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Virginia Tech Title IX Training

January 10 & 11, 2024

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TNG Strategic Risk Management Solutions





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.

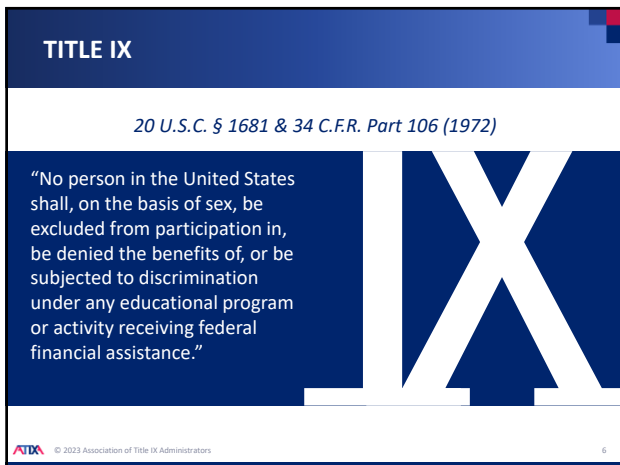
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CONTENT ADVISORY

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





THE IX COMMANDMENTS

INVESTIGATION (plus <u>prompt</u> & <u>fair</u> per VAWA Sec. 304)	Thorough	Reliable	Impartial
PROCESS	Prompt	Effective	Equitable
REMEDIES	Act reasonably to stop discrimination	Act reasonably to prevent recurrence	Act equitably to remedy effects

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EQUALITY
requires a level playing field that doesn't yet exist

The journey starts by asking those affected how they see and are impacted by the conditions, rules, and resources.



EQUITY
acknowledges systemic impediments with targeted fixes



JUSTICE
eliminates systemic barriers



AGENCY
individuals know that access is their right

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LEARNING BASIS FOR TITLE IX LITIGATION

- Title IX Cases
- Intersection of Title VII and Title IX
- Title VII and Title IX Interrelationships
- Title IX Investigations

9

GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

- Case involved teacher/student sexual harassment
- U.S. Supreme Court created high standard that students must meet to prevail on a sexual harassment claim against Recipients when an employee/student consensual relationship claim basis
- Court said individuals cannot recover monetary damages against a 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

GEBSER V. LAGO VISTA INDEP. SCHOOL (CONT.)

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.**”

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

DAVIS V. MONROE COUNTY BD. OF ED. (CONT.)

526 U.S. 629 (1999)

Finding in favor of Davis, the Supreme Court expanded on Gebser :

- 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.

DAVIS V. MONROE COUNTY BD. OF ED. (CONT.)

526 U.S. 629 (1999)

- 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.**”

INTERSECTION OF TITLE VII AND TITLE IX

- Title IX was 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 sex-based discrimination in the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention, or treatment of employees.
- Individuals can use both statutes to pursue the same violations.
- OCR’s 2020 Title IX regulations create extensive due process protections for at-will employees accused of misconduct.

TITLE IX AND TITLE VII INVESTIGATIONS

- Consider intersections of:
 - Role of institutional equity/AA/EOP officer
 - Human resources/faculty/teachers
 - Coordinator of school/campus conduct
 - Athletics
 - Public safety/SRO/Law enforcement
- Oversight of deputy coordinators/Investigators
- Effect of Title IX regulations' sexual harassment definition
- Coordination of remedies in student/employee and employee/student grievance processes
- What happens when employee is a student or student is an employee?

"PROCESS A" OR "PROCESS B"?

- Due Process is at the heart of OCR's 2020 Title IX regulations. However, the Regulations effectively create two distinct processes for responding to sex-based discrimination. (see ATIXA's 1P2P model)
 - Limiting jurisdictional language and definitions of Sexual Harassment mean that "Process A" (Compliant with 34 C.F.R. § 106.45) **only** applies when that language and those definitions are met.
 - If **any** of the allegations meet the definitions under 34 C.F.R. § 106.30, then the "Process A" must be followed.

"PROCESS A" OR "PROCESS B"? (CONT.)

