
- **Lisa Simpson, Anne Gilmore v. University of Colorado Boulder, et al.**, 10th Circuit Court of Appeals, Sept. 2007.


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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.




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TITLE IX AND VII INTER-RELATED INVESTIGATIONS 


- Understand distinctions between Title IX and Title VII in responding to and investigating discrimination and harassment claims.
 - Disparate treatment discrimination:
 - See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
 - Disparate impact discrimination:
 - See *Sharif v. New York State Educ. Dep't*, 709 F. Supp. 345 S.D.N.Y. (1989).
 - Hostile environment harassment:
 - See *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).

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TITLE IX AND TITLE VII INVESTIGATIONS (CONT.) 

- Consider:
 - Role of institutional equity/AA/EOP officer.
 - Human resources/faculty.
 - Coordinator of campus conduct.
 - Athletics.
 - Public safety.
- Oversight of deputy coordinators/investigators.
- Ability to merge/combine investigatory and hearing processes.
- 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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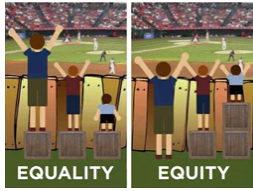
DUE PROCESS MYOPIA AS A LEGACY OF DIXON V. ALABAMA 

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 responding parties because of the posture of the case.
- All due process cases flowing from Dixon attached additional rights to the responding party.
- Responding parties in Dixon were actually civil rights victims.

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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).

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VAWA REAUTHORIZATION UPDATES TO THE CLERY ACT 

- Signed into law on March 7, 2013.
- Took effect March 7, 2014. Enforced as of July 1, 2015.
- Gender identity added as new hate crime category.
- Three new crimes added to the Annual Security Report.
 - Domestic Violence, Dating Violence, and Stalking.
- Prohibits retaliation.

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**VAWA REAUTHORIZATION
UPDATES TO THE CLERY ACT (CONT.)**



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

- Reporting and responding parties are entitled to the **same opportunities** to have a support person/advisor of their choice at **any** proceeding or related meeting.
- Reporting and responding 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 institution'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.

31

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**VAWA REAUTHORIZATION
UPDATES TO THE CLERY ACT (CONT.)**



- Reporting parties should receive written information regarding:
 - Procedures victims of Domestic Violence, Dating Violence, Sexual Assault and Stalking should follow.
 - Interim measures (e.g., academic, living, transportation, work).
 - Services available on and off-campus (e.g., counseling, advocacy, health, etc.)
 - Reporting options (e.g., campus police, local police, student conduct, HR, etc.)
 - Protection options (e.g., order of protection, no-contact orders, etc.)

32

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**VAWA REAUTHORIZATION
UPDATES TO THE CLERY ACT (CONT.)**



- Annual training for those involved in disciplinary proceedings (e.g., investigators, hearing officers, and appellate officers) on:
 - Domestic Violence, Dating Violence, Sexual Assault, and Stalking.
 - How to conduct an investigation “that protects the safety of victims and promotes accountability.”
 - How to conduct a “hearing process that protects the safety of victims and promotes accountability.”

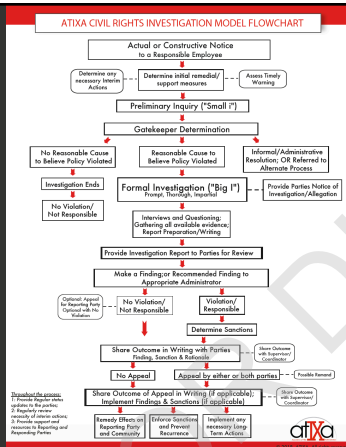
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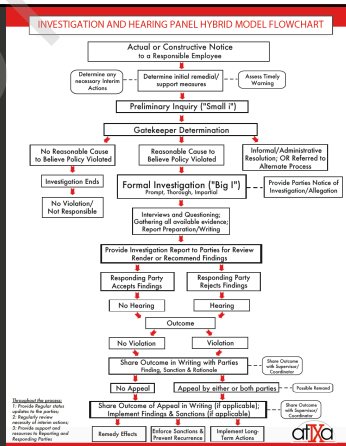
CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW


