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Association of  
Title IX Administrators

# Empire Beauty School Title IX Training Fall 2023

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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.

# 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.

# AGENDA

- 1 Title IX Team Roles & Responsibilities
- 2 Title IX Overview
- 3 When Does Title IX Apply?
- 4 Coordinating Overlap in Various Grievance Processes
- 5 Point Person for Complaints
- 6 Coordinating Informal Resolution

# AGENDA

7 Beginning the Investigation

8 Evidence

9 Pre-Interview Considerations

10 Meeting with the Parties

11 Questioning Skills

12 Trauma-Infused Interviewing

# AGENDA

**13** Meeting with Witnesses

**14** The Investigation Report

**15** Coordinating the Decision-Making Stages

**16** Ensuring Compliance with Final Sanctions

**17** Coordinating Appeal Processes



# **TITLE IX NOTICES OF PROPOSED RULEMAKING 2022 & 2023**



# TITLE IX REGULATIONS

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

# NPRM PROCESS TIMELINE

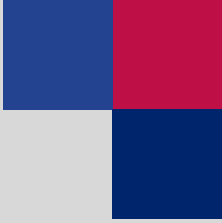
- **July 2022:** NPRM published in the Federal Register and the 60-day public comment period began
- **September 2022:** Review and comment period ended
  - Received 240,000+ comments
- **April 2023:** OCR published a separate NPRM outlining proposed changes to the Title IX regulations focused on gender identity and athletic participation; 30-day public comment period
  - Received 150,000+ comments
- **October 2023 – Sometime in 2024:** Anticipated publication of both the sexual harassment and athletics Title IX Final Rules
- **OCR has not yet announced an implementation deadline or timeline for either set of new regulations.**

# PREPARING FOR IMPLEMENTATION

- Continue to fulfill obligations under the current regulations for the start of the 2023-2024 academic year.

## Steps to Take Now:

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



# **TITLE IX TEAM ROLES & RESPONSIBILITIES**

# THE TITLE IX TEAM

- Title IX Coordinator(s)
- Deputy Coordinator(s)
- Investigator(s)
- Decision-Makers—can be a single Decision-maker or a panel of Decision-makers
  - Policy Violation
  - Appeal
- Informal Resolution Facilitator(s)
- School-appointed Advisors

# TITLE IX TEAM STRUCTURE: ADDITIONAL CONSIDERATIONS

- Co-Coordinator?
- Job responsibilities of Deputy Coordinators
  - Tailor scope and roles based on school/campus culture
  - Delegation
- Multiple campuses/locations
- Investigator oversight

# THE TITLE IX COORDINATOR

- Recipients are required to designate at least one co-worker as the “Title IX Coordinator”
- Administrator with significant authority and wide-ranging responsibilities
- Affects change across many departments
- Some institutions will allocate part-time responsibilities to the Coordinator while others will dedicate a full-time position
- Title IX Coordinator has become a profession within the field of civil rights compliance

# TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES

- Create and implement appropriate policy and procedures
- Navigate First Amendment protections
- Point person for reports and complaints
- Contact for government inquiries
- Oversight of prompt and equitable grievance procedures
- Coordinate overlap of various Future Professional and co-worker grievance processes
- Oversight of informal resolution processes
- Supervise investigations



# TITLE IX COORDINATOR: ROLES AND RESPONSIBILITIES (CONT.)

- Ensure compliance with final sanctions & remedies
- Coordinate appeal process
- General Title IX compliance oversight
- Compliance with requirements to stop, prevent, and remedy
- Training oversight
- Oversight of athletics gender equity (if applicable)
- Section 504 disability compliance oversight (if applicable)

# 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 relevant evidence

# ROLE OF THE DECISION-MAKER(S)

- Determine whether institution's policy has been violated based upon the applicable standard of evidence
  - Decisions must be based upon an independent assessment of the evidence gathered during the investigation and/or provided during a hearing, to include an assessment of the credibility of the parties and witnesses
  - Decisions must be based on the specific policy alleged to have been violated
  - Decisions must be impartial and free of substantive bias
- Determine appropriate sanctions/discipline when a policy violation is found
- Draft a written determination that outlines the rationale for the finding(s)

# ROLE OF THE APPEAL DECISION-MAKER

- Make determination on a party's request for an appeal
- Review written submissions from parties
- May review investigation report or other evidence gathered during investigation/hearing
- May need to speak with Investigator, Decision-maker, parties, or witnesses
- Review of case should be limited to the grounds noted in the appeal request
  - Not a *de novo* review
- Draft a written determination that outlines the rationale for the outcome

# ROLE OF INSTITUTION-APPOINTED ADVISORS

- Parties have the right to have an Advisor of their choice to assist them throughout the process, to include attending any meetings and interviews
- No mandate to provide an Advisor to the parties at the outset of the process
- If party does not have an Advisor at the hearing, the institution must provide an Advisor to conduct the cross-examination on behalf of the party during the live hearing
- Must be provided at no cost to the party
- No mandate to train Advisors however, it is advisable to do so for all institution-appointed Advisors

# TIX TEAM TRAINING REQUIREMENTS

- Robust training mandates
- Coordinators, Investigators, Decision-makers, Appeal Decision-makers, Informal Resolution Facilitators
- Training materials cannot include sex stereotypes; should promote impartiality
- Training materials must be maintained for seven years and posted publicly on Recipient's website

# REQUIRED TRAINING TOPICS

- Definition of sexual harassment
- Scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Use of any technology to be used at a live hearing

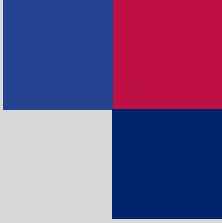
# REQUIRED TRAINING TOPICS (CONT.)

- Issues of relevance for both questions and evidence, including when questions and evidence about the Complainant's prior sexual behavior is not relevant
- Issues of relevance regarding the creation of an investigation report that fairly summarizes relevant evidence
- **Note:** The OCR sets the minimum training requirements and institutions should conduct training that covers a broader range of topics



# PUBLICATION OF TRAINING MATERIALS

- Make all materials used to train Title IX Coordinators, Investigators, Decision-makers, and any person who facilitates an informal resolution process publicly available on the Recipient's website, or if the Recipient does not maintain a website, the Recipient must make these materials available upon request for inspection by members of the public
  - The most recent materials used to train the Title IX Team should be posted
  - Although seven years of materials need to be maintained, only the most recent need to be posted
  - This requirement is not retroactive; seven years started August 14, 2020



# TITLE IX OVERVIEW

- The Law
- The IX Commandments
- Equality v. Equity

# TITLE IX

*20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)*

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”



# THE IX COMMANDMENTS

## INVESTIGATION

(plus prompt & fair 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



## EQUALITY

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



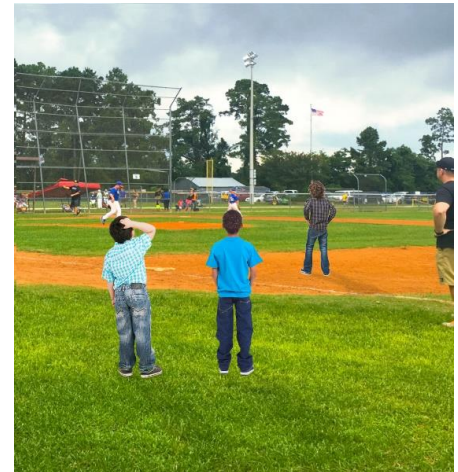
## EQUITY

*acknowledges systemic impediments with targeted fixes*



## JUSTICE

*eliminates systemic barriers*



## AGENCY

*individuals know that access is their right*

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

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



# WHEN DOES TITLE IX APPLY?

- Personal Jurisdiction
- Covered Programs
- Geographic Jurisdiction
- Subject Matter Jurisdiction
- When Title IX Does Not Apply
- Group Discussion

# WHEN DOES TITLE IX APPLY?

- Regulations emphasize the *Davis* standard - Title IX applies, and jurisdiction is required, when the Recipient has:
  - Control over the harasser (Respondent) AND control over the context of the harassment
  - “Education program or activity” includes...
    - locations, events, or circumstances under substantial control



# WHEN DOES TITLE IX APPLY?

## Personal Jurisdiction

- At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the Recipient's education program or activity.
  - The OCR adopts a fairly broad definition of what could constitute “attempting to participate”
  - Can include alumni, prospective FPs/co-workers, etc.

