



CIVIL RIGHTS INVESTIGATOR LEVEL ONE  
TRAINING & CERTIFICATION COURSE

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July 2020 3x4 Series



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# LEVEL 1 INVESTIGATIONS TRAINING



## Part 1

- I. Overview of Title IX
- II. Legal Basis for Title IX Liability
  - i. Foundational Case law
  - ii. Due Process Overview
- III. Title IX Coordinator Oversight
- IV. Overview of Investigation & Grievance Process Model
- V. Notice/Complaint
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- VII. Beginning the Investigation
  - i. Investigation Timeline
  - ii. Formal and Informal Processes
  - iii. Investigation Strategy
- VIII. Formal Comprehensive Investigation
  - i. Strategizing Interviews
  - ii. Evidence Gathering

# LEVEL 1 INVESTIGATIONS TRAINING



## Part II

### I. Investigation Details

- i. Evidence Collection
- ii. Interview Scheduling & Preparation

### II. Questioning

- i. Goals of Questioning
- ii. Types of Questions

### III. Interview Skills

- i. Demeanor
- ii. Process
- iii. Feedback
- iv. Interviewing the Parties

### IV. Trauma-Informed Interviewing

### Practices

### V. Challenging Witnesses

- i. Difficult
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- iii. Resistant/Quiet

### VI. Helpful Investigation Documents

### VII. Investigation Report

- i. Standard of Proof
- ii. Review of Relevant Evidence
- iii. Investigator at the Hearing

### VIII. Investigator role in Appeals?

# OVERVIEW OF TITLE IX

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

# TITLE IX

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



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



# THE IX COMMANDMENTS



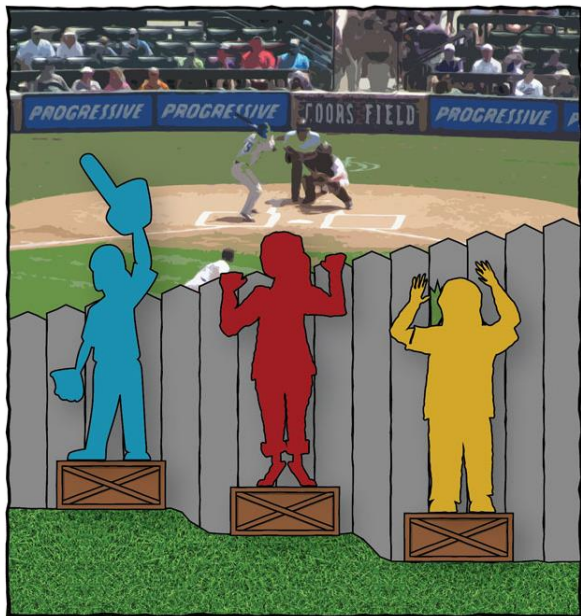
<b>Thorough</b>	<b>Reliable</b>	<b>Impartial</b>
<b>Prompt</b>	<b>Effective</b>	<b>Equitable</b>
Not act unreasonably to stop discrimination	Not act unreasonably to prevent recurrence	Act equitably to remedy effects

Investigation  
(+prompt & fair –  
VAWA Sec. 304)

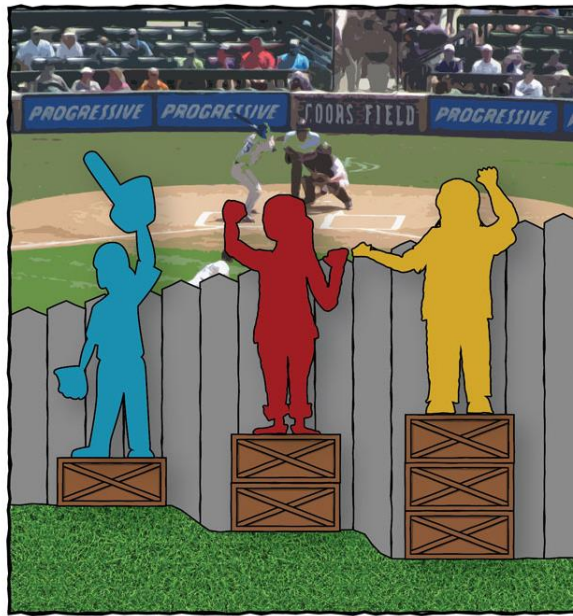
Process

Remedies

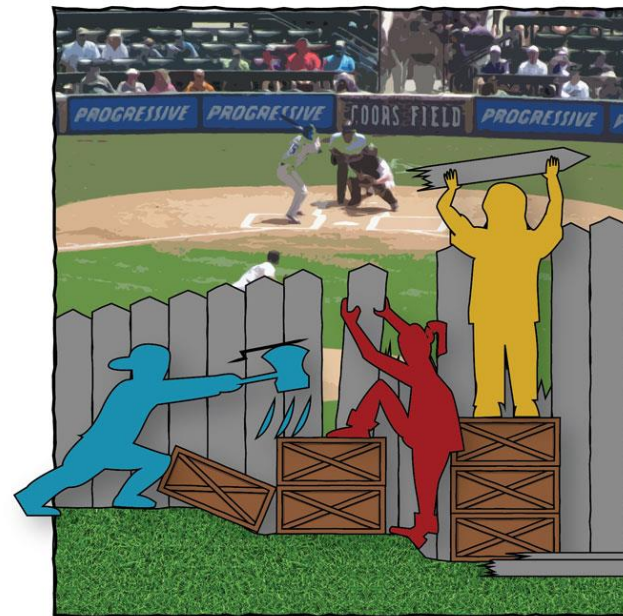
# EQUITY DEFINED



**EQUALITY**



**EQUITY**



**JUSTICE**



# LEGAL BASIS FOR TITLE IX LIABILITY

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- Significant Cases
- Intersection of Title VII and Title IX
- Title IX and VII Inter-related Investigations
- Due Process