- Civil Rights Investigation Model
- Traditional Student Conduct/Hearing Panel Model
- The Process
- Ten Steps
- Notice – Actual and Constructive
- Responsible Employee
- When Do You Investigate?
- Preliminary Inquiry
- Reluctance to Report
- Gatekeeping
- Allegation


CIVIL RIGHTS INVESTIGATION MODEL



INVESTIGATION AND HEARING PANEL HYBRID MODEL




THE PROCESS 




Incident:	Preliminary Inquiry:	Formal Investigation & Report:	Hearing:	Appeal:
Notice to Title IX officer; strategy development.	Informal resolution, administrative resolution, or formal resolution?	(and in some cases...):	Finding. Sanction.	

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TEN STEPS 

1. Allegation (complaint) or notice.
2. Preliminary inquiry (initial strategy).
3. Gatekeeper determination (earliest point).
4. Notice of investigation and/or allegation (earliest point).
5. Strategize investigation.
6. Formal comprehensive investigation.
7. Witness interviews.
8. Evidence gathering.
9. Analysis.
10. Finding.

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NOTICE - ACTUAL AND CONSTRUCTIVE 

- In the context of harassment, a school has notice if a responsible employee knew, or in the exercise of reasonable care, should have known about the sexual harassment or violence.
- OCR enforcement of Title IX uses both an actual notice and constructive notice standard because OCR investigations are an administrative enforcement process - different than a civil lawsuit for monetary damages.

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ACTUAL NOTICE



- Individual files a Title IX complaint.
- Individual notifies the Title IX coordinator or other Responsible Employee.
- Individual reports to campus police or security official.
- Staff member witnesses harassment.
- Indirect notice from sources such as flyers posted on campus, media, online postings, or video.

40

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CONSTRUCTIVE NOTICE



- Pervasiveness of the harassment may be enough to conclude that the school should have known of the hostile environment.
- Harassment is widespread, openly visible, or well known to students and/or staff.
- OCR can conclude the institution should have known of incidents of harassment from a report to an employee who had a reporting duty to a supervisor, but failed to do so.

41

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RESPONSIBLE EMPLOYEE




- A **Responsible Employee** includes any employee who:
 - Has the authority to take action to redress the harassment; or
 - Has the duty to report harassment or other types of misconduct to appropriate officials; or
 - Someone a student could reasonably believe has this authority or responsibility;

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


42


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WHEN DO YOU INVESTIGATE? 

- Receive allegations (complaint).
- Actual notice or constructive notice.
- Rumors, gossip, social media, etc. can be notice.
- Once notice exists, the duty to investigate is absolute.
 - Small "i" preliminary inquiry.
 - Big "I" comprehensive investigation.


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PRELIMINARY INQUIRY 



- This is an initial inquiry to determine if a comprehensive investigation is desired or necessary.
- Checking background, obvious patterns, indicia of predatory, violent, or threatening behavior.
- Push one Domino over at a time.
- How much involvement does reporting party want?
- Can we remedy informally or without discipline?
- Give reporting party as much control as possible in the process.
- May help to determine if there is reasonable cause to move process forward, and what policy violations should the responding party be noticed on.

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PRELIMINARY INQUIRY (CONT.) 



- Establish a preliminary timeline for the investigation.
- Investigate all allegations to determine:
 - The extent of the harassment.
 - The acuity of the threat it represents to students or employees.
 - What might be necessary to put an end to it.
- 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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RELUCTANCE TO REPORT



When a reporting party is reluctant to make formal allegations, or returns to withdraw a formal allegation, investigators should honor that request and determine the reason for reconsideration.

- Those reasons involving investigation or hearing process should be addressed by the investigator. Those involving other issues should be addressed by a support person.
- A comprehensive investigation and/or resolution should not automatically involve the reporting party, as it may, in many circumstances, be conducted without that person's involvement, if sufficient independent evidence allows.

46

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RELUCTANCE TO REPORT (CONT.)