- If **none** of the allegations meet the definitions or jurisdictional limitations under 34 C.F.R. § 106.30, then you would follow "Process B," which meets the requirements of fundamental fairness or due process, but likely does not have some of the more prescriptive requirements of Section 106.45 (e.g., mandatory live hearing, cross-examination requirements, requirement for both parties to sign off on informal resolution)
- VAWA Section 304, state law, and case law in your jurisdiction will largely dictate your "Process B."

DUE PROCESS: CURRENT ISSUES

Due Process is at the heart of OCR's Title IX regulations.

- Applies to both public and private Recipients
- Standard of Evidence
- Requirements for "Emergency Removal"
- Detailed notice of investigation and allegations (NOIA)
- Investigation report and evidence for review/response
- Live hearing with cross-examination mandatory for Higher Ed; optional for K-12
- Advisor involvement (possibly including attorneys)
- Bias by Coordinators, Investigators, Decision-makers, etc.
- Biased and/or insufficient training; materials transparency

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TITLE IX COORDINATOR OVERVIEW

- Investigation Process
- Policy Investigation
- Informal Investigation
- Investigator

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THE TITLE IX TEAM

- Title IX Coordinator (TIXC)
- Deputy Coordinators
- Investigators
- Decision-maker(s)
 - Policy Violation
 - Appeal
- Informal Resolution Facilitator(s)
- Advisors

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TIXC: SUPERVISOR OF THE INVESTIGATION STRUCTURE

The Title IX Coordinator is responsible for:

- Appointment/engagement of Investigators
- Training Investigators and Decision-makers (policy and appeal)
- Supervision of Investigators and investigations
- Helping Investigators develop investigation strategy
- Coordinating supportive measures
- Timeline compliance
- Communication and coordination of investigation teams
- Providing institutional memory to Investigators
- Retaining records of all activities
- May be an Investigator but may not be a Decision-maker
- May serve as a hearing facilitator if no substantive role

TIXC: SUPERVISOR OF THE INVESTIGATION PROCESS

Title IX Coordinator or designee is responsible for:

- Documenting complaint
- Initial assessment
- Determining extent/footing/nature of investigation
- Notice of investigation and allegations (NOIA)
- Notice of hearing
- Reviewing/transmitting the Decision-maker's written determination
- Coordinating any duty to warn
- Assurance of supportive measures/remedies
- Recordkeeping of all activities

BIAS – REGULATIONS

- The Title IX Coordinator, Investigator, Decision-maker, or any person designated by a Recipient to facilitate an informal resolution process must not:
 - Have a conflict of interest or bias for or against Complainants or Respondents generally, or
 - For or against an individual Complainant or Respondent
 - Bias and conflict of interest by Investigators that impact the outcome are grounds for appeal

Let's explore both bias and conflict of interest. What do these mean?

WHAT ARE BIAS AND PREJUDICE?

<p>Bias</p> <ul style="list-style-type: none"> ▪ A preference or tendency to like or dislike ▪ A cognitive process ▪ A thought process developed over time through repeated personal experience ▪ Implicit or explicit ▪ Formed from stereotypes, societal norms, cultural experience, expectations of the people around you 	<p>Prejudice</p> <ul style="list-style-type: none"> ▪ A preconceived opinion that is not based on fact, reason, or actual experience ▪ Can be classified as cognitive prejudice, affective prejudice, and conative prejudice ▪ Can include injury or damage as a result of some judgment or action of another in disregard of one's legal rights
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COMMON FORMS OF BIAS WITHIN INVESTIGATIONS

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

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IMPACTS OF BIAS WITHIN INVESTIGATIONS

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

COMMON FORMS OF PREJUDICE WITHIN INVESTIGATIONS

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

IMPACTS OF PREJUDICES WITHIN INVESTIGATIONS

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

**BIAS AND PREJUDICE
COMMON IDENTITIES IMPACTED**

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

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CONFLICTS OF INTEREST

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

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MITIGATING BIAS, PREJUDICE & CONFLICTS OF INTEREST IN INVESTIGATIONS

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

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

- Anticipate questions about Investigator credentials/bias at the hearing
- When bias is disqualifying, fix it right away. Don't let it fester.
- Develop an appeal process that can address bias



NOTICE/ACTUAL KNOWLEDGE – REGULATIONS

Actual knowledge:

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

ACTUAL KNOWLEDGE

- Individual notifies the Title IX Coordinator or “official with authority to institute corrective measures” (OWA)
 - Deans?
 - Conduct staff?
 - Recipient police or campus safety?
- What about K-12?
 - All employees
- What about Responsible Employees?
 - ATIXA recommends Recipients require all employees to report, unless confidential. Preferred term is Mandated Reporter.