- Case involved teacher/student sexual harassment.
- Supreme Court created high standard that students must meet to prevail on a sexual harassment claim against recipients when an employee/student consensual relationship is basis of claim.
- Court said you cannot recover monetary damages against the school **unless** the behavior has been reported to someone with power to alter the situation (“actual notice”) and **“deliberate indifference”** has been demonstrated by the school.

- 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.

- Finding in favor of Davis, the Supreme Court applied same standards to find the institution liable for damages as in the *Gebser* case:
  - The institution must have “actual notice” of the harassment; and the institution must have responded to the harassment with “deliberate indifference.” Additionally, court held:
    - Harassment must be “severe, pervasive, and objectively offensive,” and the indifference “systemic,” to the extent that the victim is deprived of educational opportunities or services.
    - Justice O’Connor added a framework to determine deliberate indifference – stating that deliberate indifference constitutes a response that is “clearly unreasonable in light of the known circumstances.”

# INTERSECTION OF TITLE VII AND TITLE IX



- Title IX consciously modeled on Title VI of the Civil Rights Act of 1964 and borrowed heavily from Title VII.
- Courts generally apply standards established under Title VII for guidance in how to establish a Title IX violation.
- Title IX prohibits against sex-based discrimination to the full range of activities related to the recruitment, evaluation, classification, payment, assignment, retention, or treatment of employees.
- Individuals can use both statutes to pursue the same violations.
- OCR's 2020 Regs. 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 OCR's 2020 Regs. definition of sexual harassment.
- Coordination of remedies in student/employee and employee/student grievance processes.
- What happens when employee is a student or student is an employee?

# DUE PROCESS: CURRENT ISSUES



- Due Process is at the heart of OCR's 2020 regulations.
  - Applies to both public and private recipients, which is a shift in legal paradigm
  - Standard of Proof
  - Requirements for “Emergency Removal”
  - Detailed Notice of Allegations/Investigation
  - Providing Inv. Report and Evidence for Review/Response
  - Live Hearing with Cross-Examination Mandatory for Higher Ed
  - Advisor Involvement (including possibly attorneys)
  - Bias by Investigators, Hearing Officers, Appellate Officers
  - Training: Biased Training; Insufficient Training, Transparency



# TITLE IX COORDINATOR OVERSIGHT

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- The Role of the Title IX Officer in the Investigation Process
  - Supervisor of the Investigation Structure
  - Supervisor of the Investigation Process
  - Trainer for Investigators

# THE TITLE IX TEAM



- Title IX Coordinator (TIXC)
- Deputy Coordinators
- Investigators
- Decision-maker(s)
- Appellate Decision-maker(s)
- Advisors

# TIXC AS SUPERVISOR OF THE INVESTIGATION STRUCTURE



- The Title IX Coordinator is responsible for:
  - The appointment of/engagement of investigators.
  - Training investigators, decision-makers, and appeals officers.
  - Supervision of investigators and investigations.
  - Helping investigators to 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 also serve as the hearing facilitator if no substantive role.

# TIXC AS SUPERVISOR OF THE INVESTIGATION PROCESS



- The Title IX Coordinator or designee is responsible for:
  - Documenting complaint.
  - Initial assessment.
  - Determining extent/footing/nature of investigation.
  - Notice of allegations and investigation.
  - Notice of hearing.
  - Reviewing/transmitting the written determination of the decision-maker.
  - Coordinating any duty to warn.
  - Assurance of supportive measures/remedies.
  - Recordkeeping of all activities.

# TRAINING AREAS FOR INVESTIGATORS – OCR 2020 REGS



- The definition of sexual harassment
- The scope of the recipient's education program or activity
- How to conduct an investigation and grievance process, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Understanding "relevant evidence" in order to create an investigation report that fairly summarizes all relevant evidence

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

**Bias and conflict of interest by investigators that impact the outcome are grounds for appeal.**

# CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

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- The Process & Ten Steps
- Jurisdiction
- Who Should Investigate?
- Confidentiality & Privacy

# THE PROCESS



**Incident**

**Initial  
Assessment**

**Formal Investigation  
& Report**

**Hearing**

**Appeal**

Complaint or

Jurisdiction?

Notice to parties

Determination

Standing?

Notice to Title IX  
Coordinator

Dismissal?

Identification of witnesses

Cross-

Vacate?

Strategy  
development

Policy violation  
implicated?

Interview scheduling

examination

Remand?

Reinstatement?

Evidence collection

Sanction?

Substitute?

Informal or  
formal  
resolution?

Report drafted

Evidence and inv. report

shared

Inv. report finalized



# 10 STEPS OF AN INVESTIGATION



1. Receive Notice/Complaint.
2. Initial Assessment and Jurisdiction Determination
3. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
4. Notice of Investigation to Parties/Notice of Formal Allegation (“Charge”).
5. Establish investigation strategy
6. Formal comprehensive investigation.
  - Witness interviews
  - Evidence gathering.
7. Draft 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 report.
  - Synthesize and analyze relevant evidence.
  - Send final report to parties for review and written response at least 10 days prior to hearing.