- The reporting party should be notified as to their options:
 - That the process will still be available to them, regardless of how long they wait.
 - That the institution will support them in any way it can (e.g., housing, classes, no contact orders, etc.).
 - That, if information is brought to attention of the institution that may involve a threat to community, the school may be forced to proceed with an investigation, but that reporting party will be notified of process.

47

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GATEKEEPING



- As the investigation unfolds, the investigators should determine if there is reasonable cause to believe that policy has been violated.
- If that threshold is reached, the investigators should communicate with the coordinator to ensure a notice of allegation is issued.
- If investigation cannot produce sufficient evidence of reasonable cause, the investigation should end prior to the issuance of the notice of allegation and no hearing should be held.

48

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WHAT IS THE GATEKEEPING FUNCTION AND WHY IS IT ESSENTIAL?



- Whether your goal is equity, due process, essential fairness, equal dignity, or a process infused with the humanity of the participants, it is unfair for responding party to be dragged through a process without substantiating evidence.
- Significant reputational harm can result from allegations of sexual harassment, etc.
- An allegation must be supported by reasonable cause to permit its **full** pursuit.

49

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ALLEGATIONS



- Prepare and deliver the notice of investigation (and possibly notice of allegation, if appropriate) on the basis of the initial inquiry.
 - Notice of investigation should be shared verbally and sent in writing to both the reporting party and the responding party.
 - Notice of allegation should also be shared with both the reporting party and the responding party.
 - Usually given in advance (two days), but interviews without notice are possible if appropriate.

50

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HOW IS NOTICE GIVEN TO THE RESPONDING PARTY?



- Who is the responding party?
 - Student.
 - Staff.
 - Faculty.
 - Visitor (e.g., contractor, invitee, etc.).
 - Visitor (e.g., non-affiliated, guest, etc.).
- How is notice typically provided?
 - Written (i.e., electronic and/or paper).
 - Verbal.

51

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STRATEGY OF INVESTIGATION

- Formal Comprehensive Investigation
- Witness Interviews
- Strategize When to Interview Parties and Witnesses
- Evidence Gathering
- Analysis and Finding

FORMAL COMPREHENSIVE INVESTIGATION

I

- 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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WITNESS INTERVIEWS

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

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STRATEGIZE WHEN TO INTERVIEW PARTIES AND WITNESSES



- 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.
- Strategize notifying the responding party of the report:
 - Immediately upon receipt of the report or notice.
 - In other circumstances, interviewing witnesses and accumulating evidence first may be the best practice.

55

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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.
- Consider verification of evidence.
- Be thorough in your examination of factual, circumstantial, and hearsay evidence, and ensure that all evidence has been examined, and all leads exhausted.



56

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ANALYSIS AND FINDING



- Review the institutional policies that apply.
- List the evidence and what it shows (relevance).
- Evaluate evidence/assess credibility of evidence and witness statements as factual, opinion-based, or circumstantial.
- Make determination or recommendation based on preponderance of the evidence, whether a policy violation is more likely than not.
- Cite concrete reasons for this conclusion in written report.
- Refer allegations and findings to appropriate administrator for implementation, sanctioning, and/or hearing.

57

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INVESTIGATION MODEL: STUDENT CONDUCT AND HR CONTEXTS

- Civil Rights Investigation Model and Student Conduct Model
- Jurisdiction
- Who Should Investigate
- Should There Be More Than One Investigator?
- Team Investigations
- Investigation Team Process Overview
- Notifications
- How is Notice Given to the Responding Party?

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, 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 equalize procedural and support mechanisms.
 - Typically provides a right of appeal for all parties to the report, not just the responding party.

59

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JURISDICTION



- For sexual misconduct/Title IX allegations:
 - There is an expectation that you have **SOME** jurisdiction over off-campus incidents (at least the on-campus effects of off-campus discrimination).
- Jurisdictional limitations:
 - Geographic and temporal.
- When is a student a "student?"
 - Application-Admission-Registration-Attendance-Breaks.
- Control over the harasser and the context of the harassment.
- What about employees outside the scope of employment?

60

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WHO SHOULD INVESTIGATE?



- Investigations of sex discrimination must be impartial, thorough, and reliable.
 - Title IX coordinator.
 - Standing panel of investigators.
 - Human resources or student services.
 - Administrators, faculty.
 - One investigator or two.
 - Outside investigator or legal counsel.
 - Coordinating investigation in multiple processes.

