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.

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Association of
Title IX Administrators

K-12 Civil Rights Investigator Two

Training & Certification Course

Albemarle County Public Schools

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.

CONTENT ADVISORY

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 Title IX practitioners encounter in their roles including slang, profanity, and other graphic or offensive language.

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AGENDA

1. Overview of the Title IX Process
2. Interviewing Skills
3. Challenging Witnesses
4. Trauma-Informed Interviewing
5. Questioning Skills
6. Issue Spotting

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AGENDA

7 Helpful Investigation Documents

8 Understanding Evidence and Credibility

9 The ATIXA Consent Construct

10 The Investigation Report

11 What Happens After the Formal Investigation?

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TITLE IX NOTICE OF PROPOSED RULEMAKING 2022

TITLE IX REGULATIONS

- Congress passed Title IX of the Education Amendments in 1972
- Since 1980, the Department of Education's Office for Civil Rights (OCR) has had primary responsibility for enforcing Title IX
- November 2018: OCR proposed the most detailed and comprehensive Title IX regulations to date[1]
- August 2020: Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- June 2022: OCR published the Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations
- On July 12, 2022, the NPRM was published in the Federal Register and the 60-day comment period began

[1] U.S. Office of the Federal Register, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance,* https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal

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NPRM PROCESS TIMELINE

- Official publication in the Federal Register July 12, 2022
- Review and comment period
  - 60-day comment period ended September 12, 2022
  - Submit comments to the Department of Education's Office for Civil Rights (OCR)
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023
- Watch for ATIXA webinars and other opportunities ☺
- There will be a separate NPRM for Athletics

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PREPARING FOR IMPLEMENTATION

- Must continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new 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
- 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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OVERVIEW OF THE “TITLE IX PROCESS”

- The Process
- Role of the Investigator
- 10 Steps of an Investigation

THE PROCESS

- Complaint or Notice to TIX Coordinator
- Strategy development

Following a formal complaint

- Jurisdiction?
- Dismissal?
- Policy violation implicated?
- Emergency Removal?
- Reinstatement to another process?
- Informal, administrative, or formal resolution?

- Notice to Parties
- Identification of witnesses
- Interview scheduling
- Evidence collection
- Investigation report drafted
- Evidence & draft investigation report shared
- Investigation report finalized

- Exchange of written questions and responses
- Determination
- Sanction?
- Remedies

- Standing?
- Vacate?
- Remand?
- Substitute?

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ROLE OF THE INVESTIGATOR

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

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10 STEPS OF AN INVESTIGATION

1. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
2. Notice of Investigation/Notice of Formal Allegation(s) to Parties (NOIA)
3. Establish investigation strategy
4. Formal comprehensive investigation
   - Witness interviews
   - Evidence gathering
5. Draft investigation report
   - Gather evidence
   - Assess credibility and evidence
   - Synthesize areas of dispute/agreement and all questions asked

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10 STEPS OF AN INVESTIGATION (CONT.)

6. Meet with Title IX Coordinator (and/or legal counsel) to review draft report and evidence
7. Provide all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
8. Revise (as needed) and finalize the investigation report
   - Gather, assess, and synthesize relevant evidence
9. Meet with Title IX Coordinator (and/or legal counsel) to review final investigation report
10. Send final report to Decision-maker and parties/Advisors for review and written response at least 10 days prior to Decision-maker making their determination of responsibility

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

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INVESTIGATION SKILLS

- Interviewing Skills
- Working with Challenging Witnesses
- Trauma-Informed Interviewing
- Questioning Skills

INTERVIEWING SKILLS

- Interview Skills
- Rapport Building
- Investigator Demeanor
- Interviewing the Parties
- Interviewing Witnesses

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INTERVIEW SKILLS

- Explain the process, your role as a neutral fact-finder, and applicable privacy protections and limitations.
- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out (i.e., alcohol/drug use). Explain amnesty policy (if applicable).
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Ascertain who the individual is and their relation to the other parties and witnesses to the complaint.

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INTERVIEW SKILLS (CONT.)

- Take the allegations from start to finish through a process of broad to narrow questions and issues that need to be addressed.
- Focus on areas of conflicting evidence or gaps in the information.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.
- Don’t be accusatory or argumentative. You don’t decide whether policy was violated and should have no real stake in the outcome.

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INTERVIEW SKILLS (CONT.)