# WHEN DOES TITLE IX APPLY?



- OCR Regs. say Title IX complaint must be dismissed if did not occur against a person **in the U.S.**, but...
  - Contrary 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 Part 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.
  - When it does, it's a trump card requiring application of regs
  - But, other policies may also apply
  - Collateral misconduct
- Discretionary jurisdiction means the recipient can (but not must) 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

# REQUIRED DEFINITIONS – OCR 2020 REGS



- 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)

# SEXUAL ASSAULT: SEX OFFENSES, FORCIBLE



Any sexual act directed against another person, without the consent of the Complainant including instances where the Complainant is incapable of giving consent.

- Forcible 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.
- Forcible Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# SEXUAL ASSAULT: SEX OFFENSES, FORCIBLE (CONTD.)



- Sexual Assault With An Object: To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will or not forcibly or against the person's will (non-consensually) in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.
- Forcible Fondling: The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.



# SEXUAL ASSAULT: SEX OFFENSES, NONFORCIBLE— NONFORCIBLE SEXUAL INTERCOURSE



- Incest: Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by [insert state] law.
- Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].

- 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].
- 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.
- 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.
- But, Regs insist this definition not be interpreted to violate First Amendment.

# WHO SHOULD INVESTIGATE?



- Investigations of sexual harassment must be impartial, thorough, and reliable.
  - Title IX Coordinator?
  - Standing panel of investigators?
  - Human resources or student services?
  - Administrators/Staff?
  - Teachers/faculty?
  - Coaches?
  - Outside/External investigator?
  - NOT Legal Counsel
  - **Well-trained**

# SHOULD THERE BE MORE THAN ONE INVESTIGATOR?



No specific requirement, but:

- Investigation must be prompt, thorough, and impartial.
- Investigator must collect the maximum amount of relevant information available to help decision-maker make a determination.
- A pool of investigators may help to ensure that your investigation meets these requirements.
- ATIXA will always prefer a team investigator approach when possible.
- Always have alternates available in case of recusal, illness etc

- Other benefits:
  - Who is chosen to investigate may be strategic to each specific case.
  - Gain ability to brainstorm investigation steps and lines of questioning with co-investigators, and to co-facilitate interviews.
  - Flexibility if there is any conflict with investigators and parties.
  - Sharing the heavy lift of required documentation and recordkeeping.

# INVESTIGATION TEAM PROCESS OVERVIEW



- The investigation team, in consultation with their supervisors, and/or the Title IX Coordinator, strategizes the entire investigation, including methodology, order, timeline, goals, obstacles, etc.
- Interview all witnesses.
- Gather and assesses all available evidence.
- Write a report.
- Provide report to the parties for review, then edit as needed and provide final report and investigation file to:
  - Coordinator, who then shares with the decision-maker(s).
  - Parties and advisors



# RELUCTANCE TO REPORT



When a Complainant is reluctant to make 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?

# RELUCTANCE TO REPORT



- Privacy vs. Confidentiality vs. Privilege
- The Complainant should be notified as to their options:
  - That the process will still be available to them, regardless of how long they wait, as long as control over Respondent remains.
  - That the recipient will support them all reasonable ways (e.g. housing, classes, no contact orders, etc.).
  - Informal resolution could be an option, if offered.
  - That, 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

# REQUESTS FOR CONFIDENTIALITY



- The recipient should explain to the Complainant that:
  - Its remedial abilities may be limited based on the level of confidentiality or privacy requested by Complainant.
  - It cannot guarantee privacy 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.
  - Only those with a need to know will be informed.
    - Train those who will be informed about “confidentiality” (really privacy)
  - **If the Respondent is an employee, Title VII may obligate a formal response regardless of the wishes of the Complainant.**
  - **If Complainant is a minor, the recipient may also need to proceed against the wishes of the Complainant. Parents may have say.**

# NOTICE TO THE RECIPIENT

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- Actual Knowledge/Notice
- Formal Complaint
- When Do You Investigate?

## Actual knowledge

- Notice of sexual harassment or allegations
- In an education program or activity
- Against a person in the US
- 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”
  - Deans?
  - Conduct Officers?
  - Campus police or campus safety?
- What about K-12?
  - All employees
- What about Responsible Employees? Do we still have those?
  - ATIXA still recommends that recipients require all employees to report, unless

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

## 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

- 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?

# MANDATORY DISMISSAL OF FORMAL COMPLAINT - OCR 2020 REGS



## The TIXC must dismiss the complaint if:

- The conduct alleged in the formal complaint would not constitute sexual harassment as defined (five offenses), even if proved, or
- Did not occur in the recipient's education program or activity, or
- Did not occur against a person in the United States.
- Complaint not participating or attempting to participate in recipient's program at time of complaint.
- Written notice of dismissal to parties required
  - 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.**

# DISCRETIONARY DISMISSAL OF FORMAL COMPLAINT - OCR 2020 REGS



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

# 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 policy/process begin?



## 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 recipient's response 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.