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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 assesses evidence.
- Write a report.
- Make a finding or recommendation (will vary by school).
 - May recommend sanction.

64

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NOTIFICATIONS



- In a civil rights model, notice has many phases, some or all of which may come to pass (equitably):
 - Notice of investigation and/or initial meeting.
 - Post-gatekeeper phase, notice of allegation (report).
 - Post-investigation, notice of hearing (if applicable).
 - Updates of status of investigation (ongoing).
 - Notice of outcome and sanctions.
 - Notice of appeal
 - Notice of final determination.

65

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LEVEL 1 INVESTIGATIONS TRAINING



Day 2

- | | |
|--|---|
| I. Standard of Proof | D. Witness Lists & Flowcharts |
| II. Importance of Investigation Report | VIII. Confidentiality |
| III. Is a Hearing Necessary? | IX. Informal Resolution |
| IV. Promptness & Timelines | X. Remedies |
| V. Role of Campus Law Enforcement | XI. Patterns and Predation |
| VI. Interviewing Skills | XII. Prior Acts |
| VII. Civil Rights Best Practices | XIII. Post-Finding: Sanctions and Appeals |
| A. Incident Timeline | XIV. Investigation Details |
| B. Scheduling | A. Evidence Collection |
| C. Five Documents | B. Questioning Skills |
| | C. Interviewing |

66

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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.
 - **Preponderance of the evidence.**
- Use language the community understands.
 - 50.1% (50% plus a feather).
 - "More likely than not."
 - The "tipped scale."

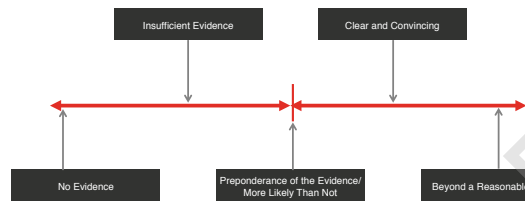
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UNDERSTANDING EVIDENCE THRESHOLDS



EVIDENTIARY STANDARDS



68

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WHO RENDERS THE FINDING?



- Variations in role of decision process.
 - Investigator renders the finding.
 - Investigator recommends the finding to an administrator or hearing panel.
 - Investigator only presents investigation report to administrator or hearing panel without findings.
- Importance of investigation report.

69

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IS A HEARING NECESSARY?



- Only if your policy insists on using the traditional student conduct process or adversarial hearing model.
- Ask if there is a better way to do equity through equity. There is. We conduct interviews in a way that provides superior due process to any hearing.
- In our experience, a well-conducted civil rights investigation results in an accepted finding (no hearing) in between 70-80 percent of cases.
- Hearings can still occur, when necessary, and in a more limited, less adversarial, more efficient fashion.

70

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WHAT ROLE DOES THE INVESTIGATOR PLAY IN AN EVENTUAL HEARING?



- The investigator is the key witness at any hearing.
- The investigation report is admitted as evidence.
- Other witnesses can be called, or the investigator may summarize their testimony instead.
- The investigator can attest to credibility, call attention to discrepancies, and arrange for expert sources of information, as needed.
- The investigator's finding may be introduced but is not binding on the hearing body.

71

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PROMPT TIMEFRAMES FOR RESOLUTION



- The 60-day rule:
 - Could it be less than 60 days?
 - More than 60 days?
 - What about pending criminal/civil matters?
 - This is discussed in detail later
 - What about injunctions?
 - What about Summer break? Winter break? Studying abroad?

72

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TIMELINES 


- Ensure that all steps in the investigation are conducted according to the timelines in the institution's policy.
- 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.
- Document unavoidable delays.
- Notice of extensions.

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ATIXA RECOMMENDED TIMELINE 

- Notice of allegation to Title IX coordinator (clock starts ticking!).
- Title IX eligibility determined (within two business days).
- Assignment to investigation team (within four business days).
- Notice of investigation (varies according to investigation strategy).
- Investigation (within 10–14 business days).
- Shared outcome of investigation (within one to three business days).
- Gatekeeping (ongoing).
- Notice of charge (within two business days of investigation conclusion or during investigation as appropriate).
- Notice of hearing (within two business days of investigation conclusion).

