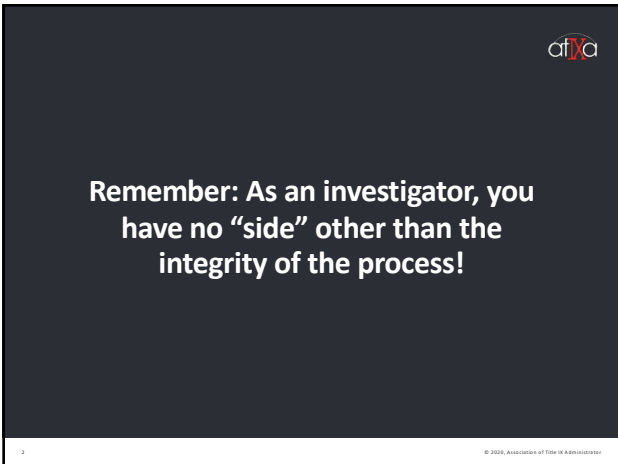
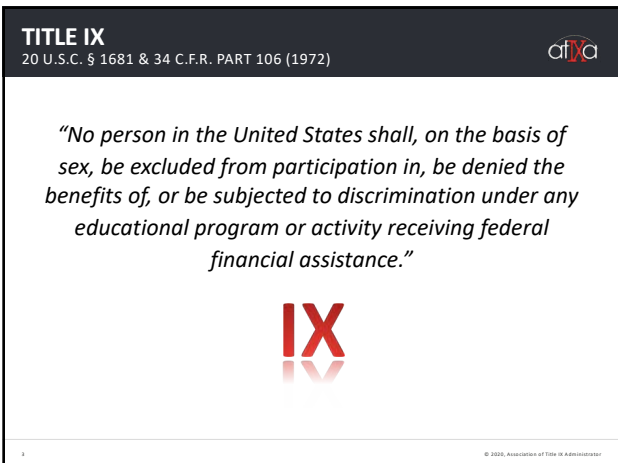




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2



3

THE IX COMMANDMENTS




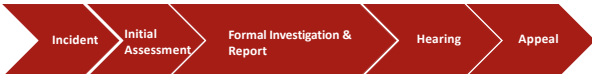
Thorough	Reliable	Impartial	Investigation (+prompt & fair – VAWA Sec. 304)	
Prompt	Effective	Equitable		Process
Not act unreasonably to stop discrimination	Not act unreasonably to prevent recurrence	Act equitably to remedy effects		

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THE PROCESS






Complaint or Notice to Title IX Coordinator Strategy development	Jurisdiction? Dismissal? Policy violation implicated? Reinstatement? Informal or formal resolution?	Notice to parties Identification of witnesses Interview scheduling Evidence collection Report drafted Evidence and IR shared IR finalized	Determination Cross-examination Sanction?	Standing? Vacate? Remand? Substitute?
--	---	---	---	--

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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.

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THE GOAL FOR INVESTIGATORS afca

Impartial

Trained

Competent

Focused

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STAYING IN YOUR LANE afca


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DUE PROCESS

- What is Due Process?
- Due Process in Procedure
- Due Process in Decision


9

WHAT IS DUE PROCESS? 

- The set of rights-based protections that accompany disciplinary action by a school, college, or university.
- Dictated by law & regulations, courts, system, district, school, or college policies and procedures.
- Private schools refer to this as “Fundamental Fairness”
 - Though courts and OCR are increasingly using the term Due Process

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EVOLUTION OF DUE PROCESS 

- Evolution of Due Process in education
 - Dean Wormer; Principal Strickland (1950’s)
 - *Dixon v. Alabama* (1961) & *Goss v. Lopez* (1975)
 - Constituency-based policies and procedures
 - Due Process & Student Conduct Administration
 - Title VII and HR Models
 - Civil Rights Investigation Model & Hearings
 - Current case law and 2020 OCR Regulations

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DUE PROCESS IN PROCEDURE 

- A school’s process should include (at a minimum):
 - Detailed and specific Notice of Allegation and/or Investigation.
 - Notice of Hearing.
 - Right to present witnesses.
 - Right to present evidence.
 - Right to an advisor of their choice
 - Opportunity to be heard and address the allegations and evidence.
 - Right to appeal
 - Right to Cross-Examination
 - Right to review all relevant evidence AND the investigation report prior to a decision.

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DUE PROCESS IN DECISION afca

- A decision must:
 - Be based on a fundamentally fair rule or policy.
 - Be made in good faith (i.e. without malice, ill-will)
 - Be unbiased
 - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
 - Not be arbitrary or capricious.
- Sanctions must be reasonable, constitutionally permissible, and should relate to the violations

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EFFECTIVE INVESTIGATIONS

- Active Accumulation of Evidence
- Consistent
- Planned/Strategic
- Documented
- Impartial



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CIVIL RIGHTS INVESTIGATION MODEL HALLMARKS afca

- Active identification and strategic gathering of evidence.
- Investigation is a critical part of the Title IX grievance process.
- Emphasizes transparency, communication, and fairness.
- Grounded in the concepts of neutrality and equity.
- Enhanced Due Process protections for parties.
- 2020 Title IX Regulations made substantial changes and additions to grievance resolution processes.

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A NOTE ABOUT TERMINOLOGY 

- Formal complaint
- Grievance process
- Recipient
- Complainant
 - Individual(s) affected by alleged conduct or circumstances
- Respondent
 - Individual(s) alleged to be responsible for alleged conduct or circumstances
- Sexual harassment
 - Quid pro quo
 - “Hostile environment”
 - VAWA offenses (sexual assault, domestic and dating violence, stalking)

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TITLE IX REGULATORY FRAMEWORK 

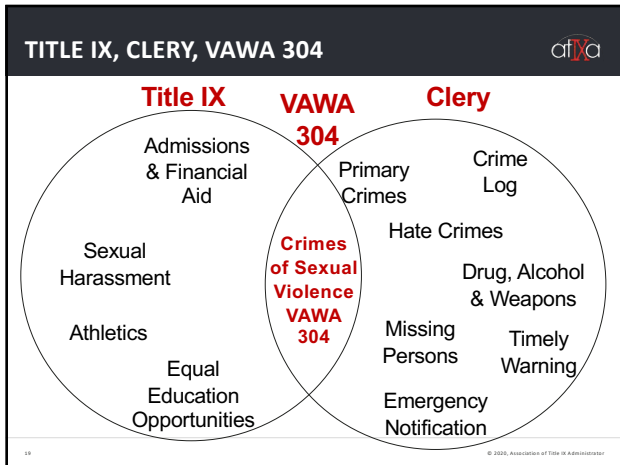
- Procedures for notice and formal complaint
- Separation between investigation, hearing, and appeal
- Distinct roles for
 - Title IX Coordinator
 - Investigator
 - Hearing Officer/Decision-Maker
 - Appeal Officer
- Evidentiary review periods
- Investigation report requirements

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STATUTORY AND REGULATORY STATUS

18



19

**THE CLERY AMENDMENT:
VAWA REAUTHORIZATION, SECTION 304**

Section 304

- Policy, procedure, training, education, and prevention requirements for:
 - Sexual assault
 - Stalking
 - Dating violence
 - Domestic violence
 } **The "Big 4"**
- Prohibits retaliation
- The 2020 Title IX regulations also include new procedural and training requirements for investigators for all forms of sexual harassment.