# WHAT IS THE APPROPRIATE STANDARD OF PROOF?



- Different Standards: What do they mean? Why do they exist?
  - Beyond a reasonable doubt
  - Clear and convincing evidence (C&C)
  - Preponderance of the evidence (POTE)
- OCR allows recipients to choose between last two
- Must apply standard consistently to all “Title IX cases”
  
- ATIXA prefers POTE as the most equitable standard.
- If you use C&C, be able to clearly articulate and define it.
  - See: *ATIXA Guide to Choosing Between Preponderance of the Evidence and Clear and Convincing Evidence*

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



# SUPPORTIVE MEASURES



- Throughout 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
  - *NOTE: Remember to provide support and resources all parties throughout the process, and don't forget to remedy on behalf of community, not just parties.*



# COMMON SUPPORTIVE MEASURES



- Referral to counseling, medical and/or other health services.
- Referral to the Employee Assistance Program.
- Visa and immigration assistance.
- Student financial aid counseling.
- Education to the community or community subgroup.
- Altering campus housing situation.
- Altering work arrangements for employees or student-employees.
- Safety planning.
- Providing campus escorts.
- Providing transportation
- accommodations.
- Implementing contact limitations (no contact orders) between the parties.
- Academic support, extensions of deadlines, or other course-related adjustments.
- Trespass, Persona Non Grata, or Be on the Lookout (BOLO) orders.
- Timely warnings.
- Class schedule modifications, withdrawals, or leaves of absence.
- Increased security and monitoring of certain areas of campus.
- Etc.

- On an emergency basis
- Individualized risk and safety analysis
- Immediate threat to health or safety
- Due Process requires opportunity to challenge removal, usually after it is implemented
- Does not apply to non-student employee administrative leave
- May allow equitable participation of Complainant, unless decision does not directly relate to Complainant.

# BEGINNING THE INVESTIGATION

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- Timeframes for Resolution
- Informal or Formal Resolution Process?
- Role of Law Enforcement
- Formal Comprehensive Investigation
- Notice to the Parties
- Strategize the Investigation



# “REASONABLY PROMPT” TIMEFRAMES FOR GRIEVANCE PROCESS



- 60-90 days to resolution is a good guide for more complex cases in higher education, according to ATIXA
  - Timeline starts from notice, not from the incident itself.
  - No set requirement in the regs, 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?

- 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:
  - So that recollections are as fresh and accurate as possible.
  - To secure necessary remedies as soon as possible.
  - But not before Notice of Allegations/Investigation.
- Provide notice of extensions.

# TEMPORARY DELAYS / EXTENSIONS



- For good cause
  - Absence of a party
  - Absence of a party's advisor
  - Concurrent law enforcement activity
  - Language assistance
  - Accommodation of disabilities
- Provide written notice of delays and extensions to all parties.

# INFORMAL AND FORMAL RESOLUTION PROCESS



OCR endorses and encourages informal resolution, and we believe it is a best 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.
- OCR regs preclude informal resolution of allegations that an employee harassed a student.

# CASE STUDY: Gwen and Mark





# GWEN'S STATEMENT



- Gwen is a freshman who lives in Cedar Hall with her roommate, Holly. She has been having some strange things happen. She told Campus Public Safety about it, but they said they couldn't really do anything. She told her RA Michelle what's been going on, and Michelle referred Gwen to you. Gwen has made a formal complaint.
- About a month ago, Gwen was studying in Fleming Library on campus. She went to check out a reading that was on reserve at the front desk for her Intro. to Econ. class. The guy at the front desk was kind of chatty and they made small talk. The next day, she got an email sent to her campus email address that said: "Hey Gwen, its Mark. Cool talking to you. I took Econ when I was a freshman, so if you need any help just let me know."

# 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



- About two weeks ago, Gwen was at a party at a frat house with Holly and a friend named Carter. Gwen noticed that Mark was at the party too. Doing her best to avoid Mark, Gwen circled the party catching up with friends she had not seen in a while. As the evening progressed, a few people expressed concern about Mark. Friends told Gwen that Mark was asking questions about Gwen and staring at her. When Gwen went to the restroom, Mark was there when she exited. She tried to quickly scoot by him. Carter noticed Mark staring at them.
- The following day, Gwen got a text from Mark asking what she was doing, but she didn't respond. She thinks someone at the party must have given him her number. She doesn't want to be friends, but she doesn't want to seem like a jerk.

# GWEN'S STATEMENT



- Last week, Gwen was leaving Math class with her roommate Holly and saw Mark standing outside the Math building by himself, staring at her. She sort of waved but kept walking.
- A few days ago Gwen found a note on her car which she parks on campus; it had a hearts and arrows on it. That night someone wrote, "Gwen u r so hot" on the whiteboard outside her room, and drew the same hearts and arrows.
- Last night, she got a text middle of the night from a blocked number that said, "Gwen I luv you." She freaked out and wrote back "Who is this?? Leave me the fuck alone." The person texted back, "Fuck you, bitch."

# GWEN'S STATEMENT



- Although she can't prove it, she feels like all of these things must be Mark.
- She has been avoiding Fleming Library and has been having friends walk her to and from her car at night.

# 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 Mark?

- The burden of proof and the burden of gathering evidence rest on the recipient, not the parties.
  - What does this really mean in practice.
- This empowers a presumption of innocence.
  - What does this presumption really mean?
- Affirmative consent standards do not shift this burden, but that is a common misunderstanding of how affirmative consent standards work.

# ROLE OF CAMPUS LAW ENFORCEMENT IN CIVIL RIGHTS INVESTIGATIONS




- Can district/school/campus law enforcement (or public safety) be the Title IX investigatory arm? Should it be?
  - Legal standards for criminal investigations are different.
  - Police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively.
  - Conflict-of-interest for sworn officers.
  - Add value by supporting recipient's investigation efforts.
- Establish MOUs with district/school/campus police and other local enforcement and update annually.
  - The power of the table top exercise.