# WHEN DOES TITLE IX APPLY?

## Personal Jurisdiction (Cont.)

- When is a Future Professional a “student”?
  - Upon **application**? Once **admitted**? Once **registered**?  
What about breaks?
- When is a co-worker an “employee”?
- What if a Future Professional withdraws or a co-worker quits?

# WHEN DOES TITLE IX APPLY?

## Personal Jurisdiction (Cont.)

- If Respondent is **not** affiliated with the institution in any way, the institution **lacks authority** to take disciplinary action
  - E.g.: Employee of an outside company (e.g., vendor, construction worker); guest or invitee; prospective FP; former FP; former co-worker; student from another institution

# WHEN DOES TITLE IX APPLY?

## Covered Programs

- All programs run by a federal funding Recipient
- It does not matter whether the program receives federal funding, all institutional programs are covered
- All programs using facilities of the funding Recipient

# WHEN DOES TITLE IX APPLY?

## Geographic Jurisdiction

- Sexual Harassment and Discrimination cases
  - Must be dismissed if did not occur against a person in the United States, but...
    - Contrary case law
  - There is NO expectation that you exercise jurisdiction over off-site/off-campus incidents UNLESS
    - The property is owned or controlled by the school OR
    - The property is being used for a program or event sponsored by the school OR
    - The property is owned or controlled by an organization recognized by the school

# WHEN DOES TITLE IX APPLY?

## Geographic Jurisdiction (Cont.)

- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- Other forms of liability may still apply and the PPTVWM analysis may come into play here
- The Recipient may still be taking discretionary jurisdiction over incidents off-campus or on non-school property, but under other policies, not Title IX (Process B, perhaps)

# WHEN DOES TITLE IX APPLY?

## Subject Matter

- Sexual Harassment as defined in the 2020 Title IX regulations
- Sex/Gender discrimination (Equity)
  - OCR recently noted this includes sexual orientation and gender identity (based on biological sex) following Supreme Court's *Bostock* case
- Any other policy violation that is sex/gender-based that causes a discriminatory effect (e.g., hazing, bullying, arson, vandalism, theft)
- Pregnant and parenting discrimination
- Retaliation

# WHEN DOES TITLE IX APPLY?

## Subject Matter (Cont.)

- Limitations:
  - Actions/conduct/speech protected by **academic freedom**
  
  - Actions/conduct/speech protected by the **First Amendment**.
    - Merely offensive conduct cannot be disciplined at a public school
    - Must be **severe, pervasive, and objectively offensive**



# IF TIX JURISDICTION IS NOT PRESENT

- Behavior could still violate and be addressed under:
  - Institutional harassment/discrimination policies
  - Future Professional Handbook/conduct policies
  - Technology/Acceptable Use policies
  - Co-worker Handbook/conduct policies
  - Professionalism standards
- Institution should still take steps to:
  - Provide support and resources to the Complainant and campus community
    - Address any “downstream effects”
  - Determine if there are patterns or institutional variables that contributed to the alleged incident
  - Take what action it can (e.g., trespass the person)

# GROUP DISCUSSION QUESTIONS

- Does your institution exercise jurisdiction over non-school property incidents?
  - Under what circumstances?
  - For Future Professionals? Co-workers?
- When is a Future Professional officially a ‘student’ under your code of conduct and/or Title IX policies?
- What are you doing to address off-campus intimate partner violence?
- What are you doing to address online harassment and discrimination?

# DEFINITIONS OF SEXUAL HARASSMENT

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

# REQUIRED DEFINITIONS – TIX REGULATIONS

**Sexual Harassment** is conduct on the basis of sex meeting one of the following conditions:

- An employee of the Recipient conditioning the provision of an aid, benefit, or service of the Recipient on an individual’s participation in unwelcome sexual conduct;
- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the Recipient’s education program or activity; or
- “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v)  
“Dating violence” as defined in 34 U.S.C. 12291(a)(10)  
“Domestic violence” as defined in 34 U.S.C. 12291(a)(8)  
“Stalking” as defined in 34 U.S.C. 12291(a)(30)

# HOSTILE ENVIRONMENT: “UNWELCOME”

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

# HOSTILE ENVIRONMENT: “REASONABLE PERSON”

Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the Complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced

# HOSTILE ENVIRONMENT: “SEVERE”

- Physical conduct is more likely to be severe
- Accompanied by threats or violence
- Consider the circumstances (e.g., the ability for Complainant to remove themselves from the harassment)

# HOSTILE ENVIRONMENT: “PERVASIVE”

- Widespread
- Openly practiced
- Well-known among Future Professionals or co-workers – reputation of a department, person, etc.
- Occurring in public spaces (more likely to be pervasive)
- Frequency of the conduct is often a variable in assessing pervasiveness (look to intensity and duration)
- Unreasonable interference with school or job
- A “gauntlet of sexual abuse” *Meritor v. Vinson*, 477 U.S. 57 (1986)



# HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”

- Reasonable person standard in context
  - “I know it when I see it...”
  - Age and relationships of Complainant and Respondent
  - Number of persons involved
  - Frequency
  - Severity
- Physically threatening
  - Humiliating
  - Intimidating
  - Ridiculing
  - Abusive

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”
- Totality of the circumstances to consider:
  - Frequency, nature, and severity of the conduct (see factors previously discussed)
  - Identity of and relationship between the parties
  - Age of the parties
  - Size of the school, location of the incidents, and context in which they occurred

# HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES (CONT.)

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

# IS THIS A HOSTILE ENVIRONMENT?

- For the past three months, Taylor has been spreading rumors about Andy being gay.
- About a month ago, Taylor used gay slurs directed at Andy in front of Andy and others, on multiple occasions.
- Andy suspects Taylor uses slurs behind his back, as well.
- This week, Taylor has started to run into Andy with his shoulder whenever they pass in hallways. The force of the contact has knocked Andy into the lockers or caused Andy to drop his tools
- Today, Andy discovered that someone had etched penises into his station. Andy saw Taylor laughing with a friend and pointing at the station.

# SEXUAL ASSAULT\*

- **Rape** – Penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.
- **Fondling** – The touching of the private body parts of the Complainant (buttocks, groin, breasts) **for the purpose of sexual gratification**, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent because of their age or because of a temporary or permanent mental incapacity.
- **Incest** – Sexual intercourse between persons who are related to each other, within the degrees wherein marriage is prohibited by [insert state] law.

# SEXUAL ASSAULT\* (CONT.)

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

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

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

# DATING VIOLENCE

- Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition —
  - Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - Dating violence does not include acts covered under the definition of domestic violence.

# DOMESTIC VIOLENCE

- A felony or misdemeanor crime of violence committed —
  - By a current or former spouse or intimate partner of the Complainant;
  - By a person with whom the Complainant shares a child in common;
  - By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
  - By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];
  - By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of [insert your state here].