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CURRENT STATE

- **Withdrawn:**
 - 2011 Dear Colleague Letter (DCL)
 - 2014 Q&A on Title IX and Sexual Violence
 - 2016 DCL on Transgender Students
- **Still in effect:**
 - 1975 regs, as amended
 - 2001 OCR Revised Sexual Harassment Guidance (has force and effect of law; conflicts with 2020 regs)
 - 2003 DCL on Title IX and Free Speech
 - 2010 DCL on Harassment and Bullying
 - 2013 DCL on Pregnant and Parenting Students
 - 2015 DCL on the role of Title IX Coordinators
 - 2017 Q&A on Campus Sexual Misconduct issued as interim guidance, still apparently in place

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TITLE IX REGULATIONS 

- 2020 Title IX regulations
- Issued May 6th, 2020 (Publication date May 19th, 2020)
- Effective and enforceable August 14th, 2020
 - Amend the Code of Federal Regs. and have force and effect of law
 - Some provisions already mandated by due process case law in some jurisdictions
 - Intervening variables (litigation and legislation) may impact enforcement in the short or long term
- The new regulations are significant, legalistic, surprisingly prescriptive, very due-process heavy, and go well beyond what any court has required under 5th/14th Amendment case law.

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REGULATIONS HAVE THE FORCE AND EFFECT OF LAW 

- **Laws** passed by Congress (e.g.: Title IX) – Enforceable by courts/OCR
- **Federal regulations** promulgated under Title IX have **force and effect of law**, meaning they are enforceable by OCR
- What effect will these regulations have on courts?
 - Controlling weight (substantive/legislative)?
 - Persuasive weight (procedural/interpretive)?
 - Could form the basis of Section 1983 actions (personal liability)
 - Could constitute deliberate indifference (?) or disparate treatment
- OCR “regulatory guidance” or “sub-regulatory guidance”
 - Influential but not strictly enforceable (e.g. 2011 and 2015 DCLs)
- State and local preemption issues – 2020 regs pre-empt state law

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GRIEVANCE PROCEDURES 

- Must include:
 - Presumption that responding party is not responsible until determination is reached
 - “Reasonably prompt” timeframes
 - Requirement to set specific timelines for major stages of the grievance process now gone
 - Range of possible sanctions and remedies (mirrors Clery Act mandate)
 - Description of standard of evidence
 - Bases and procedures for appeal
 - Appeal now required, equitably, on three grounds
 - Range of supportive measures available to all parties
 - Note shift from “interim measures” terminology

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PROMPTNESS 

- Reasonably prompt timeframes for the conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals
- Concurrent law enforcement investigation does **not** relieve the burden of the school to investigate
- Temporary delays for “good cause” and with written notice of the delay to parties
 - Complexity of the investigation
 - Concurrent law enforcement investigation with time-dependent release of evidence
 - Delays for administrative needs are insufficient

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JURISDICTIONAL ISSUES 

- Emphasizes the *Davis* standard
 - Control over the harasser and the context of the harassment
 - “education program or activity” means...
 - locations, events, or circumstances under substantial control
 - any building owned or controlled by an officially recognized student organization
- Regulations specify “harassment...against a person in the United States”
 - Off-campus conduct, study abroad programs, or school-sponsored international trips – “nothing in these final regulations would prevent...”

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JURISDICTIONAL ISSUES 

- The definition of sexual harassment arguably covers the in-program effects of out-of-program misconduct (though not the misconduct itself)
- At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed
 - OCR adopts in the discussion a fairly broad definition of what could constitute attempting to participate

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REQUIREMENTS UNDER THE REGS 

- A recipient with **actual knowledge** of sexual harassment in an education program or activity of a recipient in the United States must respond in a manner that is **not deliberately indifferent**
- Mandatory dismissal
 - Does not constitute sexual harassment (§ 106.30)
 - Does not fall within jurisdiction
 - Program or activity inside the United States
 - Complainant participating in or attempting to participate in ed program
- Does not preclude action under another policy (General Non-Discrimination Policy, conduct code, etc.)

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REQUIREMENTS UNDER THE REGS 

- Voluntary dismissal
 - Complainant withdraws complaint or allegation
 - Respondent is no longer enrolled or employed
 - “specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination”
- Simultaneous notice to the parties
- Articulated rationale
- Action under another policy
 - Due process requirements for VAWA offenses in alternate process

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REQUIREMENTS UNDER THE REGS 

- Mandatory steps upon notice (§ 106.44)
 - Promptly contact the complainant to discuss the availability of supportive measures
 - With or without filing formal complaint, inform complainant of supportive measures and respect complainant’s wishes
 - Explain to the complainant the process for filing a formal complaint
- Mandatory steps upon formal complaint (§ 106.45)
 - Follow detailed grievance process requirements
 - Offer informal resolution options
 - Dismiss complaint if no jurisdiction or no *prima facie* sexual harassment allegation

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§ 106.30 DEFINITIONS – SEXUAL HARASSMENT

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

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§ 106.30 – SEXUAL HARASSMENT

Acts of sexual harassment may be committed by any person upon any other person, regardless of the sex, sexual orientation, and/or gender identity of those involved. Sexual Harassment as an umbrella category includes the offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking, defined as:


Conduct on the basis of sex that satisfies one or more of the following:

32

§ 106.30 – SEXUAL HARASSMENT

- Quid Pro Quo
 - 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;
- “Hostile Environment”
 - 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;

33


§ 106.30 – SEXUAL HARASSMENT 

Sexual assault, defined as:

- 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.

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§ 106.30 – SEXUAL HARASSMENT 

- 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 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.

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§ 106.30 – SEXUAL HARASSMENT 

- 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.

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§ 106.30 – SEXUAL HARASSMENT 

- 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].

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§ 106.30 – SEXUAL HARASSMENT 

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.

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§ 106.30 – SEXUAL HARASSMENT 

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.

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§ 106.30 – SEXUAL HARASSMENT cfca

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.

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ISSUE SPOTTING

Using a case study, attendees should evaluate the available facts, identify issues and related evidence (available and still needed)



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CONSIDERATIONS IN ISSUE SPOTTING cfca

- Engaging in issue spotting based on the Complainant’s statement is an important first step in development of your investigation strategy.
- You will continue to identify issues as you interview others and gather evidence.
- Continuing to revisit the facts gathered and identifying issues is critical to a comprehensive civil rights investigation
- Identifying the issues posed will help to identify the framework of policies in play.