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ATIXA RECOMMENDED TIMELINE 

- Hearing (within five business days of notice of hearing).
- Notice of outcome (within two business days).
- Appeal (within three to five business days).
- Notice of appeal (within one business day).
- Notice of final determination (within seven business days).
- Notice of implementation of remedies/sanctions (no later than 60 +/- days).
 - Sanctions or responsive actions are implemented immediately unless the appropriate administrator stays implementation in extraordinary circumstances, pending the outcome of an appeal.

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ROLE OF CAMPUS LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS



- Can campus law enforcement 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.
- Establish MOUs with campus police and other local enforcement and update annually.
 - The power of the table top exercise.

76

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INTERVIEWING

- Establish Pre-interview Ground Rules
- Demeanor of Investigator(s)
- Interview Skills
- Rapport Building
- Setting Up Reasonable Expectations
- Sharing Information with Parties and Witnesses During Investigation
- Feedback to Witnesses

78


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

ESTABLISH PRE-INTERVIEW GROUND RULES 


- Who will attend?
- How will records be kept?
- Role of Advisors.
- Role of Attorneys.
- Involvement Roommates, Parents, etc.
- FERPA/confidentiality.

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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 to keep party/witness talking.

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INTERVIEW SKILLS 

- General Interview Skills:
 - Outline your interview questions but be flexible.
 - Plan the order of interviews; may be beneficial to interview responding party 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.
 - Explain process, your role as a neutral fact finder, and privacy protections and limitations.

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INTERVIEW SKILLS (CONT.)



- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out because they are afraid of getting into trouble for alcohol/drug use, etc.
- 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 statements about the parties.

82

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INTERVIEW SKILLS (CONT.)



- Pay attention to alcohol/drug consumption and timing of consumption.
- 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, etc.).
- Let parties know you may need to follow up with them as the investigation progresses.
- Recommend that the parties and witnesses not discuss the investigation.
- Discuss non-retaliation.
- Discuss FERPA and privacy issues.

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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 handle the investigation fairly and objectively?
 - Team or peer-led investigations can help create a rapport much easier.

84

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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 reporting and responding parties 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 reporting party and the responding party to ask questions.
- Keep the reporting party in the loop as to exactly when notice will be given to the responding party.

85

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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.
- Explore only those facts that are relevant to the issue at hand.
- Start with broad questions, then move to narrow, more pointed questions.
- It can be difficult for the responding party to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport building.

86

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FEEDBACK TO WITNESSES 

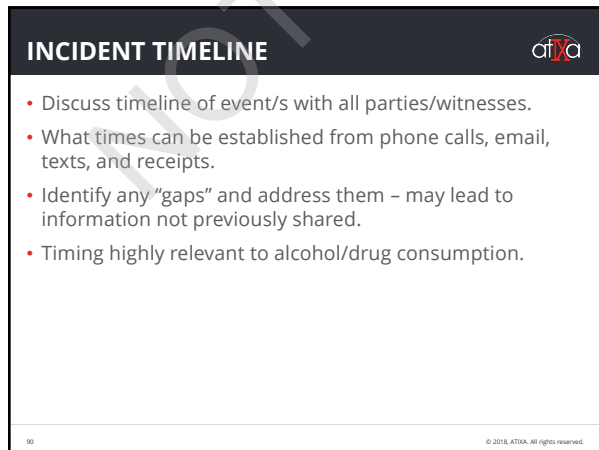
- Witnesses may ask or say:
 - Am I being investigated?
 - What are you really investigating?
 - How will you use the information you are given?
 - Is it confidential?
 - Will I get into trouble by giving you this information?
 - I don't want to cooperate.
 - Do I need my parents/lawyer present during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

87

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INCIDENT TIMELINE (CONT.)



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

91

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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?).
- 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 prepare for the next interview.