# FORMAL COMPREHENSIVE INVESTIGATION



- 
- A large, stylized red letter 'I' is positioned on the left side of the slide, extending from the top to the bottom. It has a slight shadow effect below it.
- 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 promptly, and without unreasonable deviation from the timeline.

# NOTICE TO THE PARTIES - OCR 2020 REGS

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 - OCR 2020 REGS (CONTD.)



- 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

# WHEN TO INTERVIEW PARTIES AND WITNESSES



- Notifying the Respondent of the complaint:
  - “Upon receipt of formal complaint”
  - Any allowance for interviewing witnesses and accumulating evidence?

# WITNESS INTERVIEWS



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

\*Every case is different

Additional permissions 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 is generally considered *relevant* if it has value in proving or disproving a fact at issue
- Under the Title IX Regs., evidence of the Complainant's sexual behavior or predisposition is explicitly and categorically **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 sexual behavior with respect to the Respondent and is offered to prove consent

# INVESTIGATION DETAILS

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- Evidence Collection and Issues of Concurrent Criminal Action
- Interviewing the Complainant
- Interviewing the Respondent
- Interviewing Witnesses
- Difficult Witnesses



# 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?

# EVIDENCE COLLECTION AND ISSUES OF CONCURRENT CRIMINAL ACTION



- Active accumulation of evidence.
- What if law enforcement is the sole source of evidence collection?
  - And they won't release the evidence to you?
  - Does it matter if they are local or the SRO/campus law enforcement/public safety?
- What if there is a pending criminal or civil case?
- What if a party or parents threaten to call a lawyer or file a lawsuit?
- What if a party files a lawsuit or complaint with OCR?

# EVIDENCE GATHERING



- Engage in the active accumulation of evidence.
- Timeliness.
- Document receipt of information and other materials as they are obtained in the course of the investigation.
- 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



- **All** relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory
- Credibility determinations may not be based on a person's status as a Complainant, Respondent, or witness
- Access to privileged information requires waiver/consent
- 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

# RIGHTS OF THE PARTIES DURING THE INVESTIGATION, OCR 2020 REGS



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

# VAWA SECTION 304 INFORMATION FOR COMPLAINANT



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

# TRAUMA-INFORMED INTERVIEWING

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- Considerations for 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-INFORMED 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-INFORMED INTERVIEWING



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

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

# INTERVIEWING SKILLS

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

# 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 open an amount of time roughly equivalent to the length of the interview for post-interview teamwork, review of notes with your co-investigator and to prepare for the next interview.

# 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; may be beneficial to interview Respondent last.
- Most beneficial to conduct interviews in person, if conditions permit.
- 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 Parents, Union Reps, Roommates, etc.
- FERPA (students)/Employment records/confidentiality

- Advisor of choice may be anyone, including attorney
- May restrict participation of advisors equally, except:
  - If a party does not have an advisor present at the hearing, the recipient must provide an advisor of the recipient's choice to conduct cross-exam
  - If an advisor is provided, this must be done without fee or charge to the party
  - Parents, friends, teammates, coaches, witnesses?

# 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.

# INTERVIEW SKILLS



- Explain process, your role as a neutral fact-finder, and applicable privacy protections and limitations.
- Discuss thoroughness and the need for completeness; make sure parties don't leave facts out (i.e. alcohol/drug use). Explain amnesty policy, if applicable.
- Create comfort with language and sensitive subjects.
- Establish rapport before questioning.
- Ascertain who the individual is and their relation to the other parties in the case.
- Document whether individual is cooperative or resistant.
- Be professional: gather the facts, make no judgments, and make no unnecessary statements about the parties.

# 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.

# INTERVIEW SKILLS



- Be cognizant of the difference between what is “believed” (conjecture) and what was “witnessed” (facts).
- Ask who else you should talk to and ask for any relevant documentation (i.e. texts, emails, etc.).
- Let parties/witnesses know you may need to follow up with them as the investigation progresses.
- Suggest that the parties consult their advisors before discussing the investigation with others, without placing restrictions on doing so.

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

# QUESTIONING

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- Goals of Questioning
- Types of Questions
- Questioning Exercise



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

- To 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?

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

# QUESTIONING



- Have a purpose for asking every question.
- Be sure to ask a question, not make a speech.
- Ask questions about the allegations and the evidence and the policy elements.
- Don't be accusatory or argumentative. You don't decide the allegations and should have no real stake in their outcome.
- If your skepticism shows, make sure you intend it to show, otherwise keep your cards close to your vest.
- 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.

- Listen carefully and adapt follow-up questions.
- Avoid evaluative responses to a person's answers unless needed to establish rapport, draw someone out, or convey empathy.
  - E.g.: "that's too bad"; "I'm glad you said that"
- Do not moralize.
- 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:

- What effect did your actions (or behavior) have on others? On the community? On yourself?
- Explain what you hoped to accomplish through your actions.
- Why did you choose to drink so much if you knew it was risky?
- Did you sign the Honor Code during orientation?
- I have a couple of questions: First, do you know what incapacitated means?; Second, could you tell she was incapacitated?; and Third, why did you give her another drink when evidence from witnesses indicates she was already really drunk?