# DOMESTIC VIOLENCE (CONT.)

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

# STALKING

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

# STALKING (CONT.)

- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the Complainant.
- **Substantial emotional distress** means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- The TIX regulations insist this definition not be interpreted to violate First Amendment.

# OTHER POLICY DEFINITIONS

- Retaliation
- Sexual Exploitation

# RETALIATION – REGULATION DEFINITION

## § 106.71 Retaliation

- *Retaliation prohibited.* No Recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...

# RETALIATION – REGULATION DEFINITION

(Cont.)...Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

# RETALIATION

## § 106.71 Retaliation.

- The Recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any Complainant, any individual who has been reported to be the perpetrator of sex discrimination, any Respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder...

# RETALIATION

(Cont.)...Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

- *Specific circumstances.*

(1) The exercise of rights protected under the First Amendment does not constitute retaliation prohibited under paragraph (a) of this section.

(2) Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.



# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION

## **Sexual Exploitation (non-Title IX sexual harassment)**

- Occurs when one person takes non-consensual or abusive sexual advantage of another for their own benefit or for the benefit of anyone other than the person being exploited, and that conduct does not otherwise constitute one of other sexual harassment offenses.
- Examples of sexual exploitation include, but are not limited to:
  - Sexual voyeurism (such as observing or allowing others to observe a person undressing or using the bathroom or engaging in sexual acts, without the consent of the person being observed)
  - Invasion of sexual privacy (e.g., doxxing)

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Examples (continued):
  - Knowingly making an unwelcome disclosure of (or threatening to disclose) an individual's sexual orientation, gender identity, or gender expression
  - Taking pictures, video, or audio recording of another in a sexual act, or in any other sexually related activity when there is a reasonable expectation of privacy during the activity, without the consent of all involved in the activity; or exceeding the boundaries of consent (such as allowing another person to hide in a closet and observe sexual activity; or disseminating sexual pictures without the photographed person's consent), including the making or posting of non-consensual pornography
  - Prostituting another person

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Examples (continued):
  - Engaging in sexual activity with another person while knowingly infected with human immunodeficiency virus (HIV) or a sexually transmitted disease (STD) or infection (STI), without informing the other person of the virus, disease, or infection
  - Misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual connections (e.g., spoofing)
  - Forcing a person to take an action against that person's will by threatening to show, post, or share information, video, audio, or an image that depicts the person's nudity or sexual activity

# ATIXA MODEL DEFINITIONS: SEXUAL EXPLOITATION (CONT.)

- Examples (continued):
  - Knowingly soliciting a minor for sexual activity
  - Engaging in sex trafficking
  - Knowingly creating, possessing, or disseminating child pornography

# 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.
- 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

# CONSENT (CONT.)

- Cannot be obtained by use of:
  - Physical force, threats, intimidation, or coercion
- Cannot be given by someone known to be — or who should be known to be — mentally or physically incapacitated
  
- **NOTE:** Some states have affirmative consent laws

# 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?



# NAVIGATING FIRST AMENDMENT PROTECTIONS



# NAVIGATING FIRST AMENDMENT PROTECTIONS

***“Congress shall make no law...abridging the freedom of speech...”***

- The ED reaffirms First Amendment protections in the Title IX Regulations
- Impacts policy language regarding expression
  - Pay heed to vagueness and over-breadth concerns
  - Avoid incorporating “intent” or “purpose” language
  - Incorporate appropriate standard for context

# NAVIGATING FIRST AMENDMENT PROTECTIONS (CONT.)

- Issues to consider:
  - Time, place, and manner
  - Open forum, limited open forum, and closed forum
  - Unprotected speech
    - Incitement of disruption and breach of peace
    - Defamation
    - True threat
    - Obscenity
  - Outside speakers
  - Hate speech



# **COORDINATING OVERLAP OF VARIOUS FUTURE PROFESSIONAL & CO- WORKER GRIEVANCE PROCESSES**

- Potential Processes
- Title IX And Title VII
- One Policy-Two Processes

# COORDINATING THE OVERLAP OF VARIOUS GRIEVANCE PROCESSES

- The Title IX Coordinator must coordinate across multiple constituency groups and procedures as necessary
- Potential processes:
  - Generalized sexual harassment procedures
  - General Future Professional grievance procedures
  - Co-worker grievance procedures
  - Future Professional conduct/discipline process
  - Co-worker discipline processes

# TITLE IX AND TITLE VII

- Must understand distinctions between Title IX and Title VII in responding and investigating
- Must be very familiar with all the processes
- Must have the ability to merge/combine/pick the investigatory and hearing processes and explain these to the parties

# ONE POLICY-TWO PROCESSES (1P2P)

- A community-based policy that addresses all forms of harassment, discrimination, and sexual misconduct applicable to all members of the institution community promotes equity, minimizes confusion, and supports institutional mission
  - Provides easier training focus
  - Allows for commonality in documentation and investigation



# POINT PERSON FOR REPORTS AND COMPLAINTS

- Notice, Reporting, & Confidentiality
- Initial Assessment
- Supportive Measures
- Mandatory & Discretionary Dismissals
- Emergency Removal



# POINT PERSON FOR REPORTS AND COMPLAINTS

- The Title IX Coordinator will be the individual designated to ensure the Title IX protocol is implemented and therefore should be the individual to whom all complaints or notice related to sex/gender harassment, misconduct, and discrimination should be directed
  - Contact information for Title IX Coordinator must be included on website and in all handbooks/catalogs given to applicants for admission and employment, Future Professionals, and current co-workers
  - Recipient may designate multiple portals for receipt of information (e.g., Deputy Coordinators)
    - All co-workers are expected to report notice and complaints to the Title IX Coordinator

# POINT PERSON FOR REPORTS AND COMPLAINTS

- The Title IX Coordinator must ensure the institution is promptly engaging in:
  - Initiation of the initial assessment
  - Implementation of response to stop the alleged harassment/discrimination
  - Provision of supportive measures to the parties
  - Provision of information about how to make a formal complaint
  - Action to reasonably prevent the recurrence
- The Title IX Coordinator must **coordinate** all of these steps, often across administrative processes and institutional silos
- Importance of a centralized database

# NOTICE, REPORTING, & CONFIDENTIALITY

- Notice to the Institution
- Mandatory Reporters
- Additional Reporting Requirements
- Privileged, Confidential & Private

# NOTICE TO THE INSTITUTION

- **“Actual Knowledge”** is defined as a report being received by:
  - The TIX Coordinator; or
  - Any official who has authority to institute corrective measures on behalf of the Recipient (Often called “Officials With Authority” or “OWA”)
- This is only the standard for when OCR would deem a higher education institution to have received actual notice AND MUST investigate; it is the bare minimum requirement
  - What if Recipient receives notice in some other way?
  - Other types of liability may still exist for failure to act with constructive notice (e.g., tort)

# MANDATORY REPORTERS

- ATIXA recommends that all co-workers\* report because this:
  - Enables institution to best support those who have experienced harassment or discrimination
  - Better enables tracking patterns
  - Ensures information gets to those trained to respond
  - Provides for simpler, uniform, and universal training and Reporting mechanisms
    - Institutions must ensure that all co-workers are trained regarding their obligation to report harassment to appropriate administrators as mandatory reporters

\*Can still have a small set of designated, trained co-workers who are not “mandatory reporters”

# OTHER LAWS THAT DETAIL REPORTING REQUIREMENTS

- Supervisors and Managers (per Title VII)
  - Mandated to report harassment or other misconduct of which they are aware.
- Abuse or Suspected Abuse of Minors
  - All co-workers are required to report abuse or suspected abuse of minors consistent with state law. This generally includes immediately reporting to law enforcement and to the state's child welfare agency.
- Additional state reporting requirements (e.g., elder abuse and felony reporting)

# PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

## Privilege

- Granted by laws and professional ethics
- Attorneys, licensed professional counselors, medical professionals, pastoral counselors
  - To have privilege, these individuals must be:
    - Acting in the capacity for which they are employed,
    - Acting within the scope of their license, and
    - Receive the disclosure during the scope of that employment
  - Key exception is child abuse reporting

# PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

## Confidentiality

- Designated by the institution
- Do not have to report harassment or discrimination of which they become aware
- Allows for provision of services and support without concern of reporting
- Examples: EAP
- Must still follow state reporting laws

**ATIXA recommends confidential co-workers report aggregate, non-identifiable data for Clery and Title IX statistical purposes**



# PRIVILEGE VS. CONFIDENTIALITY VS. PRIVACY

## Privacy

- Anyone who does not meet the institution's definition of a "Mandatory Reporter" can maintain privacy.
  - If using the OWA standard, then notice to those deemed "Private" does not constitute "Actual Knowledge" for OCR enforcement.
- May report incidents without identifying the parties
- Common Examples: Administrative Assistants, Non-supervisory co-workers
- Must still follow state reporting laws

# INITIAL ASSESSMENT

- Title IX Coordinator's Role
- Report vs. Formal Complaint
- Requests for Confidentiality
- Supportive Measures
- Mandatory and Permissive Dismissal
- Emergency Removal
- Notice to the Parties

# INITIAL ASSESSMENT

**Upon receipt of notice, the TIXC should be responsible for conducting an initial assessment to determine the following:**

- 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 Empire remedy informally or without discipline?
- Mandatory/Discretionary dismissal considerations
- If dismissed, does an alternate policy/process apply?

# INITIAL ASSESSMENT (CONT.)

- 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 how Empire's response was not deliberately indifferent
- 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

# REPORT VS. COMPLAINT

- Distinguish between a “report” and a “formal complaint”
- Upon receiving a “report” (either from the would-be Complainant or a third party):
  - Reach out and provide support.
  - Provide supportive and interim measures to the person alleged to have experienced the harassment. May also offer to the would-be Respondent.
  - Explain process to make a formal complaint.
    - Must be in writing and signed by the Complainant but can be made in any format (on paper or electronic) and made at any time
    - Also explain option to report to law enforcement (VAWA requirement)

# REPORT VS. COMPLAINT (CONT.)

- Upon receiving a “formal complaint:”
  - Conduct initial assessment to determine jurisdiction
  - Triggers obligation to follow “grievance process” including investigation and hearing

# FORMAL COMPLAINT

## Formal Complaint

- Document or electronic submission
- Filed by Complainant or signed by TIX Coordinator
  - TIXC does not become a party to the complaint
- Alleging sexual harassment
- Requesting an investigation
- Complainant must be participating or attempting to participate in the Recipient's education program or activity at the time of filing
- Initiates mandatory grievance process (investigation and hearing)

# 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



# 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

# 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 Empire from responding effectively and preventing the harassment of other s Future Professionals 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

# 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)

# 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)

# PPTVWM (CONT.)

- Factors to consider:
  - Whether Empire possesses other means to obtain relevant evidence (e.g., security cameras or personnel, or physical evidence)
- If Empire 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
- If supportive measures not provided, document why not.

# MANDATORY DISMISSAL – FOUR GROUNDS

## The Title IX Coordinator **MUST** dismiss the 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 OF A FORMAL COMPLAINT

**The TIX Coordinator MAY dismiss the complaint if at any time prior to a determination:**

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



# MANDATORY OR PERMISSIVE DISMISSAL OF A FORMAL COMPLAINT

- Written notice of dismissal to parties required
  - Dismissal (or non-dismissal) of formal complaint may be appealed

**Upon dismissal, the Recipient may institute action under another provision of the code of conduct or other policies. Due process requirements for VAWA offenses may be required in alternate processes.**

# EMERGENCY REMOVAL

**A Recipient may remove a Future Professional Respondent from the education program or activity on an emergency basis, only after:**

1. Undertaking an individualized safety and risk analysis
2. Determining if an immediate threat to the physical health or safety of any Future Professional or other individual arising from the allegations of sexual harassment justifies removal
3. Providing the Respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.

# EMPLOYEE ADMINISTRATIVE LEAVE

- A Recipient may place a non-Future Professional co-worker Respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act

# NOTICE REQUIREMENTS PRIOR TO INVESTIGATION

**After receiving a formal complaint, the Recipient must provide the following written notice to the parties who are known:**

- Notice of the grievance process, including any informal resolution process
- Notice of the allegations of sexual harassment potentially constituting sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview, including:
  - The identities of the parties involved in the incident, if known
  - The conduct allegedly constituting sexual harassment
  - The date and location of the alleged incident, if known

# NOTICE REQUIREMENTS PRIOR TO INVESTIGATION (CONT.)

- A statement that the Respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
- Notice that the parties may have an Advisor of their choice, who may be, but is not required to be, an attorney, and may inspect and review evidence
- Parties may inspect and review evidence prior to the completion of the investigation report
- Any provision from code of conduct that prohibits knowingly making false statements or knowingly submitting false information (if any)
- Update notice if additional allegations will be added/investigated



# **COORDINATING INFORMAL RESOLUTION**

# INFORMAL RESOLUTION – TITLE IX REGULATIONS

- The Title IX regulations include a provision that encourages informal resolution, and it is a worthy practice, when voluntary
- **Informal resolution** is not defined
- Regulations specify:
  - Formal complaint required
  - Allowed at any time prior to a final determination at discretion of TIXC
  - Voluntary, written consent of the parties
  - Not available for allegations of co-worker on Future Professional harassment
  - Must still stop, prevent, remedy, and document response

# INFORMAL RESOLUTION

- ATIXA has framed a process for Informal Resolution that includes three options:
  - A response based on supportive measures
  - A response based on a Respondent accepting responsibility
  - A response based on alternative resolution, which could include various approaches and facilitation of dialogue
- Alternative resolution approaches like mediation, restorative practices, transformative justice, etc., are likely to be used more often by colleges and universities
- ATIXA does not endorse these approaches as better or worse than other formal or informal approaches



# INFORMAL RESOLUTION CONSIDERATIONS

**The Title IX Coordinator may look to the following factors to assess whether Informal Resolution is appropriate, or which form of Informal Resolution may be most successful for the parties:**

- Amenability of the parties to Informal Resolution
- Likelihood of potential resolution, taking into account any power dynamics between the parties
- Motivation of the parties to participate
- Civility of the parties
- Cleared violence risk assessment/ongoing risk analysis
- Whether an emergency removal is needed
- Skill of the Informal Resolution facilitator with the type of complaint

# INFORMAL RESOLUTION CONSIDERATIONS (CONT.)

- Complexity of the complaint
- Emotional investment/intelligence of the parties
- Rationality of the parties
- Goals of the parties
- Adequate time to invest in Informal Resolution (resources, staff, etc.)