92

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THE FIVE DOCUMENTS TO CREATE POST-INTERVIEW



1. Interview transcript in final form (to be verified by witness).
2. Opinions & Perceptions.
3. Future Pointers document.
 - New Witnesses.
 - New Evidence.
 - Future Questions to Ask.
 - Witnesses to Go Back to With New Information.
4. The "Drips" Document.
5. Bulleted Key Takeaways from the Interview.

93

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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 opinions and perceptions documents are incorporated into the report and then generally destroyed.
- 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.

94

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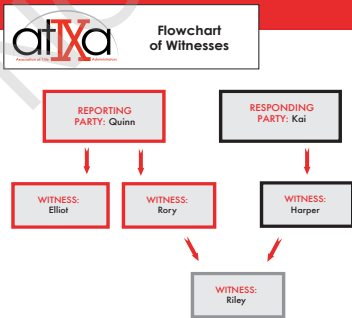
WITNESS LIST AND FLOWCHARTING BEST PRACTICES

- 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.
- In complex cases, use a flowchart to track witnesses the reporting party leads you to, the witnesses responding party 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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WITNESS FLOWCHART SAMPLE



96

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KEEPING POLICY AND PROCEDURE COPIES



- Each party should receive a copy of:
 - The policies alleged to have been violated.
 - The procedures that will be used to resolve the complaint, including the rights that extend to the parties.
- Consider providing parties with your non-retaliation provision.
- The file should contain all policies and procedures currently applicable.

97

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CONFIDENTIALITY OF THE PROCESS



- Privacy of all parties, including witnesses names and the allegations, should be maintained to the greatest extent possible.
- Should you furnish the parties with a copy of the report without redaction or summarizing?
- What advice do we give a reporting party who wants to "share" their story?
- Gag orders and confidentiality conditions (typically not allowed).

98

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CONFIDENTIALITY FOR REPORTING PARTY



- If a reporting party requests that their name not be used:
 - The institution should take all reasonable steps to respond and investigate consistent with that request,
 - So long as doing so does not prevent the school from responding effectively and preventing the harassment of other students/employees or the reporting party.
- The school should explain to the reporting party that:
 - Responsive action may be limited.
 - It cannot guarantee privacy if doing so would jeopardize the safety of the reporting party or others.
- Emphasize that only those with a need to know will be informed.
 - Train those who will be informed about confidentiality expectations.

99

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INFORMAL AND FORMAL RESOLUTION PROCESS



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

- Some minor incidents can be resolved through confrontation and/or intervention.
- More significant discrimination can also be resolved informally, by process in which responding party accepts responsibility, and/or by some forms of ADR or conflict resolution.
 - Mediation is typically not appropriate for sexual assault or violence.

100

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FOCUS ON REMEDIES



- Throughout process:
 - Investigation.
 - Stop behavior (are we rehab facilities?).
 - Remediate impact (often not sanction-based).
 - Prevent re-occurrence:
 - Consider the effect of "educational" sanctions. Second victim is both Title IX and negligence concern.
 - Consider what education/training needs to be implemented, changed, etc.

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INVESTIGATION RECORDS AS SMOKING GUNS IN LITIGATION



- "The File:"
 - The responding party's file.
 - The reporting party's file.
 - The investigation file (including investigation report).
 - Personal case notes.
 - Witness education records.
- Subpoenas:
 - If you get one, call your general counsel!
- Understanding the court process.

102

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THE PREDATORY PERPETRATOR



- It is hard to identify a predator absent evidence of pattern acts.
- We can't profile or base decisions on personality characteristics.
- Still, experienced investigators develop "Spidey sense" that informs their investigations:
 - Sociopathy (Read The Sociopath Next Door, Martha Stout, Ph.D.).
 - Can the responding party empathize?
 - Do they show genuine remorse?
 - Are they able to reflect on how they have impacted another human being?
 - Are their justifications of their actions nothing more than attacks on their accuser?
 - Are they externalizing responsibility, rationalizing or trying to justify abuse?

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PRIOR ACTS AS EVIDENCE



- Previous conduct violations by the responding party are not generally admissible in due process proceedings.
- BUT, they are essential (and legally required) considerations in any civil rights investigation.
- Must be considered as evidence of finding, not just of sanction.
- Previous good-faith allegations, convictions, and campus findings must be considered.
- The entire continuum of violence may establish pattern.