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

NOTICE/ACTUAL KNOWLEDGE – REGULATIONS (CONT.)

What is required after **Actual Knowledge**?

- A prompt response that is not deliberately indifferent
 - Outreach to Complainant
 - Optional supportive measures
 - Take wishes of Complainant into account
 - Information about how to file a “formal complaint”

FORMAL COMPLAINT – REGULATIONS

Formal Complaint:

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

WHEN DO YOU INVESTIGATE?

- Upon receipt of a formal complaint, investigation is required
- What about misconduct that is open and obvious to OWAs?
- What about rumors, gossip, social media, etc.?
 - Discretionary, but often recommended
 - OCR may not think these create an obligation for formal action, but will courts agree?
- Anonymous reports

WHEN DOES TITLE IX APPLY?

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

WHEN DOES TITLE IX APPLY?

Jurisdiction

- Covered Programs (all programs)
- Jurisdictional Limitations
 - Geographic
 - Temporal
- When is a student a “student”?
 - Application-Admission-Registration-Attendance-Breaks
- When is a Complainant “participating in or attempting to participate in the Recipient’s education program or activity”?
- When is an employee an employee?

WHEN DOES TITLE IX APPLY?

Jurisdiction for Off-Campus Incidents:

- When sufficient Recipient control is established
- Or when the off-campus conduct has an in-program effect that meets the definition of 34 C.F.R. § 106.30
- If Title IX jurisdiction is not present, the behavior could still violate:
 - Institutional harassment/discrimination policies
 - Student Handbook/Conduct policies
 - Technology/Acceptable Use policies
 - Employee Handbook/policies
 - Professionalism standards

JURISDICTION FOR OFF-CAMPUS INCIDENTS

- Mandatory jurisdiction means Title IX applies
 - Requires application of regulations
 - Other policies may also apply
 - Collateral misconduct
- Discretionary jurisdiction means the Recipient may address incidents occurring off-campus or on non-school owned/controlled property
 - Under other policies or codes of conduct
 - Outside of the Title IX process

MANDATORY DISMISSAL – FOUR GROUNDS

The Title IX Coordinator MUST dismiss a complaint at any time during the investigation or hearing:

- 1) If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in the Title IX regulations even if proved, and/or
- 2) If the conduct did not occur in the Recipient’s education program or activity,* or
- 3) If the conduct did not occur against a person in the United States, or
- 4) If at the time of filing a Formal Complaint, a Complainant is not participating in or attempting to participate in the Recipient’s education program or activity, and based on the available information, the Title IX Coordinator has determined that they do not need to sign a Formal Complaint on behalf of the Recipient

DISCRETIONARY OR PERMISSIVE DISMISSAL

The Title IX Coordinator MAY dismiss a complaint if at any time during the investigation or hearing:

- 1) If a Complainant notifies the Title IX Coordinator in writing that the Complainant would like to withdraw the formal complaint or any allegations; and/or
- 2) If the Respondent is no longer enrolled or employed by the Recipient; and/or
- 3) If specific circumstances prevent the Recipient from gathering evidence sufficient to reach a determination regarding the formal complaint or any allegations.

NOTICE OF DISMISSAL


- Upon a mandatory or permissive dismissal, the Title IX Coordinator should promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties
 - Dismissal is appealable
 - May reinstate the complaint under another provision of the Recipient’s code of conduct or other applicable resolution procedures

INITIAL ASSESSMENT IN SUMMARY



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

INITIAL ASSESSMENT IN SUMMARY



If proceeding under Title IX:

- Establish basis of investigation
 - Incident or pattern, and/or climate/culture
- Establish a preliminary timeline for the investigation
- If no formal action, document all actions taken
- Responding to anonymous reports:
 - Determine if a trend or pattern may be apparent
 - Can you identify parties?
 - Duty to attempt some form of remedial response, even to an anonymous report

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REQUESTS FOR CONFIDENTIALITY

If a Complainant requests confidentiality and/or does not want the institution to investigate:

- The Complainant should be notified of the following:
 - The process will still be available to them, regardless of how long they wait
 - The institution can provide resources and supportive measures to limit the effect of the behavior on the Complainant
 - If information is brought to the attention of the institution that may involve a threat to the community, the institution may be forced to proceed with an investigation, but that the Complainant will be notified of this process

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REQUESTS FOR CONFIDENTIALITY (CONT.)