- Be cognizant of the difference between what is “believed” (conjecture) and what was “witnessed” (facts)
- Let parties/witnesses know you may need to follow up with them as the investigation progresses
- Document whether individual is cooperative or resistant

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RAPPORT BUILDING

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

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INVESTIGATOR DEMEANOR

- 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 a party/witness is talking
- Ask questions in a straightforward, non-accusatory manner
- Nod affirmatively and use active listening skills to prompt or keep the party/witness talking

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INTERVIEWING THE PARTIES

- Provide the parties with a copy of your policies and procedures
  - Be sure the 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
- Explain what information will be shared with the other parties and witnesses
- Explain why you are taking notes and/or ask for permission to record, if applicable
- Provide ample opportunity for the parties to ask questions
- Keep parties informed of steps in process

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INTERVIEWING THE PARTIES (CONT.)

- Ask if they have any witnesses or other relevant information they want to share with the Investigator
  - What will witnesses likely say/know?
- Discuss non-retaliation and any steps regarding any supportive measures that have been put into place (e.g., no-contact orders, housing moves, etc. (if applicable))
- Provide ample opportunity for the parties to ask questions
- Keep parties informed of steps in process and let them know that you may need to follow-up with them
- Ask parties to contact you if they remember anything else or want to add to their interview

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INTERVIEWING THE COMPLAINANT

- Acknowledge difficulty of reporting and thank them
- Acknowledge that they may have told this story multiple times already
- Ask them to share a complete account of what occurred
  - Have them give full narrative without asking questions, then drill down on details
- Ask about outcry witnesses and others they may have spoke to about the incident
  - What will witnesses likely say/know?
- Ask about possible documentation such as blogs or journals

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INTERVIEWING THE COMPLAINANT (CONT.)

- Ask what the Complainant's motivation for reporting is and what they hope to see as a result
- Find out if their academics and/or work have been affected
- Ask how the incident has affected them emotionally and/or physically

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INTERVIEWING THE RESPONDENT

- Acknowledge difficulty of the situation and thank the Respondent for meeting with you
- Ask them to share a complete account of what occurred
- Question the Respondent about each allegation
  - Ask a combination of open-ended and closed-ended questions
  - Get detailed – do not leave a question unanswered
- Ask about possible motivation for the allegation(s)

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INTERVIEWING THE RESPONDENT (CONT.)

- Provide support and resources throughout the process as needed
  - Discuss counseling options and other supportive measures if they are not already connected
- If emergency removal is employed, review the terms and provide a timeframe

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INTERVIEWING WITNESSES

- Discuss privacy and FERPA guidelines – specifically inform them that what they share will be disclosed to the parties
- It may be helpful to not label the allegations as “sexual misconduct” or “sexual harassment” but to describe the behavior neutrally
- Ascertain relation to the other parties in the matter
- Address the need for complete truthfulness
- Ask for opinions
- Ask if any party spoke about the reported incident(s) after they occurred
  - Did they see any change in behavior in one or more parties after the reported incident(s)?

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INTERVIEWING WITNESSES (CONT.)

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

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INTERVIEWING WITNESSES (CONT.)

- 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.
  - I don't want to get anyone else in trouble.
  - Do I need my parents/lawyer present during interview?
- Anticipating these questions and/or covering them in advance can help to ensure that you establish good rapport, which should help you get the truth.

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INTERVIEW SCHEDULING

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

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CHALLENGING WITNESSES

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

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DIFFICULT WITNESSES

Set the tone:

- Thank them for meeting with you
- Review your role as a neutral fact-finder
- Put them at ease – ask about them without being phony
- Acknowledge any hesitation/awkwardness as normal
- Review retaliation against a witness
- Review amnesty
- Review confidentiality
- Review expectation of truthfulness

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LYING WITNESSES

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

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RESISTANT AND QUIET WITNESSES

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

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OTHER CONSIDERATIONS

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

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TRAUMA-INFORMED INTERVIEWING