# **BEGINNING THE INVESTIGATION**

# 10 STEPS OF AN INVESTIGATION

1. Receive Notice/Complaint
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation and Allegations (NOIA) to Parties (“Charge”)
5. Establish investigation strategy
6. Formal comprehensive investigation
  - Witness interviews
  - Evidence gathering

# 10 STEPS OF AN INVESTIGATION (CONT.)

7. Draft investigation report
8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence
9. Provide report all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
10. Complete final investigation report
  - Synthesize and analyze relevant evidence
  - Send final report to parties for review and written response at least 10 days prior to hearing

# INVESTIGATION PHILOSOPHY

- The burden of proof and the burden of gathering evidence rest on the Recipient, not the parties
  - 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”

# “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 breaks? FMLA?

# 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 a co-worker harassed a Future Professional

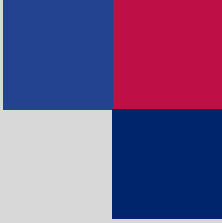
# FORMAL COMPREHENSIVE INVESTIGATION

- 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

# STRATEGIZE THE INVESTIGATION

## Common questions to consider:

- Whom to interview?
- When/in what order?
- What information/evidence can be obtained?
- How do we maximize the quantity/quality of evidence?
- How and when do we notify witnesses?
- Who needs to be aware of the investigation?
- When and how do we share evidence/information with the parties?



# **CASE STUDY: GWEN AND ALEX**

# GWEN'S STATEMENT

- Gwen is a Future Professional who is 4 weeks from graduation. She comes to administration and reports that some strange things have been happening. She indicates that she wants to file a formal complaint for Empire to investigate.
- 3 months ago, Alex, a co-worker, started asking Gwen personal questions. This happened after Gwen started dating her current fiancée. Gwen believes the questions started because Alex now knows that she is interested in females. Alex's partner, Jordan, is also a co-worker.
- One afternoon, Alex came in to the salon. Jordan was also there. Alex came over to Gwen and hugged her, from behind, for an extended period of time. Gwen felt that she was “grinding” on her buttocks with her genitals.

# GWEN'S STATEMENT

- Gwen was surprised to get this email, but she didn't want to be rude, so she wrote back, "Thanks, but I think I got it so far lol!" She didn't recognize the name on the school email account, Mark Noy, but she assumed that it was the guy who worked at the library.
- The person wrote back, "Cool. Hey one of my buddies is having a party after the game Sat., you should come. It'll be a blast." They emailed back and forth a few times. He sent her some pictures of himself, and it was the guy from the library. Gwen stopped responding because she started to get a little creeped out. He asked for her Snapchat but she didn't give it to him.

# GWEN'S STATEMENT

- After that, Gwen did not return to class the rest of the week.
- Since then, Gwen has been extremely uncomfortable working on clients when either Alex or Jordan was around.
- Gwen believes that Alex acted out to make Jordan different, because there is a rumor that Alex and Jordan's relationship is rocky.
- Gwen is supposed to graduate in a few weeks, but is now significantly behind in her hours. Gwen has requested to no longer have to work around either Jordan or Alex until the school "handles this."



# CASE STUDY

- How will you proceed with an investigation?
  - Who do you want to talk to?
  - Order of interviews?
  - What information do you need to gather?
  - When will you meet with Alex?
  - When does Alex receive an NOIA?

# NOTICE TO THE PARTIES - REGULATIONS

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

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

# NOTICE TO THE PARTIES - REGULATIONS (CONT.)

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

# RIGHTS OF THE PARTIES DURING THE INVESTIGATION - REGULATIONS

## Right to:

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

# WITNESS INTERVIEWS - STRATEGIES

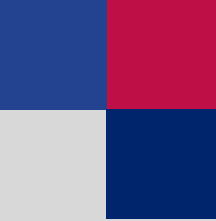
- Strategize contacting witnesses, ordering witness interviews, and preventing contact between witnesses, where necessary
  - Is there any allowance for interviewing witnesses and accumulating evidence prior to sending the NOIA?
- Solicit witness lists from the Complainant and Respondent
- Determine when you are going to question Respondent
- **Example order\*:**  
Complainant → Respondent → Witnesses Identified by the Parties → Neutral witnesses → Any additional witnesses → Round 2 → Round 3.

\*Every case is different

# 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



# EVIDENCE

# RELEVANCE

- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
- Evidence of the Complainant's **sexual predisposition** is explicitly and categorically not relevant.
- Evidence of the Complainant's **prior sexual behavior** is not relevant except for two limited exceptions:
  - Offered to prove that someone other than the Respondent committed the conduct alleged, or
  - Concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent
- While the regulations do not require the same analysis applied to the Respondent, Recipients should consider applying this analysis equitably except for pattern investigations



# EVIDENCE GATHERING

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

# EVIDENCE GUIDELINES

- **All** relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory
- No restriction on parties discussing case or gathering evidence
- Equal opportunity to:
  - Present witnesses
  - Present evidence
  - Inspect all evidence, including evidence not used to support determination
- No limits on types/amount of evidence which may be offered

# EVIDENCE COLLECTION AND ISSUES OF CONCURRENT CRIMINAL ACTION

- What if law enforcement is the sole source of evidence collection?
  - And they won't release the evidence to you?
- What if there is a pending criminal or civil case?
- What if a party or parent/guardian threatens to call a lawyer or file a lawsuit?
- What if a party files a lawsuit or complaint with the OCR?

# CREDIBILITY

- Credibility is largely a function of corroboration and consistency
- To assess credibility is to assess the extent to which an individual's testimony can be relied upon to be accurate and helpful in understanding the complaint
  - Credible is not synonymous with truthful
  - Memory errors do not necessarily destroy witness credibility, nor does some evasion or misleading
  - Refrain from focusing on irrelevant inaccuracies and inconsistencies



# **PRE-INTERVIEW CONSIDERATIONS**

# INTERVIEW SCHEDULING

- Try to anticipate how long each interview will take (e.g., How many times will you interview the witness? How much time can the witness give you?). Schedule your interview slots accordingly.
- Back-to-back interviews should be avoided, if possible. Interviews often take longer than expected and may require you to reschedule interviews.
- Leave some time after each interview for post-interview review

# PREPARE FOR EACH INTERVIEW

- Outline your interview questions in advance but be flexible. If you need to deviate from your script and insert a logical follow-up question, be prepared to do so.
- Plan the order of interviews
- Interviews should be conducted in a neutral, quiet, and private setting with no or minimal likelihood of interruptions

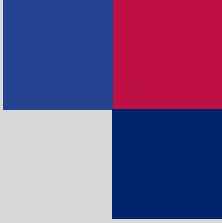
# ESTABLISH PRE-INTERVIEW GROUND RULES

- Who will attend?
- How will records be kept? Recording? Access?
- Role of Advisors
- Difference between Advisor/attorney role in interviews vs. in a hearing
- Involvement of support persons, etc.
- FERPA (Future Professionals)/Employment records/confidentiality



# SHARING INFORMATION WITH PARTIES AND WITNESSES DURING INVESTIGATION

- Decide how much information you will share in advance of each interview and have a rationale for what information will be shared and what will not be shared
  - Remember that prior to a decision, the parties must have an opportunity to review all “directly related” evidence
  - You may be challenged on a decision not to share, so have a rationale
- Explore only those facts that are relevant to the issue at hand or that seem likely to lead to relevant evidence
- Start with broad questions, then move to narrow, more pin-pointed questions



# MEETING WITH THE PARTIES

# ADVISOR OF CHOICE

An “Advisor of choice” may be anyone, including:

Attorney

Advocate

Parent/  
Guardian

Friend

Witness

- You may establish ground rules for the participation of Advisors in all meetings
- If a party does not have an Advisor, the Investigator should inquire as to whether they would like one provided by the institution at no cost (higher ed. only)
  - Under the regulations, this will have to be done at the hearing, but it is recommended to appoint one at the outset of the process