- The institution's responsive action/remedial abilities may be limited based on the level of confidentiality or privacy requested by the Complainant
- Privacy cannot be guaranteed if doing so would jeopardize the safety of the Complainant or others
- Only those with a need to know will be informed
- If the Respondent is an employee, the institution may need to proceed due to Title VII

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REQUESTS FOR CONFIDENTIALITY (CONT.)

- The institution should take all reasonable steps to respond consistent with the Complainant’s request
 - Provided that doing so does not prevent the Recipient from responding effectively and preventing the harassment of other students or the Complainant
- Use the PPTVWM analysis to determine whether to honor a Complainant’s request for confidentiality
- Proceeding without a Complainant’s participation has due process implications for the Respondent

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PPTVWM

- Title IX Coordinator may need to file a formal complaint if any of the following are present:
 - **PPTVWM**
 - Pattern
 - Predation
 - Threat
 - Violence/Weapon
 - Minors (will always be reported to proper authorities)

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PPTVWM (CONT.)

- Factors to consider:
 - Additional complaints of sexual harassment involving the same Respondent
 - Whether the sexual harassment was committed by multiple individuals
 - Whether the Respondent has a prior history of violence
 - Whether the report reveals a pattern of behavior at a given location or by a particular group
 - Whether the Respondent threatened further sexual harassment or violence against the Complainant or others
 - Whether a weapon facilitated the sexual harassment
 - Age of the Complainant (incidents involving minors will always be reported to proper authorities)

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PPTVWM (CONT.)

- Factors to consider:
 - Whether the Recipient possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence)
- If the Recipient proceeds, it should notify the Complainant and utilize appropriate supportive measures to protect them

SUPPORTIVE MEASURES

- Provided to all parties throughout the process:
 - Non-disciplinary, non-punitive
 - Individualized
 - Restore or preserve equal access
 - Without unreasonably burdening other party
 - Protect safety of parties or environment, or deter sexual harassment
- Remedy on behalf of community, not just parties
- If supportive measures not provided, document why not

SUPPORTIVE MEASURE EXAMPLES

- | | |
|---|--|
| ▪ Counseling and/or health service referral | ▪ Altering work arrangements for employees or student-employees |
| ▪ Employee Assistance Program referral | ▪ Providing campus safety escorts |
| ▪ Visa and immigration assistance | ▪ Contact limitations (no contact orders) |
| ▪ Student financial aid counseling | ▪ Academic support, extensions of deadlines, or other course-related adjustments |
| ▪ Community or community subgroup education | ▪ Increased security and monitoring of certain areas |
| ▪ Altering housing assignment | ▪ Trespass, Persona Non Grata, or Be on the Lookout (BOLO) orders |
| ▪ Safety planning | |
| ▪ Transportation assistance | |
| ▪ Timely warnings | |

EMERGENCY REMOVAL

- Individualized risk and safety analysis
- Immediate threat to health or safety
- Due Process requires opportunity to challenge removal, usually after it is implemented
 - May allow equitable participation of Complainant, unless the decision does not directly relate to Complainant
- Does not apply to non-student employee administrative leave
- Emergency Removal decisions may be made at any point and include decisions to remove from any educational program or activity

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INVESTIGATION PHILOSOPHY

- The burden of proof and the burden of gathering evidence rest on the Recipient, not the parties
 - This is likely not a change from current investigation requirements
 - Affirmative consent standards do not shift this burden, but that is a common misunderstanding of how affirmative consent standards work.
- Title IX regulations require a stated presumption of the Respondent being “not responsible”

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“REASONABLY PROMPT” TIMEFRAMES FOR GRIEVANCE PROCESS

60-90 days to resolution is a good guide for more complex cases in higher education

- Timeline starts from notice, not from the incident itself
- No set requirement other than to have prompt, designated timeframes in your procedures
- Goal is to avoid undue delay
- For K-12, the timeframe will be much shorter.
- What about injunctions?
- What about Summer break? Sabbatical? FMLA? Winter break? Studying abroad?