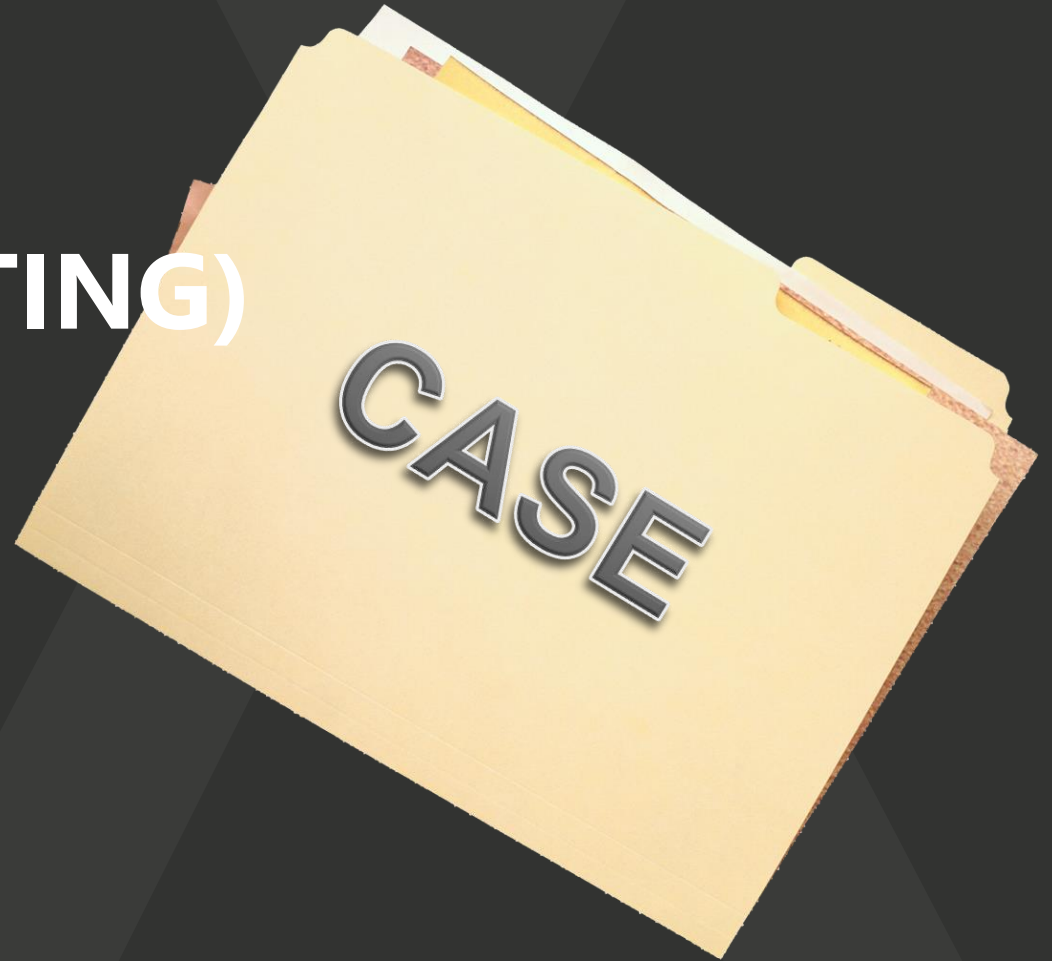
# QUESTIONING EXERCISE



Please critique the following questions:

- What other options were there for you in this situation?
- What was the purpose of your behavior?
- How would you feel if others were engaged in comparable behavior?
- What would be the consequences to the community if everyone engaged in comparable behavior?
- How does your responsibility for living within community standards apply to your actions in this situation?
- How might you react if such a situation were to come up again?

# **CASE STUDY (TIME PERMITTING)**





# MEETING WITH THE PARTIES

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# SHARING INFORMATION WITH PARTIES AND WITNESSES DURING INVESTIGATION



- Decide how much information you will share in advance of each interview and have a rationale for what information will be shared and what will not be shared.
  - 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-point questions.
- It can be difficult for the Respondent to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport-building. Provide a detailed description of the allegations as necessary

# SETTING UP REASONABLE EXPECTATIONS



- People who conduct investigations with skill rest secure in the knowledge that all those involved, including witnesses, were treated objectively and fairly.
- Be sure Complainant and Respondent understand parameters of the policy, what it does and does not cover, how the process plays out, and what the process can and cannot accomplish.
- Provide ample opportunity for the Complainant and the Respondent to ask questions.
- Keep parties informed of steps in 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.

# 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 and told 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 this has 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 touch.

# 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 as to 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.



# PATTERN/PREDATORY BEHAVIORS



- Investigators should be aware of any evidence of pattern acts or clear grooming actions.
- Investigators should not profile or base decisions on personality characteristics.
- Investigators may examine certain factors to inform their investigations:
  - Can the Respondent empathize with the other party?
  - Are they able to reflect on how their actions (violation or not) have impacted another person?
  - Do they justify their behavior and actions with rationalizations or attacks on the Complainant?
- Investigators are not using this line of inquiry to draw a conclusion, but to help inform the direction of the investigation.