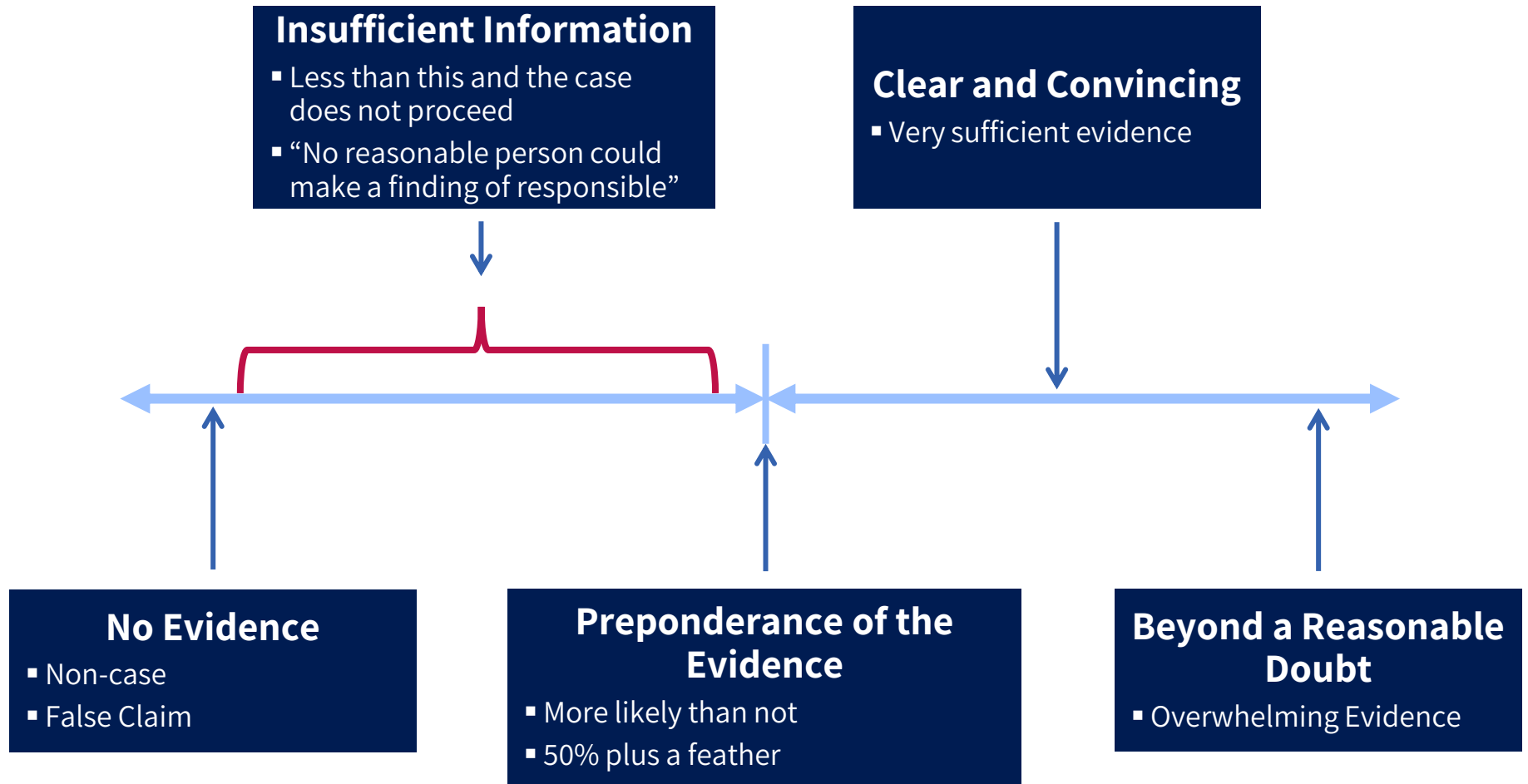
# PROVIDING POLICY AND PROCEDURE COPIES

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

# BEGINNING THE INTERVIEW

- Be sure the Complainant and Respondent understand the parameters of the policy, what it does and does not cover, how the process works, and what the process can and cannot accomplish.
- Discuss thoroughness and the need for completeness; make sure they don't leave facts out (i.e., alcohol/drug use). Explain your amnesty policy, if applicable.
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Document whether individual is cooperative or resistant.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.

# EXPLAINING EVIDENTIARY STANDARDS



# DEMEANOR OF INVESTIGATOR(S)

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

# INTERVIEWING SKILLS

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



# INTERVIEWING THE COMPLAINANT

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

# INTERVIEWING THE COMPLAINANT

- Ask about those they spoke to about the incident
- Ask what the Complainant's motivation is for reporting and what they hope to see as a result
- Find out if their academics and/or work have been affected
- Ask how the incident(s) affected them emotionally and/or physically
- Advise that the allegations will be discussed with the Respondent and witnesses
- Let the Complainant know next steps and when you will be in contact
- Suggest that the Complainant consult their Advisor before discussing the investigation with others, without placing restrictions on doing so.

# RELUCTANT COMPLAINANTS

When a Complainant is reluctant to make or continue with a formal complaint, or withdraws after filing one, the TIXC will determine next steps

- A risk or threat assessment of some kind, as well as consideration of the Complainant's reasons may affect whether the TIXC decides to proceed and file a formal complaint themselves
- Although an investigation could proceed without the Complainant, it may prove difficult or impossible for the Investigator to gather sufficient evidence
- Effect of not submitting to cross-exam at hearing
- Possibility of informal resolution

# REQUESTS FOR CONFIDENTIALITY

## **The TIXC should explain to the Complainant that:**

- Support and resolution may be limited based on the level of confidentiality or privacy requested by Complainant
- Privacy cannot be guaranteed if doing so would jeopardize the safety of the Complainant or others in cases involving pattern, predation, violence, threat, weapons, minors, or other compelling safety risks.
- If the Complainant chooses to proceed, only those with a need to know will be informed.
  - Train those who will be informed about “confidentiality” (really privacy)
  - Privacy vs. Confidentiality vs. Privilege

# RELUCTANT COMPLAINANTS

- The Complainant should be notified of their options:
  - The process will still be available to them, regardless of how long they wait, as long as control over Respondent remains
  - The Recipient will support them in all reasonable ways (e.g., housing, classes, no contact orders)
  - Informal resolution could be an option, if offered
  - If information is brought to attention of the Recipient that may involve a threat to community, the Recipient may be forced to proceed with an investigation, but the Complainant will be notified of the process and treated as if they are fully participating, if they wish

# INTERVIEWING THE RESPONDENT

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

# INTERVIEWING THE RESPONDENT

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

# FINAL QUESTIONS FOR ALL INTERVIEWS

- Is there anyone else that you think we should talk to?
- Are there any questions that we didn't ask that you thought we should have or were going to?
- Is there anything else you think we need to know?
- FOR THE PARTIES
  - Are there any questions that you would like us to ask any other witness or the other party(ies)?
  - DOCUMENT THIS – See the next slide...



# “APPENDIX C”

**Questions suggested or requested to be asked by the parties should be documented and included as an appendix in these sections:**

- **Section 1:** Questions the party wanted asked specifically but were not because the answers were gained in a narrative or otherwise volunteered. The question posed and the answer should be noted here.
- **Section 2:** Questions the party wanted asked specifically that were asked and in the manner the party wanted.
  - Document: The question they wanted, how it was asked and the answer

# “APPENDIX C” (CONT.)

- **Section 3:** Questions the party wanted asked specifically that were asked but not in the manner the party wanted
  - Document: The question they wanted, the one that was asked, the answer and the rationale for changing the form of the question (e.g., argumentative, blaming, improper form)
- **Section 4:** Questions the party wanted asked specifically that were not asked
  - Document: The rationale for not asking the question (e.g., irrelevant, already asked and answered)



# QUESTIONING SKILLS

# 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.

# TYPES OF QUESTIONS

## Use

- 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.