TIMELINES

- Ensure that all steps in the investigation are conducted according to the timelines in the Recipient’s procedures.
 - Procedures should provide some flexibility at the discretion of the TIXC.
- Parties and witnesses should be interviewed as soon as possible:
 - Ensures that recollections are as fresh and accurate as possible
 - Not before Notice of Investigation and Allegations (NOIA)

TEMPORARY DELAYS/EXTENSIONS

- Examples of good cause
 - Absence of a party
 - Absence of a party’s Advisor
 - Concurrent law enforcement activity
 - Language assistance
 - Accommodation of disabilities
- If an extension is granted, all parties must be notified in writing as to the extension and rationale

INFORMAL RESOLUTION PROCESS

The OCR endorses and encourages informal resolution, and it is an effective practice, when voluntary.

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

FORMAL COMPREHENSIVE INVESTIGATION

- Commence a thorough, reliable, impartial, prompt, and fair investigation
 - Determine the strategy for the investigation
 - Witness interviews
 - Evidence gathering
 - Intended timeframe to complete the investigation
 - Evidence review
 - Report writing and review
- Complete the investigation without unreasonable deviation from the timeline

PRIVACY – REGULATIONS

Additional permissions from the parties required for:

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

INVESTIGATION RECORDS

- “The File”:
 - The Respondent’s file
 - The Complainant’s file
 - The investigation file (including evidence)
 - Personal case notes
 - Witness education records
- Investigation Report
- Contact Log

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INCIDENT TIMELINE

- Timeline of event(s)
- Include as much detail as possible
- What times can be established from phone calls, email, texts, and receipts?
- Identify any “gaps” and address them – may lead to information not previously shared
- Timing is highly relevant to alcohol/drug consumption in cases where consent may be an issue

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INCIDENT TIMELINE (CONT.)

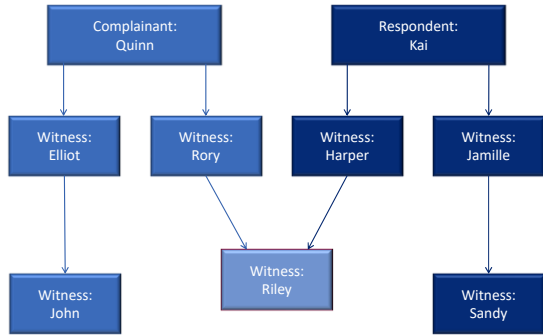
- Timing also highly relevant in cases involving physical evidence such as bruising, bite marks, etc.
- In stalking and/or verbal, online sexual harassment cases, times of communication between parties may be important
- Establishing a reliable timeline useful when questioning witnesses such as bartenders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

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WITNESS LIST AND FLOWCHARTING BEST PRACTICES

- Keep an updated list of 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

WITNESS FLOWCHART SAMPLE





QUESTIONING CONSIDERATIONS

- Understand 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
- What are the goals of questioning?
 - Learn the facts
 - Establish a timeline
 - Understand each party’s perception of what happened
- NOT the goals of questioning:
 - Curiosity
 - Chasing the rabbit into Wonderland

QUESTIONING CONSIDERATIONS (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?

QUESTIONING CONSIDERATIONS (CONT.)

- Have a purpose for asking every question.
- Be sure to ask a question, not make a speech.
- Don’t be accusatory or argumentative. You don’t decide the allegations and should have no real stake in their outcome.
- Don’t make questions too long or confusing.
- If you ask a bad or blaming question, take it back.
- If you say something inappropriate, apologize.