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TRAVIS AND JUSTIN

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TRAVIS


Travis was on the lacrosse team for three weeks. Travis reported that he was being sexually harassed by Justin, the lacrosse team captain. In the span of two weeks, Justin has asked Travis out three times. The first time Justin asked Travis out, it was in the locker room when they both were naked, and Justin put his hand on Travis' back. The second time Justin asked, he was pretty drunk and got in Travis' personal space at a bar. The third time, Justin walked up next to him in the shower and tried to grab Travis' buttocks. Travis also kissed Justin at a party the weekend before the shower interaction.

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DIANE

45


DIANE 

Diane is a faculty member working with a small team of seven student research assistants who meet each morning to check-in with each other and the status of their grant projects in the university lab. May is a student team-member who has recently announced that she is pregnant.

One morning, May texted Diane that she was going to miss the morning meeting. Diane announced to the group that they should get started because May wouldn't be joining the meeting that day. A third student researcher, Paulie, responded with a snort, and said, "I bet she has morning sickness. Too bad, her breasts are getting to be GINORMOUS and I was looking forward to having a peek this morning." Several team members laughed hard at this joke, while a couple of others chuckled uncomfortably.

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DIANE 

Diane was livid, and immediately began to wonder how she could work with a team of people who objectify women like this. After the meeting she stormed into the Title IX office to complain about Paulie's conduct. She explained how uncomfortable she felt by the incident, how she no longer could work with Paulie, stating that he should be terminated from the grant-funded position and that the other students who laughed should be put on probation.


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CONSENT CONSTRUCT

- Force
- Incapacity
- Consent
- Case Study


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CONSENT IS... 

- Informed, knowing, and voluntary (freely given).
- Active (not passive).
- Affirmative action through clear words or actions.
- That create mutually understandable permission regarding the conditions of sexual activity.
- No means no, but nothing also means no. Silence and passivity do not equal consent.
- To be valid, consent must be given immediately prior to or contemporaneously with the sexual or intimate activity.
- Consent can be withdrawn at any time, so long as it is clearly communicated – verbally or non-verbally.

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OVERVIEW OF THE 3 QUESTIONS 

1. Was force used by the Respondent to obtain sexual or intimate access?
2. Was the Complainant incapacitated?
 - a. Did the Respondent know, or
 - b. Should Respondent have known that the alleged victim was incapacitated (e.g. by alcohol, other drugs, sleep, etc.)?

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 the specific sexual or intimate activity that took place as it took place?

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FORCE 

- Was force used by the Respondent to obtain sexual or intimate access?
- Because consent must be voluntary (an act of free will), consent cannot be obtained through use of force.
- Types of force to consider:
 - Physical violence: hitting, restraint, pushing, kicking, etc.
 - Threats: anything that gets others to do something they wouldn't ordinarily have done absent the threat.
 - Intimidation: an implied threat that menaces and/or causes reasonable fear.

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FORCE afca

- Types of force to consider (cont.)
 - Coercion: the application of an unreasonable amount of pressure for sexual access.
 - Consider:
 - Frequency.
 - Intensity.
 - Duration.
 - Isolation.

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INCAPACITY afca

- First, **was the Complainant incapacitated** at the time of sex?
 - Could the person make rational, reasonable decisions?
 - Could the Complainant appreciate the situation and address it consciously such that any consent was informed –
 - Situational awareness
 - Consequential awareness
- Second, **did the Respondent know** of the incapacity (fact)?
- Or, **should the Respondent have known** from all the circumstances (reasonable person)?

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INCAPACITY afca

- Incapacitation is a state where individuals cannot make rational, reasonable decisions because they lack the capacity to give knowing consent.
- Incapacitation is a determination that will be made after the incident *in light of all the facts available*.
- Assessing incapacitation is very fact-dependent.
- Blackouts are frequent issues.
 - Blackout ≠ incapacitation (automatically).
 - Blackout = no working (form of short-term) memory for a consistent period, thus unable to understand who, what, when, where, why, or how.
 - Partial blackout must be assessed as well.
- What if the Respondent was drunk?

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INCAPACITY 

- What was the form of incapacity?
 - Alcohol or other drugs.
 - Incapacity ≠ Impaired, drunk, intoxicated, or under the influence.
 - Incapacity = an extreme form of intoxication.
 - Administered voluntarily or without Complainant's knowledge.
 - Rape drugs.
- Mental/cognitive impairment.
- Injury.
- Asleep or unconscious.

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BEHAVIORAL CUES 

- Evidence of incapacity may be in the report taken from context clues, such as:
 - Slurred speech
 - The smell of alcohol on the breath in combination with other factors
 - Shaky equilibrium; stumbling
 - Passing out
 - Throwing up
 - Appearing Disoriented
 - Unconsciousness
 - Known Blackout
 - Although memory is absent in a blackout, verbal and motor skills are still functioning.
 - Outrageous or unusual behavior* (requires prior knowledge)

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SOME FACTS ABOUT ALCOHOL 

- Most abused drug on college campuses.
- Most commonly used date rape drug.
- Time – the **only** sobering tool.
 - One “drink” per hour.
 - “Myth of puking.”
- Pace of consumption.
- Food in the stomach.
- Carbonation and alcohol.
- Medications and alcohol.

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COMMON INTOXICATION FACTORS 

- Rate of consumption.
- Strength of drink.
- Food in the stomach.
- Body weight.
- Body type – body fat percentage.
- Gender.
 - E.g. enzymes, hormones, body fat, and water in body.
- Functional tolerance.
- Medications.
- Illness and dehydration.
- Fatigue.
- Caffeine.
- Genetics.
- Ethnicity.

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INCAPACITY ANALYSIS 

- If the Complainant **was not** incapacitated, move on to the Consent analysis.
- If the Complainant **was** incapacitated, but:
 - The Respondent did not know it, **AND**
 - The Respondent would not have reasonably known it = policy not violated. Move to Consent analysis.
- If the Complainant **was** incapacitated, and:
 - The Respondent **knew it or caused it** = policy violation. Sanction accordingly.
 - The Respondent **should have known it** = policy violation. Sanction accordingly.

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KNOWLEDGE CONSTRUCT 

- These answers should be in the report if the primary consideration is the out of norm behaviors of the Complainant as a determination of Incapacity:
 - Did the Respondent know the Complainant previously?
 - If so, was Complainant acting very differently from previous similar situations?
 - Evaluate what the Respondent observed the Complainant consuming (via the timeline).
 - Determine if Respondent provided any of the alcohol for the Complainant.
 - Other relevant behavioral cues.

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CREATE A TIMELINE 

- First must evaluate if the Complainant was incapacitated.
 - This inquiry will likely be triggered by statements such as:
 - “The next thing I remember was . . .”
 - “I woke up and . . .”
 - “I don’t remember anything after . . .”
 - That is your cue to start a timeline of the events during the incident to make the first-level analysis of whether the Complainant was incapacitated.