104

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POST-FINDING

- Sanctioning Considerations
- Common Sanctions
- Sanctioning in Sexual Misconduct Cases
- Considerations Post-Finding
- DCL Guidance on Appropriate Remedies
- Sharing of Outcomes
- The Appeals Process

SANCTIONING CONSIDERATIONS



The sanction must be reasonable and reflect the severity of the behavior.

- May consider prior misconduct.
- The role of precedent.
- May consider attitude.
- Should be educational, but safety is primary consideration.
- What best compensates for loss or injury to school or persons.
- Compliant with laws and regulations (e.g.: Title IX).
- Should consider the education impact on the responding and reporting parties.

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COMMON STUDENT SANCTIONS



- Warning.
- Probation.
- Loss of privileges.
- Counseling.
- No contact.
- Residence hall relocation.
- Suspension or expulsion
- Limited access to campus.
- Service hours.
- Online education.
- Parental notification.
- Alcohol and drug assessment and counseling.
- Discretionary sanctions.
- School suspension.
- School 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 is not 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 requirements.
- Conduct a risk assessment audit and mitigation process.

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SANCTIONING IN SEXUAL MISCONDUCT CASES (CONT.)



- **Title IX and case law require:**
 - Bring an end to the discriminatory conduct (Stop).
 - Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct (Prevent).
 - Restore the reporting party as best you can to their pre-deprivation status (Remedy).
- Real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

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CONSIDERATIONS POST-FINDING



- Ensure remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- Take immediate steps to protect reporting parties even before the final outcome of investigation (e.g., no contact orders, etc.).
- Ensure that remedies are equitable.
- Consider restorative justice as part of remedial process.
- Monitor for retaliation and respond immediately to allegations.
- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, and state and federal case law.

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COMMON REMEDIES/SUPPORT

* NOT AN EXHAUSTIVE LIST



- Providing an escort.
- Ensuring reporting party and responding party do not attend the same classes or work in the same space.
- Relocating to a different residence hall.
- Providing counseling services.
- Providing medical services.
- Providing academic support services, such as tutoring.
- Transportation options.
- Offering no-contact orders.
- Arranging for the reporting party to re-take a course/withdraw from a class without penalty.
- Reviewing any disciplinary actions taken against the reporting party to see if there is a causal connection between the harassment and the misconduct and adverse action.
- Holding campus-wide training and education initiatives.

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SHARING OF OUTCOMES



- Title IX requires institutions to apprise reporting parties of the status of investigations, **findings, sanctions** (or remedial actions) **AND THE RATIONALE THEREFORE.**
 - Provide this information in writing and place no conditions on receiving or sharing it.
- FERPA and the Clery Act/VAWA are considered the primary sources of legal provisions for reporting party notification.
 - 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.

113

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THE APPEALS PROCESS



- Equitable.
- One level of appeal.
- Short window to request appeal.
- Grounds for appeal.
- Committee versus individual determination.
- Deference to original hearing authority.
- Remand.

114

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INVESTIGATION DETAILS:

- Evidence Collection and Issues of Concurrent Criminal Action
- General Questioning Skills
- Interviewing the Reporting Party
- Interviewing the Responding Party
- Interviewing Witnesses

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 campus law enforcement/public safety?
- What if there is a pending criminal or civil case?
- What if the responding party threatens to call a lawyer or files a lawsuit?
- What if the reporting party files a lawsuit or complaint with OCR?

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GENERAL QUESTIONING SKILLS



- 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 the what is more likely than not what happened (is that the truth?).
 - Three sides to every story (or more).
- What are NOT the goals of questioning?
 - Curiosity.
 - Chasing the rabbit into Wonderland.

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QUESTIONING GUIDELINES



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

- Engage in a matching process.
 - Ask questions about the allegations and 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.

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THE ART OF QUESTIONING



- Listen carefully and adapt follow-up questions.
- Avoid evaluative responses to a person's answers.
 - E.g.: that's too bad, I'm glad you said that.
- Do not moralize.
- Do not blame the reporting party (often called "victim-blaming").
 - E.g.: Why didn't you hit him? Why didn't you leave? Why did you get so drunk?
 - Reporting parties' responses to trauma are quite varied.
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "fooled around," and "had a few drinks."