QUESTIONING GUIDELINES

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

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

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TYPES OF QUESTIONS

<p>Use</p> <ul style="list-style-type: none"> ▪ Open-ended Questions <ul style="list-style-type: none"> ▪ Tell us...who, what, how? ▪ Closed-ended Questions <ul style="list-style-type: none"> ▪ Did you, were you? ▪ Use infrequently, but when needed to drill down on a specific issue. 	<p>Avoid</p> <ul style="list-style-type: none"> ▪ Compound Questions <ul style="list-style-type: none"> ▪ I have two questions. First..., Second... ▪ Multiple Choice Questions <ul style="list-style-type: none"> ▪ Were you a), b), c)...? ▪ Leading Questions <ul style="list-style-type: none"> ▪ Isn't it the case that...?
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RESTATE/REFRAME

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

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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"
 - Empathy vs. sympathy
- Do not moralize or sanitize
- 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.

INTERVIEW GUIDELINES

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

CONDUCTING INTERVIEWS

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

CONDUCTING INTERVIEWS (CONT.)

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

CONDUCTING INTERVIEWS (CONT.)

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

CONDUCTING INTERVIEWS (CONT.)

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

IMPACT OF NON-PARTICIPATION

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

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

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IMPACT OF NON-PARTICIPATION (CONT.)

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

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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 your goal when you offered to take them home?
- 3) What were you thinking when you went into their room?
- 4) Do you feel like you had too much to drink?
- 5) Do you remember the training session we did on Title IX and consent and harassment?
- 6) I have a couple of questions: First, could you tell they were incapacitated?; and second, why did you give them another drink when they already appeared to be really drunk?

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QUESTIONING EXERCISE

- 7) If you were in this situation again, what would you do differently?
- 8) Did you have any expectations when you got back to the apartment?
- 9) How would you feel if you were the other party?
- 10) How would you like if someone did this to you?
- 11) Do you think you have any responsibility for what happened?
- 12) What clear words or actions gave you consent?

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TRAUMA-INFORMED INTERVIEW

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IMPACT OF TRAUMA ON FUNCTIONING

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graph TD; T((Trauma)) --> N((Neurological)); T --> B((Biological)); T --> P((Psychological)); T --> S((Social)); T --> E((Emotional));
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THE BRAIN’S RESPONSE TO TRAUMA

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

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

This is a neurobiological response, not a choice.

TRAUMA-INFUSED RESPONSE

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

TRAUMA AND 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)
- Use Cognitive Interviewing to aid recall (learn more about this in Investigator Level Four Certification)

TRAUMA AND INTERVIEWING (CONT.)

Avoid:

- Unsupportive responses
- Taking control any more than is necessary
- 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



LIVE HEARING

- A live hearing, whether with a panel or an administrator, is required by OCR for Higher Ed.
 - Hearing is optional for K-12. Report review is followed by exchange of relevant written questions and responses facilitated by Decision-maker.
- Hearings facilitate the parties' ability to review all available evidence and ask questions of witnesses and each other.
- Can the hearing be waived?
- Investigators should be prepared to be subjected to cross-examination at the hearing.
- Avoid off-line discussions of case with any of the Decision-makers.

WHAT ROLE DOES THE INVESTIGATOR PLAY IN A HEARING?

- The Investigator is often a key witness at any hearing
- The investigation report is admitted as evidence
- The Investigator may be questioned and subjected to cross-exam by all parties' Advisors
 - Why did you decide some evidence relevant; other evidence was not?
- The Investigator's opinions regarding credibility and responsibility should not influence the hearing, so questions about the Investigator's opinions should be avoided; Investigators should not volunteer, and Decision-makers should not probe for, this information



THE APPEAL PROCESS

- Appeals are mandatory under the Title IX regulations
- Equitable
- Clearly communicated to parties
- One level of appeal is best practice
- Defined window of time to request appeal
- Three clear grounds for appeal (though Recipients may add others)
- Committee versus individual determination preferred
- Deference to original hearing authority
- Remand

THE ROLE OF THE INVESTIGATOR IN APPEALS

- If something about the investigation or report is appealed
- If you are claimed to have:
 - Had a conflict of interest, AND/OR
 - Been biased or prejudiced, AND
 - Exhibited that bias or conflict in a manner that significantly affected the outcome or sanction, THEN
- You should prepare a response memo and submit it to the Appeal Decision-maker or gatekeeper

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FINALITY OF DETERMINATION

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

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Questions