## Avoid

- Compound Questions
  - I have two questions. First..., Second...
- Multiple Choice Questions
  - Were you a), b), c)...?
- Leading Questions
  - Isn't it the case that...?

# 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.



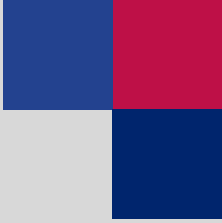
# QUESTIONING EXERCISE

## **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?

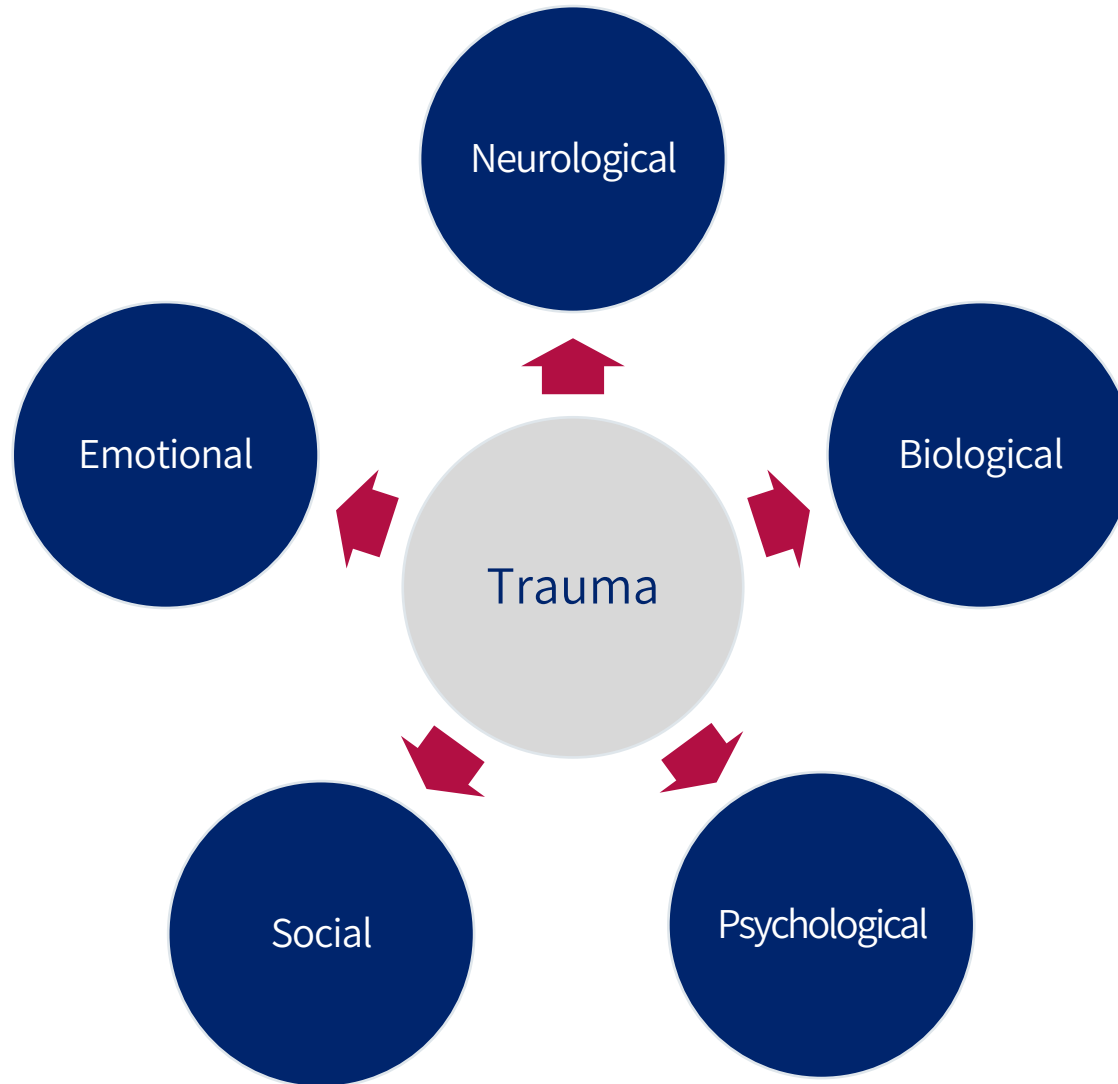
# QUESTIONING EXERCISE

- 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?



# **TRAUMA-INFUSED INTERVIEWING**

# IMPACT OF TRAUMA ON FUNCTIONING



# 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

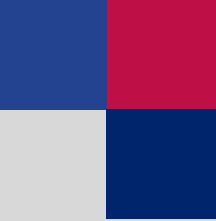
- Prioritize developing rapport and building trust
- Emphasize transparency and predictability
- Physical aspects of interview (light, access, comfort, etc.)
- Be cognizant of why someone may have responded in a “counterintuitive” manner
- Be mindful that recall is often difficult and slow following 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





# WITNESSES

# STARTING THE WITNESS INTERVIEW

## 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 immunity/amnesty
- Review confidentiality
- Review expectation of truthfulness

# ANTICIPATING WITNESSES' QUESTIONS

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

# INTERVIEWING WITNESSES

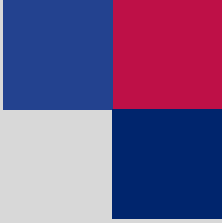
- It may be helpful to not label the allegations as “sexual misconduct” or “sexual harassment”
- Ascertain their relation to the other parties in the matter
- Ask for their opinions about the parties and other witnesses
- Ask if either party spoke about the incident(s) after they happened
- Ask if they have noticed any significant change in the parties
- Ask if they have made any previous statements, such as to law enforcement or private Investigators
- Ask all interviewees to contact you if they remember anything else or want to add to their statement

# RESISTANT AND QUIET WITNESSES

- Gauge their resistance or hesitation and try to individually address their motivation
- Answer their questions about the process and purpose of the interview
- Explain the expectations of the school, if applicable
- Having a framework of specific topics and questions can be helpful with quiet witnesses
- Letting them know that you already know a fair amount of information and they are corroborating can be helpful
- If they become talkative, respond positively

# LYING WITNESSES

- Maintain rapport and avoid accusation
  - Use “mirroring” and collaborative problem-solving techniques
  - Recommended phrases: “Help me understand...” or “Make this make sense...” or “I think I’m missing something...”
- Allow opportunity for witness to restate
- Try to understand and individually address their motivation
- Explain the expectation for truthfulness and impact of dishonesty on the investigation/parties
- Calmly bring them back to the questions
- If needed, leave the door open for follow up



# THE INVESTIGATION REPORT

# THE INVESTIGATION REPORT

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



# THE INVESTIGATION REPORT

- References or contains all applicable policies and procedures
- Provides timeline of investigation steps
- Describes the allegations
- Describes and includes evidence gathered, including statements and interviews
- Explains unsuccessful attempts to collect information and/or interview witnesses

# THE INVESTIGATION REPORT – G.A.S.

- **G**ather evidence
  - Organize the evidence so it is useful to the Decision-maker who applies the policy elements
- **A**ssess credibility of parties and witnesses without making ultimate conclusions
  - Point out areas of corroboration and issues that may bear on credibility
  - Assess evidence to determine what is relevant
- **S**ynthesize areas of agreement/areas that are disputed
  - Synthesis may also include an appendix of questions posed, questions rejected, and questions considered.