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INTERVIEWING THE REPORTING PARTY



- 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 story without asking questions, then drill down on details.
- Ask about outcry witnesses and possible documentation such as blogs or journals.

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INTERVIEWING THE REPORTING PARTY (CONT.)



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

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INTERVIEWING THE REPORTING PARTY (CONT.)



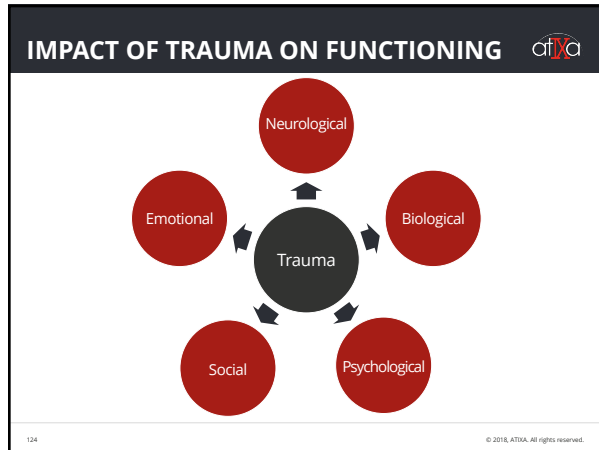
- Remedies Issues:
 - Notify of their option to report to police; institution will help facilitate report.
 - Emotional, academic, and/or physical impact.
 - Counseling and advocacy options (on and off-campus).
 - Retaliation - prohibition and to whom to report.
- Interim Remedies:
 - No-contact orders.
 - Course adjustments.
 - Housing adjustments.


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TRAUMA INFORMED INTERVIEWING

- Sexual Assault as Trauma
- Considerations for Interviewing




THE BRAIN'S RESPONSE TO TRAUMA 

In response to the anticipated trauma of sexual assault, hormones are released into body which 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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INTERVIEWING CONSIDERATIONS 

- Be cognizant of why someone may have responded in a "counterintuitive" manner.
- Be mindful that recall is often difficult and slow following trauma.
- Use non judgmental/non-blaming language.
- Avoid re-traumatization (but must still ask necessary questions).
- Prioritize developing rapport and building trust.
- Emphasize transparency and predictability.

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A TRAUMA INFORMED RESPONSE ALSO: 

- Promotes safety.
- Recognizes the impact of trauma on a cognitive, physical, psychological, emotional, and neurobiological level.
- Understands how trauma can impact one'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.

127

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WHAT MIGHT SHUT A REPORTING PARTY DOWN 

- Unsupportive responses.
- Avoid:
 - Taking control any more then you have to.
 - Escalating the situation.
 - Defining or labeling a reporting party's experience.
 - Asking why questions.
 - "Why did you . . . ?"
 - Verbalizing judgment in the moment.
 - Telling reporting party they must press charges.

128

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INTERVIEWING THE RESPONDING PARTY 

- Acknowledge difficulty of the situation and thank the responding party for meeting with you.
- Provide a copy of your policies and procedures.
- Ask the person to share a complete account of what occurred.
- Question the responding party as to the allegations – ask a combination of open and closed ended questions.
- Get detailed – do not leave a question unanswered.
- Ask about witnesses and any other relevant information.
- Ask about possible motivation for complaint.

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INTERVIEWING THE RESPONDING PARTY (CONT.)



- Let the responding party know next steps and when you will be in touch.
- Discuss counseling options if the individual is not already connected.
- Discuss non-retaliation and any intermediary steps such as no-contact orders, housing moves, and exclusions.
- If interim suspension/action is employed, review the terms and provide a timeframe.
- Encourage the person to maintain privacy of the investigation.

130

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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.
- Ascertain relation to the other parties in the case.
- Ask questions, and address the need for complete truthfulness.
- 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 (CONT.)



- Ask if they have been contacted already by one of the parties.
- Ask if they have made any previous statements, such as to private investigators.
- 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.

132

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