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TIMELINE CONSTRUCT 

- Begin the timeline at the time the incident began, starting at the time the Complainant began consuming alcohol/engaging in recreational drug use. Ask (but perhaps in a different way):
 - What were you drinking (e.g. wine, beer, or hard liquor)?
 - How much were you drinking (e.g. shot, 12 oz., or large cup)?
 - How many drinks did you have?
 - Were you using any recreational drugs?
 - When did you eat? What did you eat?
 - Are you on any personal medications?

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TIMELINE CONSTRUCT 

- If Complainant did not have anything to drink, or only had a small amount, you need to consider if the individual was drugged. You will need to ask:
 - Where were you when you were drinking?
 - Did you leave your drink at any time then resume consuming?
 - Did anyone provide drinks for you?

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TIMELINE CONSTRUCT 

- Determine what the Respondent observed about the Complainant’s behaviors. Do not ask these questions directly as written below:
 - Slurring words?
 - Stumbling?
 - Acting unusual (e.g. not making sense, appearing drunk, etc.)?
 - Falling asleep?
 - Throwing up?
 - Disoriented?
 - And, if Respondent knows Complainant, was s/he acting different from the way s/he usually acts?

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TIMELINE CONSTRUCT 

- The decision-maker will need to make an assessment if, based on the preponderance of the evidence, the Complainant was more likely than not incapacitated.
- If the answer is “No,” then will proceed to the Consent analysis.
- If the answer is “Yes,” then move to part two of your analysis.
- Conduct the same timeline for the Respondent, superimposed on the Complainant’s timeline.

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TIMELINE EXAMPLE

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CREATING A TIMELINE

The decision-maker will use the preponderance of evidence standard.

Use documentary evidence, e.g. texts to establish where, why, when, how, and who.

Match up as many times and locations as possible.

What did the other party observe?

Timeline events:

- 4pm: Two 1oz shots in room before leaving for party.
- 5pm: Grabbed a quick shower and bite to eat after practice.
- 6pm: Eat half a pizza at the student union building.
- 7pm: Caught up with Steven at Delta Tau Sigma.
- 8pm: Went to the the Alpha Phi Omega party; drank two solo cups of mystery punch. / Smoked a joint with Gina. / Two solo cups of beer from a keg at DTS.

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CREATING A TIMELINE

Timeline events:

- 9pm: Keg stand and two Jell-O shots.
- 10pm: Dancing with section mates.
- 11pm: Arrived at Alpha Phi Omega for beer pong championships. / One beer and another joint with Greg.
- 12am: Celebrated pong championship with Carly on the dance floor. / Snorted some Adderall.
- 1am: Walked Carly home.
- 2am: Paul alleges Carly asked him to stay the night. / Watched the end of Seth Myers.
- 3am: Paul alleges Carly consented to oral sex and intercourse.
- 4am: Danced with Paul before he walked me home.

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CONSENT ANALYSIS

- What clear words or actions by the Complainant gave the Respondent permission for the specific sexual or intimate activity that took place as it took place?
 - Is there any sexual or intimate pattern history between the parties?
 - What verbal and non-verbal cues were present during any acts that the parties agree were consensual?
 - This is where getting detail and specifics of intimate behaviors is critical.

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CASE STUDY

Using a case study, attendees should evaluate the available facts, identify issues and evidence (available and still needed), and assess compared to policy prohibitions.



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AMY AND TODD

71

AMY




On Friday, April 23, I went to an on-campus party. I was doing a lot of drinking and dancing and getting to know people. I had at least four drinks in the first few hours I was there. Then, I met Todd. I remember that he came up to me on the dance floor and started to dance with me. He was really good-looking, and so was the other guy he was with, Jeff, whom I had met at a different party the week before.

We danced and had a lot of fun, and I remember drinking some more and Todd getting me some Jell-O shots, which were really strong and nasty. I wasn't feeling well and went into the bathroom, thinking I might throw up. The bathroom was really crowded, so I went outside for some fresh air instead. I sat on the stoop, feeling sick. Todd came over and helped me out. I remember walking home with him but nothing else.

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AMY 

When I woke up the next day, his name and number were scrawled on a pad by my sofa, and there was a used condom in the toilet. I got scared and called him to find out what had happened. I remembered most of what he said about the party, but when he told me that we came back to my room and had sex, I started to cry. I didn't remember any of it and was afraid I might be pregnant. Todd assured me that he wore a condom and asked me out again. I hung up and cried.

I told everything to my roommate, Sarah, who was sitting on the sofa when I called Todd. She suggested that I call the campus police, but I felt more comfortable talking to you.

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TODD 

On the night of Friday April 23, I went to an on-campus party. There was a band and a lot of alcohol. I got to the party at about 11:00 p.m. and slammed about three beers in the first hour I was there. It was very crowded, and people were dancing. A lot of people already seemed to be drunk. I hung out around the dance floor with my friend Jeff Kwik for a while, until I noticed Amy Craft dancing. She was really cute, and I had noticed her on campus a few times. I went up to her and we started talking. She seemed a little tipsy and in a pretty loose mood. We talked for a while, and I think I got her about two or three beers over the next hour. I didn't have anything more to drink because the three beers I slammed were doing the trick just fine.

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TODD 

Around 1:00 a.m., somebody started passing out Jell-O shots spiked with grain alcohol. I didn't want to mix beer and liquor, but Amy had a few shots. We danced a lot, and then I got her a few more Jell-O shots. She went off to the bathroom, and after that I couldn't find her, which really bummed me out. I waited around to see if she would show up again, but she didn't. I took off and started to walk back to my residence hall. As I left the party, I looked over and saw Amy. She seemed to be in pretty bad shape. I offered to take her home, and she told me her dorm and leaned on my arm.

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TODD 

When we got to her dorm, I helped her inside, and was about to leave, but she asked me to come up to her room, just to make sure she got there. I took her upstairs, opened the door for her, and let her in. She asked me to get her a glass of water, and I did. I started to take off again, but she asked me not to go. When I turned around, she kissed me, hard. We kissed for a while, but she wasn't feeling well and went into the bathroom again. When she came out, she said she felt better, but tired. She lay down and we kissed some more. I started to massage her back, and she passed out. She came to about 20 minutes later and started to kiss me and fondle me. She took off her shirt, and all of my clothes. I started to kiss her all over, and she said she wanted to lay down again. I asked her if she was OK, and she said she was. I asked her if she had a condom, and she said she had one in her dresser. I went to get it, and when I got back to the couch, she was out again.

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TODD 

She woke up after about 20 minutes, and I suggested that she just go to sleep. But she said she felt much better and started to give me oral sex. After a while, she put the condom on me and we had sex. It was great. She was really wild and liked to be on top. Afterward, we talked until the early morning, and I gave her my number and left. The next day, she called me to ask me why my name was on the pad by her sofa. I told her about meeting her at the party and about our evening together. She seemed to get upset, and said she remembered meeting me at the party, but nothing else. I asked if she ever wanted to get together again, and she hung up on me.


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TRAUMA AND INVESTIGATIONS

- Introduction to Trauma
- Neurobiological Impact of Trauma
- Trauma and Interviewing
- Trauma and Credibility


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WHAT IS TRAUMA? 