# WITNESSES

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- Feedback to Witnesses
- Interviewing Witnesses
- Difficult Witnesses
- Lying Witnesses
- Resistant and/or Quiet Witnesses

# FEEDBACK TO WITNESSES



- Witnesses may ask or say:
  - Am I being investigated?
  - What are you really investigating?
  - How will you use the information you are given?
  - Is it confidential?
  - Will I get into trouble by giving you this information?
  - I don't want to cooperate.
  - Do I need my parents/lawyer present during interview?
- Anticipating these questions and/or covering them in advance can help 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” but to describe the behavior, neutrally.
- Ascertain relation to the other parties in the matter.
- Address the need for complete truthfulness.
- Ask relevant questions.
- Ask for opinions.
- Ask if either party spoke about the incidents after they happened.
  - Did they see any change in behavior?

# INTERVIEWING WITNESSES



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

# DIFFICULT WITNESSES



- Set the tone:
  - Thank them.
  - 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.
  - Review confidentiality.
  - Review expectation of truthfulness.

# LYING WITNESSES



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

# RESISTANT AND QUIET WITNESSES



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



# OTHER CONSIDERATIONS



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

# HELPFUL INVESTIGATION DOCUMENTS

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- Incident Timeline
- Post-interview Documents
- Witness Lists and Flowcharting

# INCIDENT TIMELINE



- Discuss timeline of event/s with all parties/witnesses.
- Obtain 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 highly relevant to alcohol/drug consumption.

# INCIDENT TIMELINE



- 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.

# “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.
- 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, etc.) .
- 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, etc.).

# INVESTIGATION RECORDS AS SMOKING GUNS IN LITIGATION



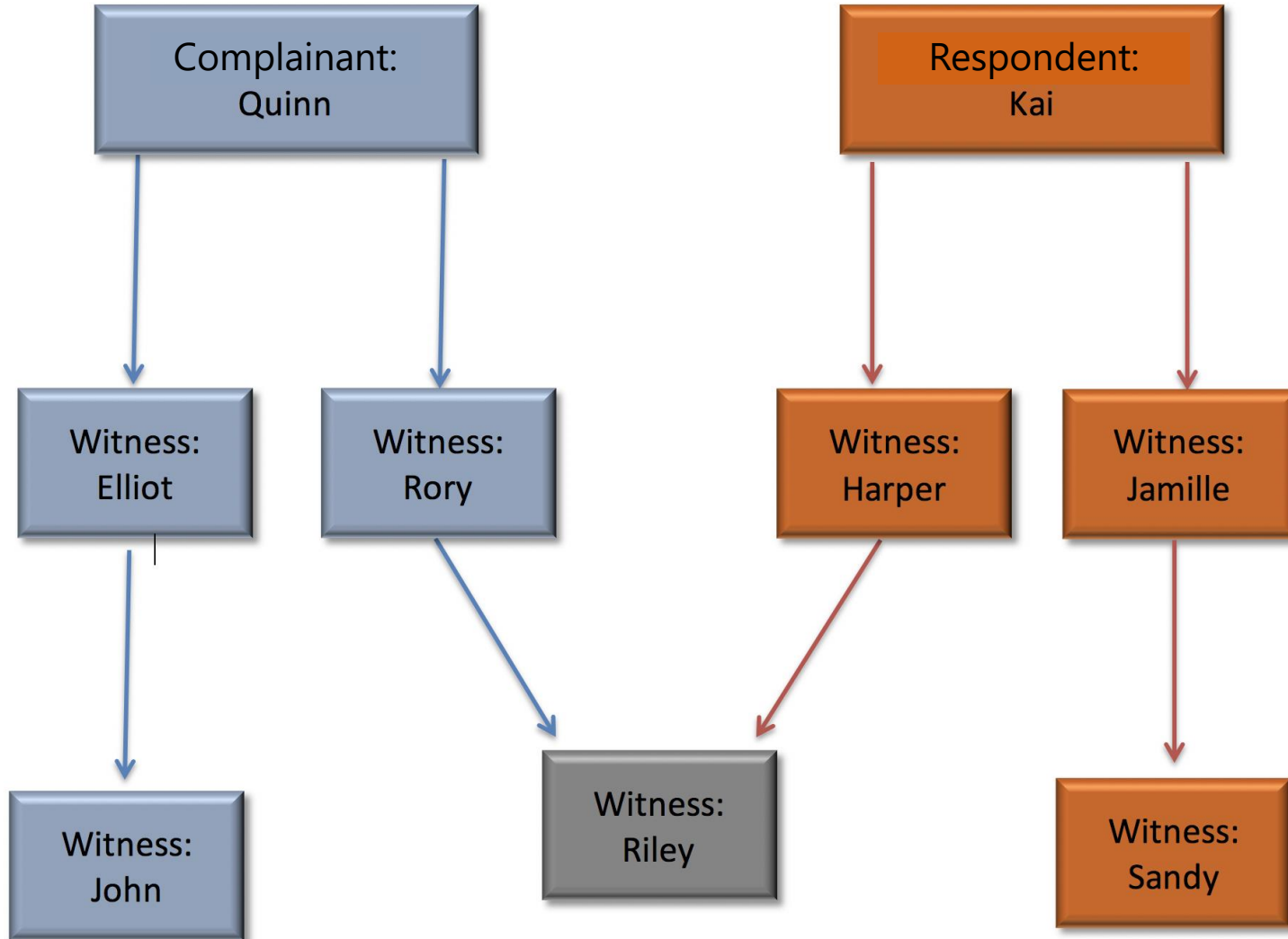
- “The File”:
  - The Respondent’s file.
  - The Complainant’s file.
  - The investigation file (including investigation report).
  - Personal case notes.
  - Witness education records.
- Subpoenas:
  - If you get one, call your general counsel!
- Understand the court process and your role in it. The documentation of your investigation is largely admissible in court, and you’re a witness to it.