**G.A.S. is covered in more detail in Investigator Two**

# MORE THAN FACT-GATHERING

- Review the institutional policies that apply
- Follow G.A.S. model, meaning stop short of making a finding, making a recommendation, or doing anything that influences or usurps the independent role of the Decision-maker
- If you have an opinion on whether policy was violated, keep it to yourself
- Refer report to TIXC for review and hearing/determination

# IMPORTANCE OF THE REPORT

- Decision process:
  - Investigator (through the TIXC) refers the investigation report to the Decision-maker(s) without determination
  - Investigator  $\neq$  Decision-maker
- Report should highlight the relationships between different pieces of evidence
  - Contradictory, corroborating, (in)consistencies, etc.
  - Investigator's opinion is not controlling but should point the Decision-maker(s) toward decisive or corroborating evidence without telling them how to interpret it

# 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
- After sending the evidence, the Investigator(s) must:
  - Allow 10 days for written response
  - Consider response prior to completion of report

Source: § 106.45(b)(5)(vi)

# PARTY ACCESS TO EVIDENCE/REPORT

- Whether included as relevant in the investigation report or not, all such directly related evidence is subject to the parties' inspection and review and must be available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination

# EVIDENCE AND REPORT REVIEW BY PARTIES

## PART 2

### **At least 10 days prior to making a determination regarding responsibility (hearing):**

- 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
- A separate file of all directly related evidence will also be shared (this evidence is excluded from the report)
- For K-12 schools without a hearing, this must occur 10 days prior to time of determination regarding responsibility

Source: § 106.45(b)(5)(vii) and § 106.45(b)(6)(ii)

# 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



# COORDINATING THE DECISION- MAKING STAGES

- Title IX Coordinator's Role
- Standard of Evidence
- Making a Determination

# DECISION-MAKERS IN TITLE IX PROCESSES

- The Title IX Coordinator **cannot** be the Decision-maker but may need to coordinate with Decision-makers:
  - Coordinating hearings, Hearing Panel/Decision-Maker
  - Facilitating the sending of notices to the parties (e.g., Notice of hearing, Notice of outcome, Notice of appeal)
  - Overseeing appeal processes
  - Sanctions
  - Remedies
  - Providing institutional memory
  - Training Decision-makers (hearings and appeals)
  - Recordkeeping of all activities

# STANDARD OF EVIDENCE

- Current industry standard is **preponderance of the evidence**
- OCR requires Recipients to 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 Future Professionals as for complaints against co-workers

# EQUITY: PREPONDERANCE STANDARD

- The only equitable standard
- ATIXA maintains that preponderance of the evidence is the appropriate standard
- Articulate the standard throughout institutional policy, procedures, investigations, and hearings
- Educate the parties and their Advisors
- Use language the community understands:
  - 50.1%
  - “More likely than not”
  - The “tipped scale”
  - Try NOT to use just the term “preponderance of the evidence” – it is not common language

# DECISION-MAKERS: MAKING A FINDING/DETERMINATION

- Review applicable institutional policies
- Parse the policy
  - Provide specific findings for each alleged violation and for each Respondent
- Review the evidence and what it shows (relevance)
- Assess the credibility of evidence and witness statements as factual, opinion-based, or circumstantial
- Determination whether a policy violation occurred based on standard of evidence
- Concretely cite the reasons for this conclusion
- Move to sanctioning (if applicable)



# ENSURING COMPLIANCE WITH FINAL SANCTIONS

- Sanctioning Considerations
- Assuring Compliance
- Common Sanctions

# SANCTIONING CONSIDERATIONS

- Title IX Coordinator does not issue sanctions but oversees the process
- Investigation alone is not sufficient to overcome a deliberate indifference claim

## **Title IX and case law require resolutions which:**

- **STOP:** bring an end to the discriminatory conduct
- **PREVENT:** take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct
- **REMEDY:** restore the Complainant to their pre-deprivation status as best you can



# SANCTIONING CONSIDERATIONS (CONT.)

- There must be a nexus between the sanction(s) and the discriminatory conduct that led to the sanction(s)
- Engage in strategic education and training requirements
- Conduct a risk assessment audit and mitigation process
- The OCR asserts institutions should consider impact on the Respondent's education when determining sanction(s)

# DISCIPLINARY SANCTIONS: REGULATORY REQUIREMENTS

- Grievance process must “describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the Recipient may implement following any determination of responsibility” (34 C.F.R. § 106.45)
- Recipients must follow a “grievance process that complies with Section 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures” (34 C.F.R. § 108.0(c))
- Disciplinary sanctions alone are often insufficient because the Recipient must also provide the Complainant with appropriate remedies designed to restore or preserve equal educational access

# DISCIPLINARY SANCTIONS: REGULATORY REQUIREMENTS (CONT.)

- Disciplinary sanctions are not required under Title IX
  - The obligation is to remedy in a manner that is not clearly unreasonable
  - Sanctions can be one form of remedy
  - Disciplinary sanctions – both their form and substance – are at the discretion of the institution (i.e., the OCR will not second-guess the sanctions)
    - Provides flexibility based on the nature and severity of the behavior, the parties, and the context of the behavior, as well.
- Institution must inform the Complainant and the Respondent of any and all sanctions imposed on the Respondent; this includes co-worker discipline

# ASSURANCE OF COMPLIANCE WITH FINAL SANCTIONS

- Take steps to confirm and document that all sanctions were enforced/completed
  - Did the Respondent attend mandatory training?
  - Is the Respondent complying with the no-contact order?
  - Were the necessary documents placed in the Respondent's personnel or conduct file?
  - Was the notation placed on the Respondent's transcript or personnel file?
- Possible consequences of a Respondent's failure to comply with sanctions:
  - Failure to comply conduct charge
  - Additional sanctions imposed



# COORDINATING THE APPEAL PROCESS

- Appeals
- Appeal Grounds
- Appeal Process
- Recordkeeping

# APPEALS

- Appeals are mandatory under the Title IX Regulations
- Must offer equitable opportunity to appeal based on determination or dismissal of any allegations
- Clearly communicate to parties
  - Process to appeal
  - When an appeal is received and opportunity to respond
- Opportunity for all parties to support or oppose outcome
- Written decision with rationale delivered simultaneously to the parties
- Appeal Decision-maker cannot have had any other role in the investigation or resolution process

# APPEALS (CONT.)

- “Reasonably prompt” timeframe for producing appeal decision
- One level of appeal is best practice
- Defined window of time to request appeal
- Short window to request an appeal
  - Can always grant an extension if necessary
- Three mandatory grounds for appeal; may add others
- Committee versus individual determination preferred
- Deference to original Decision-maker
- Remand
- Document-based review
  - NOT *de novo*

# APPEAL GROUNDS

- A Recipient must offer both parties an opportunity to appeal a determination regarding responsibility, and from a Recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - Procedural irregularity that affected the outcome of the matter
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter
  - The Title IX Coordinator, Investigator(s), or Decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
- May add additional grounds provided they are made available on an equitable basis

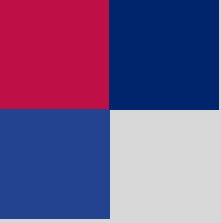


# RECORDKEEPING AND DOCUMENTATION

- Certain records must be created, retained, and available to the parties 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 formal complaint, must document the basis for why the Recipient's response was not deliberately indifferent**

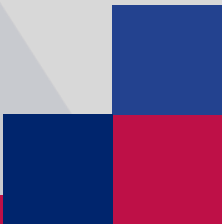
# RECORDKEEPING AND DOCUMENTATION (CONT.)

- Rationale for each determination
- Measures taken to preserve/restore access to education programs/activity



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**Questions?**



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**Thanks for joining us today.**

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