- Considerations for Interviewing

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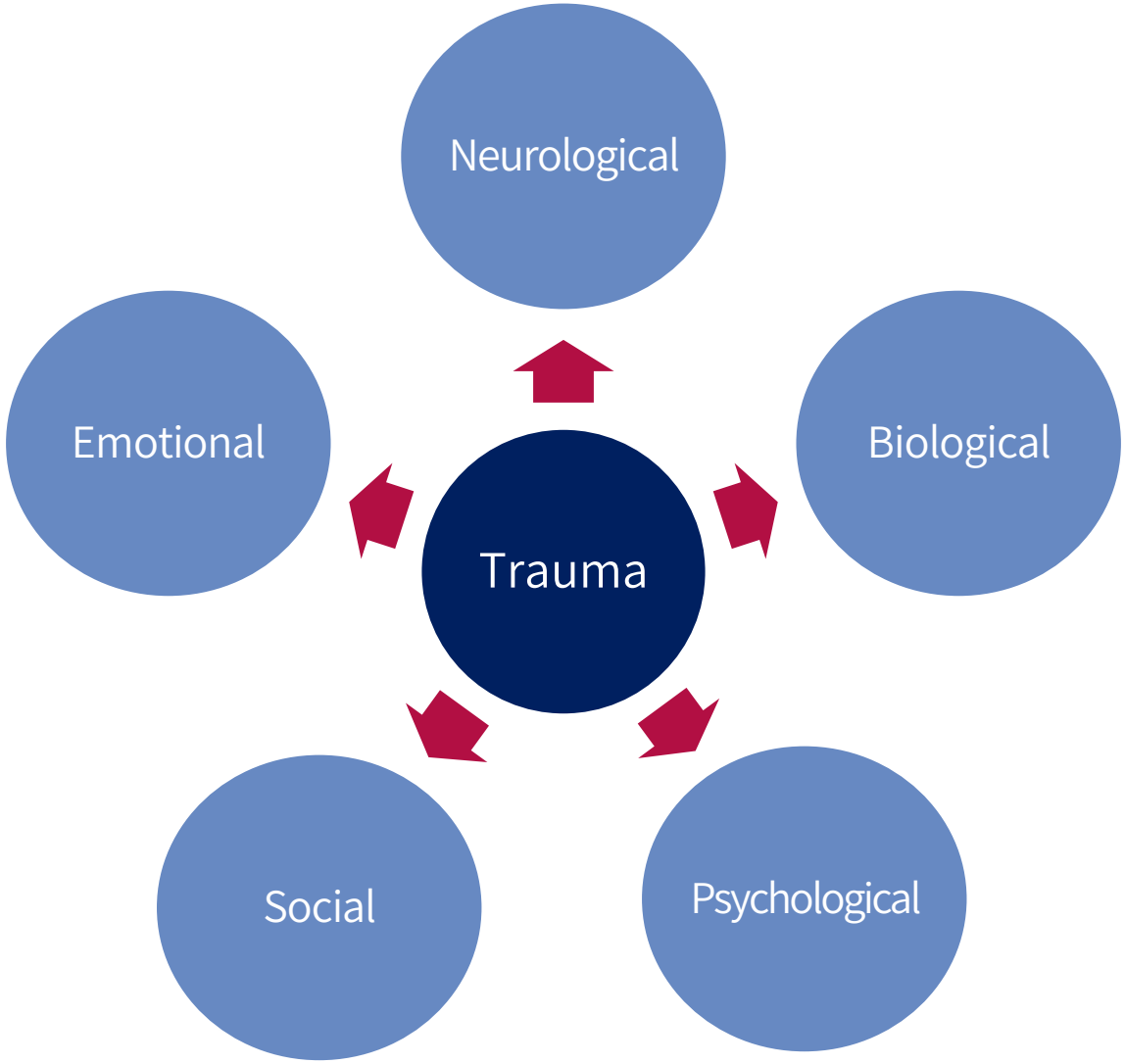
IMPACT OF TRAUMA ON FUNCTIONING



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THE BRAIN'S RESPONSE TO TRAUMA

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

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

This is a neurobiological response, not a choice.

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TRAUMA-INFORMED INTERVIEWING

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

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TRAUMA-INFORMED INTERVIEWING (CONT.)

- Use Cognitive Interviewing to aid recall (learn more about this in Investigator Four Certification)
- It does NOT mean that you cannot or do not gather evidence that may call into question the credibility of the interviewee

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TRAUMA-INFORMED INTERVIEWING

Avoid:

- Unsupportive responses
- Taking control more then you have to
- Escalating the situation
- Defining or labeling a party's experience
- Asking why questions (i.e., "Why did you . . . ?")
- Verbalizing judgment in the moment
- Using trauma as a substitute for evidence or basis to assess credibility
  - Trauma doesn't prove anything in terms of a policy violation

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QUESTIONING SKILLS

- Goals of Questioning
- Types of Questions
- Questioning Exercise

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GOAL OF QUESTIONING

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

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GOAL OF QUESTIONING (CONT.)