- Exposure to an event or events that creates a real or perceived threat to life, safety, or sense of well being and bodily integrity.
- May result from war, natural disasters, severely distressing events.
- When the brain senses a threat, releases hormones or chemicals throughout the body to help react to the threat and/or trauma.
- The brain does not distinguish between “types” of sexual assault,
 - E.g. stranger or acquaintance, but interprets them equally as threats to survival.
- The brain also does not typically differentiate between an actual threat and a perceived or subjective threat.
 - Sometimes also a function of prior experiences, rather than the immediate situation.

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MEMORY AND TRAUMA 

- Memory is formed in two steps:
 - Encoding: organizing sensory information coming into brain.
 - Consolidation: grouping into memories and storing the stimulus.
- Trauma can interfere with the encoding and/or the consolidation of memory.
- May create fragmented memories.
- Recall can be slower and more difficult.
- Alcohol may interfere further with memory.
- However, sensory information (smell, sound, etc.), may still function properly.

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TRAUMA & INTERVIEWING 

- Expecting a Complainant to give a linear account in the days after an incident, or after having been triggered, is not always realistic.
- Memory fragmentation can occur.
- Having “inconsistent” memory, pausing, and stumbling to provide an account are not outside the bounds of what one could expect from a person who has experienced trauma.
- Considerations for credibility?

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TRAUMA & INTERVIEWING 

- Allowance for sleep cycles prior to interviews (if within 96-120 hours).
- A non-linear account, with jumping around and scattered memories is not uncommon.
- If alcohol is an additional factor, narrow and detailed questions will be difficult for reporting parties to access and may create additional stress.
- Use open-ended questions.
- Don't interrupt or barrage with questions.
- Use strategies that pull out fragmented memories.
- Be patient during the interview and allow time.

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TRAUMA & INTERVIEWING 

- Empathy is critical.
 - However, remember to remain impartial.
- Tell me more about...
- Help me understand your thoughts when...
- What was going through your mind when...
- What are you able to remember about...?
 - 5 senses
- What were your reactions to this experience?
 - Physically
 - Emotionally
- What, if anything, can you not you forget about this experience?

Source: Partially drawn from Russell Strand, Forensic Experiential Trauma Interview: A Trauma Informed Experience.

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TRAUMA & CREDIBILITY 

- Trauma may help explain elements that negatively impact a party's credibility
 - Inconsistencies in a party or witness's statement.
 - Lack of linearity in a party or witness's account or statement.
 - Lack of memory about an incident.
 - Memory errors by a party or witness.
 - Demeanor or affect.
 - Brief answers, or answers lacking in detail.

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TRAUMA & CREDIBILITY cfca

- However, while trauma may help explain issues that impact credibility, it typically does NOT excuse them.
 - An assessment of credibility must focus on issues such as the reliability, consistency and believability of the parties.
 - If, for example, a party’s account is inconsistent or variable, lacking in detail, or has material memory gaps, it typically lacks credibility.
 - An understanding of trauma and its impact will provide insight as to why some credibility deficits exist, but a trauma-informed understanding should not materially impact a credibility assessment.
- Use caution because actual or perceived trauma may have little or nothing to do with consent.

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STRATEGY OF THE INVESTIGATION



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STRATEGY IS KEY cfca

- The investigation team, in consultation with the Title IX Coordinator or designated Deputy strategizes throughout the entire investigation. This includes:
 - What are the issues presented?
 - Are there undisputed facts? Which ones are significant to the investigation?
 - Are there facts in dispute? Which ones are significant to the investigation?
 - What Policy(s) elements may have been violated?
 - Who do you need to interview?
 - What should be the order of the interviews?

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OTHER ELEMENTS TO CONSIDER IN STRATEGY 

- Strategize when to interview Complainant and Respondent.
- What are the key issues involved?
 - What additional strategies do you need to address key issues?
- What additional documentary evidence will be important to the investigation?
- Discuss your Methodology for this case (what approach will you use?)
- Timeline (within 30-60 days will vary by case).

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WHEN TO INTERVIEW PARTIES AND WITNESSES 

- Impact of new Title IX regulations on clear and timely notice to the parties of the allegations and investigation.
- Parties and witnesses should be interviewed as soon as possible:
 - So that recollections are as fresh and accurate as possible.
 - To secure necessary remedies in a timely manner.
 - Should not conduct interviews until parties have received their written notice of the allegations and investigation.

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STRATEGY EXERCISE 

- Use your issues list
- Develop your Strategy
 - Is there undisputed information? Is it relevant to explore?
 - Is there disputed information? Is it relevant to explore?
 - Are there any key issues that aren't policy violations?
 - Are there possible policy violations that were not included in the notice of investigation/allegation?
 - Who do you want to talk with (order of interviews?)
 - What represents your next steps?

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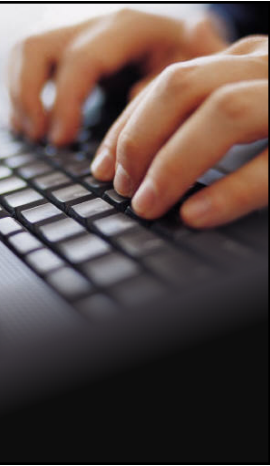
STRATEGY EVOLUTION afca

- Find an opportunity to let your subconscious work on the gaps in information.
 - Turn your brain off ... walk away and do something else
 - Use colleagues: co-investigator and others
- If you are too busy analyzing what you know, you will not focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them.
- Look for evidence that should be there that is not, for some reason.

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NOTE-TAKING AND RECORD KEEPING



- What Kinds Of Notes Should Be Kept?
- Note-Taking


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WHAT KINDS OF NOTES SHOULD BE KEPT? afca

- Assemble an investigative file and keep it in a secure location.
- Keep a timeline of the steps in the process, including dates of all meetings and interviews.
- Interviews – notes vs. recording.
 - Recording is becoming more common
- Notes – handwritten vs. computer.
- **Interviewee verification.**
- Records of all contacts, including emails and phone calls with all parties.

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NOTE-TAKING 

- Taking notes may slow down the interview in a good way.
- Use pre-prepared numbered questions as a framework, but be flexible.
- Note-taking should occur throughout the entire interview, not just when the Respondent makes a pertinent disclosure or an “incriminating” remark.
- Documentation is critical: you are creating the record of the complaint.
- Remember that students have the right to inspect their education record under FERPA.

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NOTE-TAKING 

- Notes should be complete and detailed.
 - Important for assessing credibility.
 - Decision may turn on small details.
- Where possible, include verbatim statements on critical issues – Use their words, not yours.
- Keep notes on what is told to the Complainant, Respondent, and witnesses.
- You may want to summarize perceptions of credibility.
 - Recognize, however, that notes and evidence may be subject to review.

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NOTE-TAKING 

- Remember that “sole possession” FERPA exception is very limited.
- Date all records and include who was present at any meetings; number pages.
- Review your notes before the interview concludes.
- Clarify anything you are unclear about.
- Document any refusal to answer, evasion, or refusal to participate.
- Capture key quotes.
- Review and finalize notes immediately upon completion of interview.