# WITNESS LIST AND FLOWCHARTING BEST PRACTICES



- Keep a freshly updated list of your witnesses as you learn of them.
- Identify which parties or witnesses led you to other witnesses.
- Keep track of whether witnesses are neutral, loyal and biased, or loyal but objective. Include reasoning.
- In complex cases, use a flowchart to track witnesses the Complainant leads you to, the witnesses Respondent leads you to, and the witnesses who are neutral.
- Note in the flowchart where witnesses intersect in terms of relationships to each other and/or potential loyalties to parties.

# WITNESS FLOWCHART SAMPLE





# THE INVESTIGATION REPORT

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- The Investigation Report
- Standard of Proof
- Assessment of Credibility/Synthesis
- Referral to Decision-maker

- 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 and photographs, etc.

# THE INVESTIGATION REPORT



- References or contain 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

- **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.

# 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 for hearing (or to the decision-maker, for K-12 schools without a hearing).

# EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1 - OCR 2020 REGS



Prior to the completion of the report...

- Evidence directly related to allegations must be sent
  - To each party and advisor
  - In electronic format or hard copy
  - Including evidence upon which the Recipient does not intend to rely
  - Including exculpatory and inculpatory evidence
  - Allow 10 days for written response
  - Consider response prior to completion of report
  - Make this evidence available at hearing

# EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2 - OCR 2020 REGS



At least 10 Days Prior to Hearing...

- The final Inv. Report summarizing relevant evidence must be sent
  - To each party and advisor
  - In electronic format or hard copy
  - For the party's review and written response
  - Best Practice: Provide the investigative report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties
  - For K-12 schools without a hearing, this must occur 10 days prior to time of determination regarding responsibility
  - For K-12 schools with or without a hearing, this review is followed by exchange of relevant written questions and responses facilitated by decision-maker.

# WHO RENDERS THE DETERMINATION?



- Decision process:
  - Investigator refers investigation report to decision-makers without determination.
  - Investigator  $\neq$  Decision-maker.
- Importance of investigation report.
  - How much credibility assessment and analysis to include?
  - You want a balance; serve the content up on a silver platter, but you're just composing ingredients; the chef prepares the final dish.
  - Your opinion is not controlling, but you want to point the decision-makers toward decisive or corroborating evidence w/o telling them how to interpret it.



# LIVE HEARING



- A live hearing, whether with a panel or an administrator, is required by OCR for higher ed.
  - K-12 hearing optional.
- 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 subject 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 conclusion on credibility needs to be assessed by the decision-maker(s).
  - Whether someone/some evidence is credible; comparative credibility.
- The investigator's opinions regarding a determination 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.

# SANCTIONS & APPEALS

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- Common Sanctions
- Sanctioning in Sexual Misconduct Cases
- Communicating Outcomes
- Basic Overview of Appeals

# SANCTIONS AND REMEDIES UPON DETERMINATION OF RESPONSIBILITY



- Disciplinary sanctions for Respondent.
- “Remedies” to Complainant
- Any sanction must be reasonable and proportionate to the severity of the behavior.
- The appeal may return a matter to investigators, or consult investigators on the appealability of certain elements of the file, report, or testimony.

# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Investigation alone may not be sufficient to overcome a deliberate indifference claim.
- Must be a nexus between the sanctions and the discriminatory conduct which led to the sanction(s).
- What is appropriate?
  - Separation/expulsion.
  - Suspension.
  - Lesser sanctions.
- Engage in strategic education and training as remedies.
- Conduct a risk assessment audit and mitigation process.

# CONSIDERATIONS POST-FINDING



- Ensure remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- When applicable, take immediate steps to preserve access to education even before the final outcome of investigation (e.g. no contact orders, etc.).
- Ensure that long-term actions/remedies are equitable.
- Monitor for retaliation; respond immediately to allegations.
- Regularly review policies, procedures, and practices to ensure they are in accordance with best practices, industry standards, and state and federal case law.

- Title IX requires recipients to apprise parties of the status of investigations, **determinations, sanctions** (or remedial actions) **and supporting rationale**.
  - Recipient provide this information in writing and place no conditions on receiving or sharing it.
- Clery Act/VAWA and OCR 2020 Regs are the primary sources of mandates for outcome notification. FERPA also permits disclosure in certain circumstances.
  - Clery/VAWA disclosure of sexual assault outcomes/sanctions.
  - FERPA re-disclosure restrictions lifted in 2008.
  - FERPA cannot be construed to conflict with or prevent compliance with Title IX.

# VAWA REAUTHORIZATION UPDATES TO THE CLERY ACT



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

- Complainant and Respondent are entitled to the **same opportunities** to have a support person/advisor of their choice at **any** proceeding or related meeting.
- Parties must be simultaneously informed in writing of:
  - **The outcome**...that arises from an allegation of domestic violence, dating violence, sexual assault, or stalking.
  - The recipient’s procedures for appeal.
  - Any change to the results that occurs prior to the time that such results become final.
  - When such results become final.



# THE APPEALS PROCESS



- Appeals are mandatory under OCR's 2020 Regs
- 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 your investigation or report is appealed OR
- 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 appeals officer or gatekeeper.

# 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.

QUESTIONS?

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# CONTACT INFORMATION

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