Consider before asking questions:

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

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TYPES OF QUESTIONS

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

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TYPES OF QUESTIONS (CONT.)

- Have a purpose for asking every question
- Ask questions about the allegations, the evidence, and the policy elements
- Start with broad questions, then move to narrow, more pin-pointed questions
- It can be difficult for the Respondent to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport-building
- Be sure to ask a question, not make a speech
- Listen carefully and adapt follow-up questions

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TYPES OF QUESTIONS (CONT.)

- If you ask a bad or blaming question, take it back
- If you say something inappropriate, apologize
- Avoid evaluative responses to a person's answers unless needed to establish rapport, draw someone out, or convey empathy
  - e.g.: "That's too bad;" or "I'm glad you said that"
- Do not moralize
- Drill down on timelines and details
- Ask specific questions bout alcohol/drug consumption and timing of consumption, if relevant

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TYPES OF QUESTIONS (CONT.)

- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as “hooked up,” “drunk,” “sex,” “fooled around,” “had a few drinks,” “was acting weird.”
- Be cautious with questions that invite parties to second-guess their actions, as this may be perceived as blaming. The questions may be fair game, but it’s all in how you ask them.
- Don’t leave a question or gap unanswered.
- Ask who else you should talk to and ask for any relevant documentation (i.e., texts, emails, etc.)

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QUESTIONING EXERCISE

Please critique the following questions:

1. When you did (X), what effect do you think that had on the other party?
2. What was the purpose of your behavior?
3. Did you sign the student handbook form at the beginning of the school year?
4. First, do you know what consent means? Second, why did you continue to touch him when he seemed like he didn't want you to?
5. What could you have done differently in this situation?
6. How would you like it if someone did that to you?
7. Do you think you have any responsibility for what happened?

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ISSUE SPOTTING

Considerations

Case Study

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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CASE STUDY: TRAVIS AND JUSTIN

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CASE STUDY: 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 changing their clothes, and Justin put his hand on Travis's back. The second time Justin asked, he appeared to be drunk and got in Travis's personal space at a school dance. The third time, Justin walked up next to Travis in the locker room 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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CASE STUDY: TRAVIS AND JUSTIN

- You were just assigned to be the investigator for this complaint and were given this statement from Travis. Based upon the information in this statement:
- Evaluate the available facts
- Identify the issues and related evidence (available and still needed)

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HELPFUL INVESTIGATION DOCUMENTS

- Notetaking
- Incident Timeline
- Documenting Questions
- Witness Lists and Flowcharting
- Post-Interview Documents
- 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
- Capture key quotations
- Document any refusal to answer, evasion, or refusal to participate
- Keep notes regarding what the Complainant, Respondent, and witnesses are told

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NOTETAKING (CONT.)

- You may want to summarize perceptions of credibility
  - Recognize, however, that notes and evidence may be subject to review
- 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
- Review and finalize notes immediately upon completion of interview

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INCIDENT TIMELINE

- Discuss timeline of event(s) with all parties/witnesses
- Obtain as much detail as possible
- Indicate which times can be corroborated by phone calls, emails, texts, receipts, etc.
- Identify any “gaps” and address them – may lead to information not previously shared
- Timing highly relevant in complaints involving
  - Alcohol/drug consumption
  - Physical evidence such as bruising, bite marks, etc.
  - Stalking and/or verbal, online sexual harassment cases where times of communication between parties may be important

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INCIDENT TIMELINE (CONT.)

- Establishing a reliable timeline can be useful when questioning witnesses and searching for video footage

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DOCUMENTING QUESTIONS

- Questions the Investigator(s) asked the parties and witnesses should be documented and included as an appendix to the investigation report
  - Did any interviewees decline to answer any specific questions?
- Questions suggested by parties should be documented and included as an appendix:
  - Were they asked “as is”?
  - Were they re-phrased? If so, why?
  - Were they rejected? If so, why?

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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. Include reasoning.
- In complex cases, use a flowchart to track witnesses the Complainant leads you to, the witnesses Respondent leads you to, and the witnesses who are neutral.
- Note in the flowchart where witnesses intersect in terms of relationships to each other and/or potential loyalties to parties.