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THE FIVE DOCUMENTS TO CREATE POST-INTERVIEW 

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

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RECORD-KEEPING 

- Certain records must be maintained for at least seven years:
 - Sexual harassment investigation including any responsibility determination, any disciplinary sanctions imposed, and any remedies implemented
 - Any appeal and related result(s)
 - Any informal resolution implemented
 - Any supportive measures implemented
- For each conclusion, recipient must document the rationale for its determination
- Recipient must document measures taken to preserve/restore access to education programs/activity

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RECORD-KEEPING 

- Considerations for investigator notes
 - Fact-based observations
 - Avoid conclusions or determinations
- “Maintain” applies to what is kept
- Develop and maintain minimalistic note-taking style
- Overwritten notes
- Think about who could potentially read – parties, attorneys, judge, jury, public

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MEETING CONSIDERATIONS

- A review from Investigator One



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THE ENVIRONMENT




- Where will you do the interview?
 - Your office?
 - Conference room?
- Videoconference, phone, and email interviews
- Important aspects:
 - Neutral environment.
 - Minimize distractions.
 - Sit in their chair.
 - Check your lobby/waiting area for distractions and “hidden messages.”

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THE INVESTIGATORS



- Maintain professionalism, but balance with relaxed atmosphere.
 - Attire.
 - Demeanor.
- You are an extension of the environment.
- Your neutrality is key but should be balanced with compassion.
- Maintain good eye contact and comfortable, open body language.

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OTHER CONSIDERATIONS 

- Consider who should conduct the interview and who should be note-taking.
- Allow time. (What if you don't have enough?)
- Use breaks strategically.
- Remain calm and professional.

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MANAGING EXPECTATIONS 


- No one is happy at the end of these cases.
- People who conduct investigations with skill rest secure in the knowledge that all involved, including witnesses, are treated objectively and fairly.
- **Be sure the parties understand parameters of the policy, what it does and does not cover, how process plays out, and what process can and cannot accomplish.**
- Provide ample opportunity for interviewee (especially the Complainant and the Respondent) to ask questions.

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QUESTIONING SKILLS & GUIDELINES

- A review from Investigator One



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QUESTIONING GUIDELINES 

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

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

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RESTATE/REFRAME 

- Restate/summarize what is said. Helps validate that you are listening.
- Do not launder the language.
 - Report what is said. Rephrase with caution.
- Helps ensure you understand what is being said.
- Consider using these phrases
 - “So it sounds like...”
 - “Tell me more...”
 - “Walk me through”
 - “Help me understand”

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CONDUCTING INTERVIEWS 

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

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INTERVIEW GUIDELINES 

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

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CONDUCTING INTERVIEWS CONT. 

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

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CONDUCTING INTERVIEWS CONT. 

At the end:

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

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IMPACT OF NON-PARTICIPATION afca

- Engagement expectations
 - What happens if a party declines to be interviewed?
 - Requests for written questions
 - Refusal to answer questions
 - Refusal to engage in process
 - What happens if a party declines to testify at the hearing?
 - What happens if a party refuses to submit to cross-examination?
- Evidentiary preclusions under 2020 regulations
- Evidentiary “vacuum” resulting from non-participation

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HIT THE G.A.S.

- Gather Evidence
- Assess Credibility
- Synthesize the Information


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GATHER THE EVIDENCE afca

- Collect the evidence from all sources
- Organize it according to the investigation strategy and allegations
 - Chronology
 - Geography
 - Policy prohibitions
 - Alleged violations
- Summarize evidence in a written report
- This the fact-gathering function. It’s a function all investigators have performed since at least 2011, and it’s not new or different as a result of regulations.

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ASSESS CREDIBILITY 

- Accuracy and reliability of information
- “Credible” is not synonymous with “truthful”
- Memory errors, evasion, misleading *may* impact
- Primary factors: corroboration and consistency
- Avoid *too much* focus on irrelevant inconsistencies
- Source + content + plausibility
- Trauma-informed approach should be consistent

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COMMON ERRORS IN ASSESSING CREDIBILITY 

- Misplaced emphasis on nonverbal indicators of deception such as nervousness/anxiety
- Misplaced emphasis on inconsistency of information provided by an interviewee
 - Research shows truthful memory recall includes the natural omission or subsequent recollection of details
- Confusion about memory
 - Stress and emotion may lead to enhancement of memory or to the disruption of encoding and retrieval processes

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COMMON ERRORS IN ASSESSING CREDIBILITY 

- Misplaced focus on the status of the parties
 - No scientific studies support the notion of neurobiological response differences between perpetrators and victims
- Bias in interviews
 - Presumptions of guilt can influence credibility assessments

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INTERVIEW TACTICS afca

- Reverse Chronological Order
- Use of a Model Statement
- Asking unexpected questions
- Asking the individual to recall information in unexpected ways, e.g. sketch
- Asking interviewees for details that the investigator can check
 - Truth tellers generally add more “checkable” details
 - Liars provide details that are difficult to verify
- The Funnel

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CREDIBILITY afca

- Inherent plausibility
 - “Does this make sense?”
 - Be careful of bias influencing sense of “logical”
- Motive to falsify
 - Do they have a reason to lie?
- Corroboration
 - Aligned testimony and/or physical evidence
- Past record
 - Is there a history of similar behavior?
- Demeanor
 - Do they seem to be lying or telling the truth?

*Enforcement Guidance
on Vicarious Employer
Liability for Unlawful
Harassment by
Supervisors*

EEOC (1999)

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FACTORS TO CONSIDER FOR CREDIBILITY afca

Corroborating evidence

- Strongest indicator of credibility
- Independent, objective authentication
 - Party says they went to dinner, provides receipt
 - Party describes text conversation, provides screenshots
- Corroboration of central vs. environmental facts
- Not simply alignment with friendly witnesses

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FACTORS TO CONSIDER FOR CREDIBILITY 

Corroborating evidence

- Can include contemporaneous witness accounts
 - More “separate” the witness, greater the credibility boost
- Outcry witnesses
 - Does what party said then line up with what they say now?
- Pay attention to allegiances
 - Friends, roommates, teammates, group membership
 - This can work both directions (ex. the honest roommate)

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FACTORS TO CONSIDER FOR CREDIBILITY 

Inherent plausibility

- Does what the party described make sense?
 - Consideration of environmental factors, trauma, relationships
- Is it believable on its face?
- “Plausibility” is a function of “likeliness”
 - Would a reasonable person in the same scenario do the same things? Why or why not?
 - Are there more likely alternatives based on the evidence?