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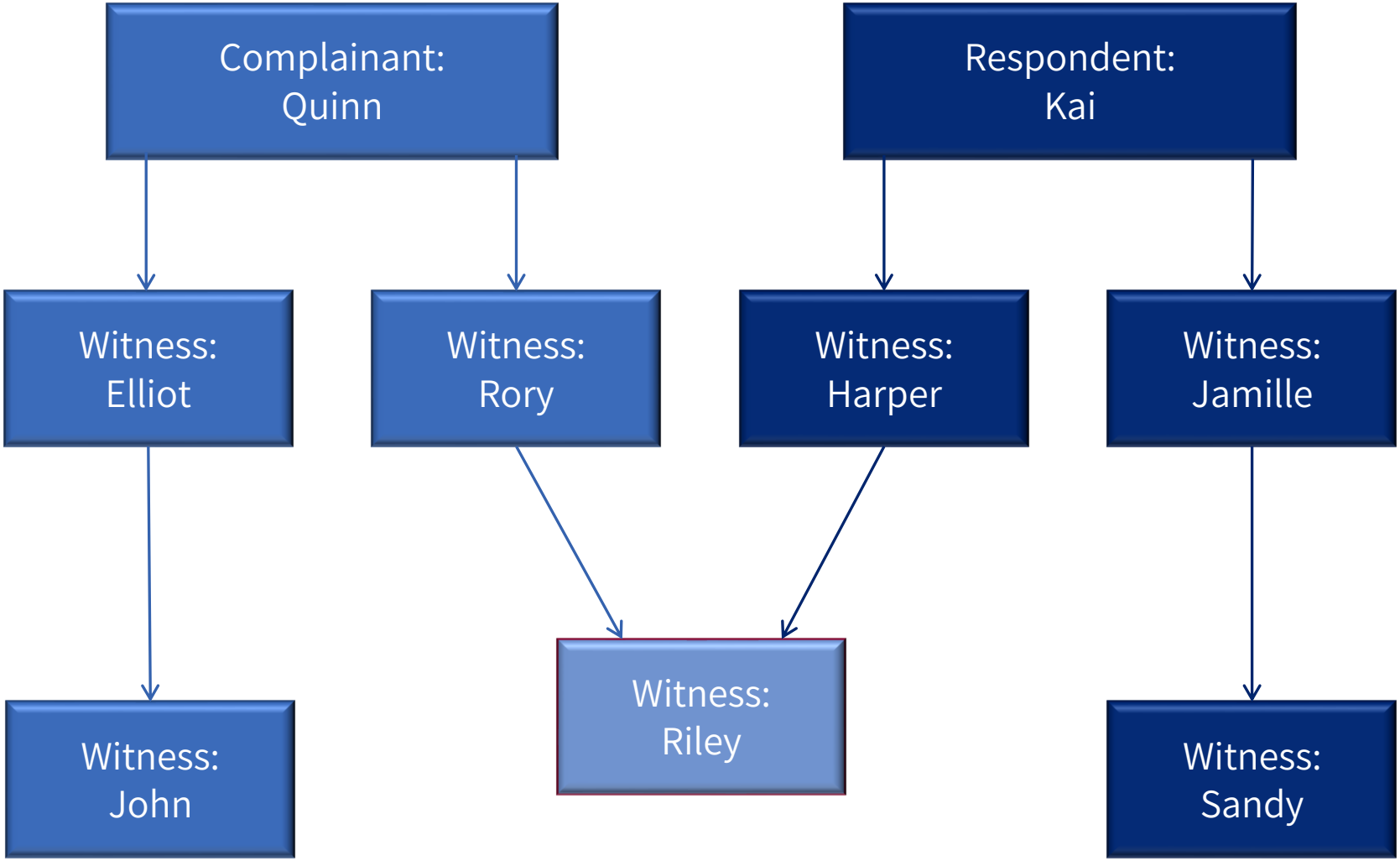
WITNESS FLOWCHART SAMPLE



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DOCUMENTS YOU MAY WANT TO CREATE POST-INTERVIEW

1. Interview Transcript in Final Form (to be verified by interviewee)
   - Full interview transcripts go into the evidence file
2. Future Pointers Document
   - New witnesses
   - New evidence
   - Future questions to ask
   - Witnesses to go back to with new information
     - Kept in the file, as a final checklist of investigation completeness

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DOCUMENTS YOU MAY WANT TO CREATE POST-INTERVIEW (CONT.)