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FACTORS TO CONSIDER FOR CREDIBILITY 

Inherent plausibility

- Is the party’s statement consistent with the evidence?
- Is their physical location or proximity reasonable?
 - Could they have heard what they said they heard?
 - Were there other impediments? (darkness, obstructions)
- How good is their memory?
 - Temporal proximity based on age of allegations
 - “I think” “I’m pretty sure” “It would make sense”

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FACTORS TO CONSIDER FOR CREDIBILITY 

Motive to falsify

- Does the party have a reason to lie?
- What's at stake if the allegations are true?
 - Think academic or career implications
 - Also personal or relationship consequences
- What if the allegations are false?
 - Other pressures on the reporting party – failing grades, dramatic changes in social/personal life, other academic implications
- Reliance on written document during testimony

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FACTORS TO CONSIDER FOR CREDIBILITY 

Past record

- Is there evidence or records of past misconduct?
- Are there determinations of responsibility for substantially similar misconduct?
- Check record for past allegations
 - Even if found “not responsible,” may evidence pattern or proclivity
- Written/verbal statements, pre-existing relationship

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FACTORS TO CONSIDER FOR CREDIBILITY 


Demeanor

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

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CREDIBILITY ASSESSMENTS IN INVESTIGATION REPORTS




- Indicate where to look to the decision-maker without rendering conclusions or making findings related to credibility.
- NOT GOOD
 “The decision-maker should find Mark to be unbelievable in his testimony about having received consent for the following reasons....”
- GOOD
 “Mark’s testimony about X contrasts with Mariana’s testimony about X, and the accounts of Witness 1 and Witness 7 aligned with Mariana’s testimony, not Mark’s, during the investigation.”

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SYNTHESIZE AREAS OF DISPUTE




- Examine only actions that have a direct relation to the situation under review or a pattern of incidents.
- Narrow the scope to areas in dispute or disagreement between the parties.
 - Two lists: contested and uncontested facts
- Use evidentiary and report review periods to clarify disputed facts
- Present evidence in report organized around facts relating to alleged policy violations
- Contested facts will form the bulk of the decision-maker’s work in making a determination.

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THE INVESTIGATION REPORT


SAMPLE TEMPLATE FOR INVESTIGATIVE REPORTS

This is just one example that may be useful. You should consult with a licensed attorney in your own jurisdiction before adapting this template.

University of Knowledge

Date of Report:

This report addresses alleged violations of the Policy (Name(s)) of the University of Knowledge. Name(s) of Investigator(s) conducted the investigation into these allegations. This report will determine whether it is more likely than not that there has been a violation of the relevant university policy or policies.

Executive Summary:
(Summarize findings here.)

Procedural History:
Include the date of the incident, the date on which it was reported, how and to whom generally it was reported, the date on which investigators were assigned to it, and the date on which the investigation closed.

On Month XX, 2000, Reporting Party met with Name Here in the Office of Victim Assistance at University of Knowledge along with Name Other Present Parties. Reporting Party reported that General Allegations occurred on Month XX, 2000. Reporting Party has not reported this matter to law enforcement at this time, although she is aware of this option.


This report was referred to investigators Name Here and Name Here on Month XX, 2000. Both investigators were present in person for each interview. They alternated questioning and note-taking roles. This investigation was completed on Month XX, 2000.

Involved Parties:

Reporting Party is, e.g., a first-year undergraduate female residing in the residence halls).

1. Responding Party is, e.g., a male graduate student and a residence advisor in the residence halls).
2. Witness 1 is, e.g., a freshman female residing in the residence halls and Reporting Party's roommate).
3. Witness 2 is, e.g., a male undergraduate living off-campus and a classmate and friend of Reporting Party.
4. Witness 3 is, e.g., an employee of nearby bar; employee is not affiliated with the university.


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ELEMENTS OF THE INVESTIGATION REPORT 

- Case identification information:
 - Case number, investigator(s), date of notice, date assigned to investigator, and date investigation closed.
- Source of initial complaint/allegation:
 - Source of initial report, information regarding the formal complaint; name and contact information of Complainant, and status; record same for Respondent.
- Details from initial report/complaint:
 - Nature of incident.
 - How initial report and/or formal complaint was received (e.g. security incident report, hotline, in person, Web form, etc.).

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ALSO INCLUDE IN THE INVESTIGATION REPORT 

- Results of interviews with parties and witnesses.
- Results of interviews with experts.
- Summary of other information collected (i.e. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.).

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THE INVESTIGATION REPORT 

- A skeleton template is helpful
- The investigation report is the one comprehensive document summarizing the investigation, including:
 - Detail the allegations and how they were brought forward.
 - Explain the role of the parties and witnesses, and any relations between them.
 - Results of interviews with parties and witnesses.
 - Results of interviews with experts.
 - Summary of other information collected (i.e. information from police reports including pretext calls, medical exams, video surveillance and photographs, copies of texts, emails, and social networking messages, etc.).

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FOCUS ON WHAT YOU DON'T KNOW, RATHER THAN WHAT YOU DO KNOW afca

- Find an opportunity to let your subconscious work on the gaps in information.
- If you are too busy analyzing what you know, you won't focus on the need to identify what is missing, what is yet to be obtained, or why certain witnesses have not told you things that it would have been logical or expected to hear from them.
- Look for evidence that should be there that is not, for some reason.

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INVESTIGATING RETALIATION CLAIMS

- Basic Legal Principles
- Investigating Retaliation Claims



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RETALIATION BASIC LEGAL PRINCIPLES afca

Title IX regulations prohibit recipients from intimidating, coercing, or retaliating against individuals because they engage in activities protected by Title IX.

- Protected activity under Title IX:
 - Reporting sex discrimination, including sexual harassment and assault.
 - Filing a discrimination complaint.
 - Assisting someone in reporting discrimination or filing a complaint.
 - Participating in any manner in an investigation of discrimination, for example as a witness.
 - Protesting any form of sex discrimination (e.g. lack of equity in athletics).

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INVESTIGATING RETALIATION CLAIMS: KEYS TO UNDERSTANDING 

- Establishing retaliation, unlike establishing sexual harassment, requires proving motive – the intent to retaliate.
- Someone’s intention is rarely displayed openly. Therefore, the legal framework is about whether a retaliatory motive can be inferred from the evidence.
- Gathering details of what occurred is critical.

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PRELIMINARY ELEMENTS OF A RETALIATION CLAIM 

- The following elements establish an *inference of retaliation*:
 - Did the individual engage in protected activity?
 - Usually straightforward,
 - Unless there is a question of reasonableness of belief or manner.
 - Was the individual subsequently subjected to adverse action?
 - Do the circumstances suggest a connection between the protected activity and adverse action?
 - Did individual accused of retaliation know about activity?
 - How soon after the protected activity did the adverse action occur?
 - If these three elements are not shown, the claim fails.

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RETALIATION AND ADVERSE ACTION 

- Common definition of *adverse action*:
 - Significantly disadvantages or restricts the individual as to their status as students or employees, or their ability to gain the benefits or opportunities of the program; or
 - Precluded from their discrimination claims; or
 - Reasonably acted or could act as a deterrent to further protected activity.
 - The U.S. Supreme Court and the federal courts have defined adverse action *very broadly*.