3. Bulleted Key Takeaways from the Interview
   - Included in the report; no need to keep that document, but it can be kept in the file

Note: Consider the record retention requirements in the 2020 Title IX regulations

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COMPREHENSIVE FILE

Title IX Coordinator should maintain:

- Supportive measures and interim action correspondence and documents
- Emergency Removal documents (if applicable)
- Communication regarding informal resolution (if applicable)
- Signed releases of information for Advisors
- Advisor Non-Disclosure Agreement (if applicable)
- Dismissal information (if applicable)
- Allegations of bias or conflict of interest and response

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INVESTIGATION FILE

Investigator should maintain:

- Copies of the policies and procedures in place at the time of the incident and at the time of the investigation
- Notice of Investigation and Allegations (NOIA)
  - All subsequent NOIA updates
- File for each party and witness
  - Approved interview transcripts
  - Associated evidence (e.g., screenshots, written statements)
  - Correspondence with the Investigator(s)
- Other collected evidence (log)

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INVESTIGATION FILE (CONT.)

- Background information (education, employment, etc.)
- Witness flowcharts
- Investigator notes
- Timelines for incident and investigation
- Contact log

Subpoenas: If you get one, call your legal counsel!

Understand the court process and your role in it. The documentation of your investigation is largely admissible in court, and you're a witness to it.

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RECORDKEEPING

- Under the 2020 Title IX Regulations, 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, parents/guardians, judge, jury, public

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UNDERSTANDING EVIDENCE AND CREDIBILITY

- Review of Evidence
- Review of Three Buckets of Evidence
- Credibility Assessments

EVIDENCE

- No restrictions on discussing case or gathering evidence
- Equal opportunity to:
  - Present witnesses, including fact and expert witnesses
  - Present evidence, including inculpatory and exculpatory evidence
  - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence that may be offered, except must be relevant and respect “rape shield” and privilege provisions

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UNDERSTANDING EVIDENCE

Investigators gather and assess different types of evidence for relevance and credibility:

- Documentary evidence (e.g., supportive writings or documents)
- Electronic evidence (e.g., photos, text messages, and videos)
- Real evidence (i.e., physical objects)
- Direct or testimonial evidence (e.g., personal observation or experience)
- Circumstantial evidence (i.e., not eyewitness, but compelling)

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UNDERSTANDING EVIDENCE (CONT.)

- Hearsay evidence (e.g., statement made not from personal observation or experience but presented as important information)
- Character evidence
- Impact/Mitigation statements (typically only considered relevant in sanctioning)

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BUCKET 1: RELEVANT EVIDENCE

- Evidence is relevant when it tends to prove or disprove an issue in the complaint
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 2 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers within the investigation report via secure technology

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BUCKET 2: DIRECTLY RELATED, BUT NOT RELEVANT EVIDENCE

- Evidence is directly related when it is connected to the complaint but is neither inculpatory nor exculpatory and will not be relied upon in the investigation report
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 1 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers in a separate file via secure technology

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BUCKET 3: NEITHER RELEVANT NOR DIRECTLY-RELATED EVIDENCE

- Evidence should be maintained by the Investigator(s) but disregarded for purposes of the process
- Parties/Advisors/Decision-makers don't get to know about it
- Redact from evidence files shared with the parties/Advisors/Decision-makers

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CREDIBILITY ASSESSMENTS

- What is Credibility?
- Factors to Consider for Credibility

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WHAT IS CREDIBILITY?

- Primary factors: corroboration and consistency
- Accuracy and reliability of information
- Decision-makers must determine the credibility of testimony and evidence, and hence its reliability
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading may impact credibility
- Avoid too much focus on irrelevant inconsistencies
- Source + content + plausibility
- Credibility assessment may not be based on a person’s status as a Complainant, Respondent, or Witness

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CREDIBILITY

Inherent Plausibility

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

Motive to Falsify

- Do they have a reason to lie?

Corroboration

- Aligned testimony and/or physical evidence

Past Record

- Is there a history of similar behavior?

Demeanor (use caution!)

- 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

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?
- Is the statement consistent with the evidence?

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FACTORS TO CONSIDER FOR CREDIBILITY

Inherent Plausibility (Cont.)

- 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 or witness 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

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
- Can include contemporaneous witness accounts
  - More “separate” the witness, greater the credibility boost

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FACTORS TO CONSIDER FOR CREDIBILITY

Corroborating Evidence (Cont.)

- 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

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
- Use caution; past violations do not mean current violations

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FACTORS TO CONSIDER FOR CREDIBILITY

Demeanor

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

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ATIXA CONSENT CONSTRUCT

- 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?

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity.

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?

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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
- Can include physical violence, threats, intimidation, coercion
- Consider the impact of power dynamics

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INCAPACITY

2. Was the Complainant incapacitated? If so, did the Respondent know or should have known?

- 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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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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THE INVESTIGATION REPORT

- G.A.S. Framework
- Sharing the Evidence and Report

THE INVESTIGATION REPORT

- Investigators must create an investigation report that fairly summarizes all relevant evidence
- Under the 2020 Title IX regulations, Investigators may or may not assess credibility with or without rendering conclusions or making findings related to credibility but will help to roadmap where Decision-makers should look for information critical to a determination
  - ATIXA advises that Investigators make credibility assessments instead of credibility determinations
- The regulations also allow Investigators to include a recommended finding of responsibility in the investigation report
  - ATIXA advises against Investigators including a recommended finding in the investigation report

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THE INVESTIGATION REPORT

- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses
  - Results of interviews with experts (if any)
  - Summary of other information collected (i.e., information from police reports including pretext calls medical exams, video surveillance, and photographs; copies of text, email, and social networking messages; etc.)
- G.A.S. framework
- The supplemental “bucket” to the report

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G.A.S. FRAMEWORK

To draw a clear line between investigation and decision-making functions, Investigators should follow the G.A.S. Framework for investigations and reports:

- **Gather** evidence
- **Assess** credibility and evidence
- **Synthesize** areas of dispute/agreement and all questions asked

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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 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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CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS

- Indicate where the Decision-maker should look without rendering 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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IMPORTANCE OF THE REPORT

- Decision process:
  - Investigator refers the investigation report to the Decision-maker(s) **without** determination
  - Investigator ≠ Decision-maker
- Importance of investigation report
  - Highlight the relationships between different pieces of evidence
    - Contradictory, corroborating, (in)consistencies, etc.
  - The Investigator's opinion is not controlling, but they want to point the Decision-makers toward decisive or corroborating evidence without telling them how to interpret it

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EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
  - Be sent to each party and Advisor
  - Be in an electronic format or hard copy
  - Include evidence upon which the Recipient does not intend to rely
  - Include exculpatory and inculpatory evidence
  - Be made available at any hearing
- **Best practice:** Provide the draft investigation report at the same time.
- After sending the evidence, the investigator must:
  - Allow 10 days for written response
  - Consider response prior to completion of report

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EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2

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

- The final Investigation Report summarizing relevant evidence must be sent:
  - To each party and Advisor
  - In an electronic format or hard copy
  - For the parties' review and written response
- **Best Practice:** Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties
- For K-12 schools, with or without a hearing, this review is followed by, or in conjunction with, the exchange of relevant written questions and responses facilitated by a Decision-maker

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WHAT HAPPENS AFTER THE FORMAL INVESTIGATION?

- Who Renders the Determination?
- Questioning (and Optional Hearing)
- Standard of Evidence
- Sanctions & Remedies
- Appeals
- Finality of Determination
- Communicating Outcomes

WHO RENDERS THE DETERMINATION?

- Decision process:
  - Investigator refers investigation report to Decision-maker without determination
  - Investigator ≠ Decision-maker
  - Coordinator ≠ Decision-maker
- Importance of investigation report
  - How much credibility assessment and analysis to include?
    - Goal is balance; serve the content up on a silver platter, but the Investigator is just composing ingredients; the chef prepares the final dish.
  - Investigator's opinion is not controlling, but they want to point the Decision-maker toward decisive or corroborating evidence without telling them how to interpret it

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QUESTIONING BY DECISION-MAKER (AND OPTIONAL HEARING)

- **Live hearing not required** for K-12 (unless already required by state law, district policy, board policy, etc.)
- **Live cross-examination not required** for K-12 (unless already required)
  - Questioning may be conducted indirectly through the Decision-maker
- Parties must be given opportunity to submit written questions for the other party and all witnesses, provide each party with the answers, and allowed additional, limited follow-up questions from each party

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QUESTIONING BY DECISION-MAKER (AND OPTIONAL HEARING) (CONT.)