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**INVESTIGATING RETALIATION CLAIMS:
REBUTTING THE INFERENCE** 

- What is the stated non-retaliatory reason for the adverse action?
 - Is the explanation for the action legitimate on its face?
- Is there evidence that the stated legitimate reason is a pretext?
 - This is the heart of the case – is the explanation the true reason?
- The preponderance of the evidence must establish that the adverse action was motivated by retaliation.

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**INVESTIGATING RETALIATION CLAIMS:
IS THE EXPLANATION LEGITIMATE?** 

- Factors to consider:
 - The explanation makes sense.
 - The action was consistent with established policy or practice.
 - No adverse action was taken against others who engaged in protected activity.
 - Complainant was treated the same as other individuals.

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**INVESTIGATING RETALIATION CLAIMS
IS THERE EVIDENCE OF PRETEXT?** 

- Factors to consider:
 - The explanation given is not credible.
 - Other actions by the same individual are inconsistent with the explanation.
 - The explanation is not consistent with past policy or practice.
 - There is evidence of other individuals treated differently in similar situations.

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BIAS & PREJUDICE



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"BIAS" DEFINED




- Tendency to believe that some people, ideas, etc. are better than others that usually results in treating some people unfairly.
- Strong interest in something or ability to do something.
- Inclination of temperament or outlook; especially a personal and sometimes unreasoned judgment (*merriam-webster.com*).
- "Biased" – To cause partiality or favoritism; influence, especially unfairly (*dictionary.com*).
- **Confirmation Bias**
- **"Like Me" Bias**

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"PREJUDICE" DEFINED



- Unfair feeling of dislike for a person or group because of race, sex, religion, etc.
- Feeling of like or dislike for someone or something especially when it is not reasonable or logical (*merriam-webster.com*).
- Any preconceived opinion or feeling, either favorable or unfavorable (*dictionary.com*).
- A prejudicial action is harmful to someone. In the investigation context, the "harm" is an unfair decision.

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BIAS & PREJUDICE 

Key Issues

- Conscious vs. unconscious.
- Positive vs. negative.
- Social & cultural capital.
- Stereotyping.
- Cultural competence.
- Multi-partiality.
- Social justice.

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BIAS AND PREJUDICE CONT. 

- Common hot-button areas of bias & prejudice that impact investigators:
 - Sexual orientation.
 - Gender, transgender, and gender identity.
 - Race.
 - Ethnicity.
 - Religion or religious beliefs.
 - Political views.
 - Athletes.
 - Greek life.
 - Alcohol or drug use.
 - Sexual freedom

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CONFLICT OF INTEREST 

- Conflicts of interest create create role confusion that can compromise impartiality and objectivity
- Types of conflicts:
 - Wearing too many hats in the process
 - Legal Counsel as decision-maker
 - Non-impartial appellate officer, hearing officer, or board
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest
- Also, having disciplined a student or employee previously is often not a conflict of interest

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BIAS ISSUES IN RECENT CASELAW 

- Bias in Procedure
 - Exclusion of evidence
 - “Believe First” or “I believe you”
 - Failure to follow procedures
 - Placing burden of proof on the Respondent
- Biased training materials
- Insufficient Training
- Bias due to internal and external pressures (e.g. politics, identity of the parties or parents, lawsuits and attorneys, etc.)
- Conflicts of interest

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BIAS & CONFLICT IN PROCEDURE 

- Process for self-recusal
- TIXC oversight of investigation and hearing
 - Strategy meetings
 - Regular check-ins
 - Report review
 - Insulation against internal/external pressures
- Party challenge to investigators and hearing officers
 - Replacement of personnel
 - Redo portions of grievance process
- Internal Appeal function


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INCLUSIVE INVESTIGATIONS

- Working with Gender Non-Conforming Individuals
- Working with LGBTQ Individuals
- Same-Sex Sexual Violence
- Hate-Based Misconduct


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TERMINOLOGY 

- **Sex:** References chromosomes, hormones, reproductive organs, and genitalia.
- **Gender:** Refers to the attitudes, feelings, and behaviors that a given culture associates with biological sex.
- **Gender Identity:** Internal sense of gender.
- **Gender Expression:** Outward expression of gender, often through clothing, behavior, posture, mannerisms, speech patterns, and activities.
- **Sexual Orientation:** Attracted to sexually or romantically, on a continuum (e.g. gay, lesbian, bisexual, heterosexual, asexual, and pansexual).

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TERMINOLOGY 

- **Queer:** An umbrella term referring to LGBTQI individuals, and/or a nonbinary term used to reflect a fluid gender identity than societal gender “norms”
- **Cisgender:** Gender identity is consistent with the sex they were assigned at birth.
- **Transgender:** Umbrella term referring to a wide range of persons whose gender identity or expression may not match the gender assigned at birth.
- **Bisexual:** Attracted to people of the same as well as other genders.

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TERMINOLOGY 

- **Heterosexual:** Attracted to people of a gender other than their own.
- **Asexual:** Minimal or no sexual attraction to others.
- **Intersex:** Born with genitalia, reproductive systems, and/or sex chromosomes of both males and females.
- **Pansexual:** Attracted to people regardless of gender.

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VIOLENCE AND SEXUAL ORIENTATION 

Sexual Violence and Intimate Partner Violence Can Happen to Anyone...

- regardless of sex, gender, gender identity, and gender expression.
- regardless of sexual orientation.

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RELUCTANCE TO REPORT 

- Concern about a homophobic response.
- Concern about preconception that sexual assault cannot occur between same-sex partners.
- Fear of exposing LGBTQI community to negative stereotypes.
- Fear of the impact a report may have on a small, sometimes close-knit community at the school.
- Fear of reaction of family and friends.
- Fear of institution not understanding their identity, expression, or orientation.

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RELUCTANCE TO REPORT 

- Fear of being outed and implications for medical treatment.
- Concern about how “systems” will respond, especially law enforcement.
- Previous negative experiences with school staff, the law, or community members.
- Fear that male-on-male sexual violence in connection with hazing/bullying will be reduced to “boys being boys.”

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CONSIDERATIONS FOR INVESTIGATIONS 

- Educate yourself and your community
 - Do not expect parties to “educate you.” Stick to the facts.
 - Ask for additional education or training if needed.
- Be mindful of how power dynamics and targeting can come into play.
- Assume nothing and allow for self-identification.
- Provide a safe, non-judgmental, and respectful environment.

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CONSIDERATIONS FOR INVESTIGATIONS 

- A visible reaction may negatively impact rapport.
- Use inclusive language; reflect language used by the parties during interviews and in all communication.
- Anticipate heightened confidentiality concerns.
- Use your school/campus/district/community-based experts.
- Be aware of your biases.

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HATE-BASED MISCONDUCT 

- Targeting persons based on their real or perceived membership in an historically oppressed group.
 - When sex or gender is the basis, it’s a TIX.
 - Be aware that trauma may be especially severe for the Complainant.
 - Parties may have heightened concerns about safety and retaliation.
 - Investigations may focus on identification of Respondent or parties.

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QUESTIONS?



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CONTACT INFORMATION

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