- Investigator should avoid off-line discussions of complaint with any of the Decision-makers, as it could give the perception of bias/conflict (although the OCR says this is not prohibited)
- The Decision-maker may need to speak with the Investigator to get clarification of information in the investigation report or evidence file

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STANDARD OF EVIDENCE

- Current industry standard is preponderance of the evidence
- The OCR says Recipients must now apply either the preponderance of the evidence standard or the clear and convincing evidence standard
- Standard of evidence must be consistent for all formal complaints of sexual harassment, regardless of policy or underlying statutory authority
- Must also apply the same standard of evidence for complaints against students as for complaints against employees, including teachers and administrators

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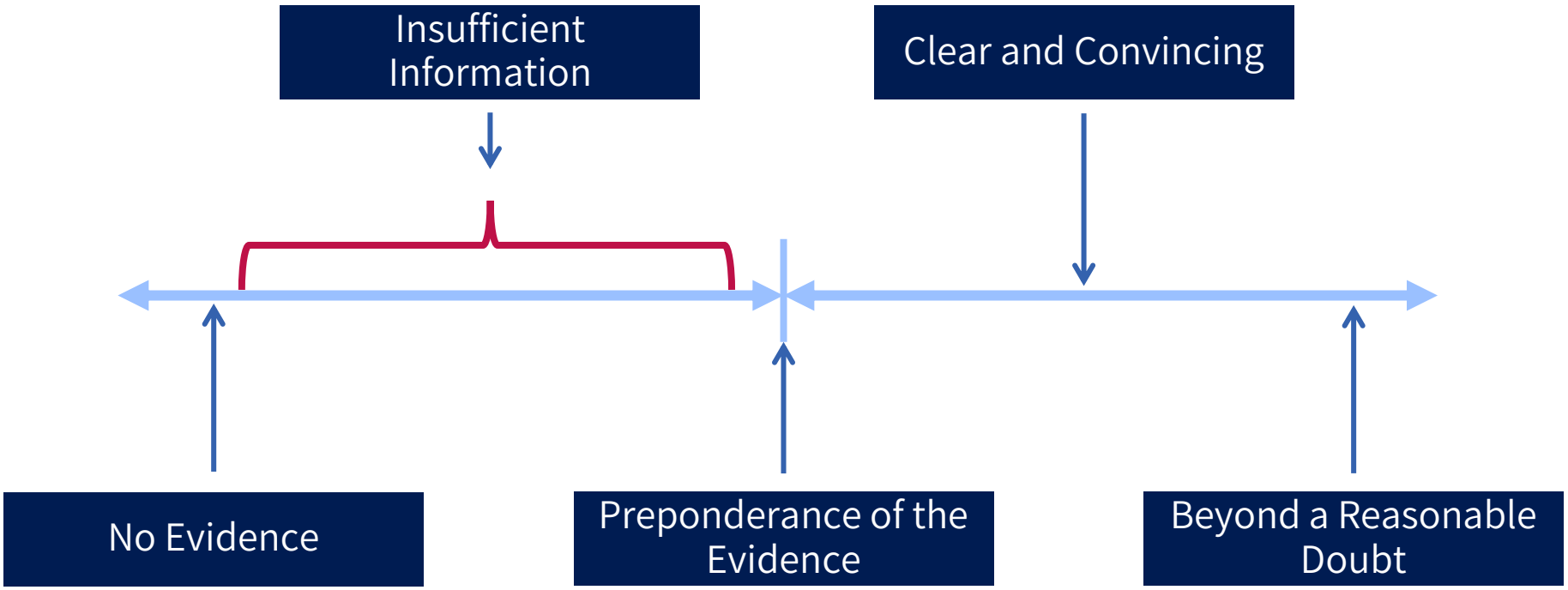
EVIDENTIARY STANDARDS



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SANCTIONS AND REMEDIES UPON DETERMINATION OF RESPONSIBILITY

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

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THE APPEAL PROCESS

- Appeals are mandatory under the Title IX regulations
  - Three required grounds for appeal, although Recipients may add additional grounds
- Equitable
- Clearly communicated to parties
- One level of appeal is best practice
- Defined window of time to request appeal
- Committee versus individual determination preferred
- Deference to original Decision-maker

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THE APPEAL PROCESS (CONT.)

- The Appeal Decision-maker(s) may remand a matter to the Investigator or consult with the Investigator on the appealability of certain elements of the file, report, or testimony

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FINALITY OF DETERMINATION

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

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COMMUNICATING OUTCOMES

Title IX regulations require Recipients to apprise parties of the:

- status of investigations
- outcome of the determination, any sanctions and remedies provided and the supporting rationale
- outcome of any appeal with the supporting rationale

- Recipient must provide this information in writing and place no conditions on receiving or sharing it
- FERPA cannot be construed to conflict with or prevent compliance with Title IX

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Questions?

Thanks for joining us today.

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