



# CIVIL RIGHTS INVESTIGATOR TRAINING & CERTIFICATION LEVEL ONE COURSE

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# LEVEL 1 INVESTIGATIONS TRAINING



## Part 1

- I. Overview of Title IX
- II. Legal Basis for Title IX Liability
  - i. Foundational Caselaw
  - ii. Due Process Overview
- III. Title IX Coordinator Oversight
- IV. Overview of Civil Rights Investigation & Resolution Model
- V. Notice: Actual & Constructive
- VI. Preliminary Inquiry
  - i. Gatekeeping
  - ii. Interim Actions
- VII. Beginning the Investigation
  - i. Investigation Timeline
  - ii. Formal and Informal Processes
  - iii. Investigation Strategy
- VIII. Formal Comprehensive Investigation
  - i. Notice to the Parties
  - ii. Strategizing Interviews
  - iii. Evidence Gathering

# OVERVIEW OF TITLE IX

- 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



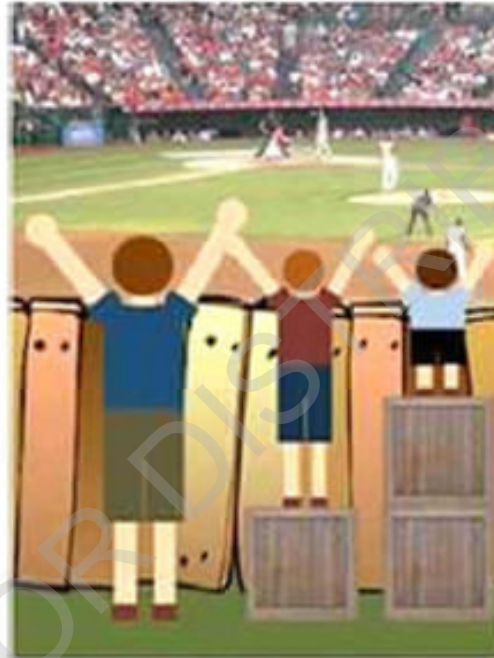
Thorough	Reliable	Impartial	Investigation (prompt & fair – VAWA Sec. 304)
Prompt	Effective	Equitable	Process
End the Discrimination	Prevent its Recurrence	Remedy the effects upon the victim & community	Remedies

# EQUALITY V. EQUITY

## EQUALITY VERSUS EQUITY



In the first image, it is assumed that everyone will benefit from the same supports. They are being treated equally.

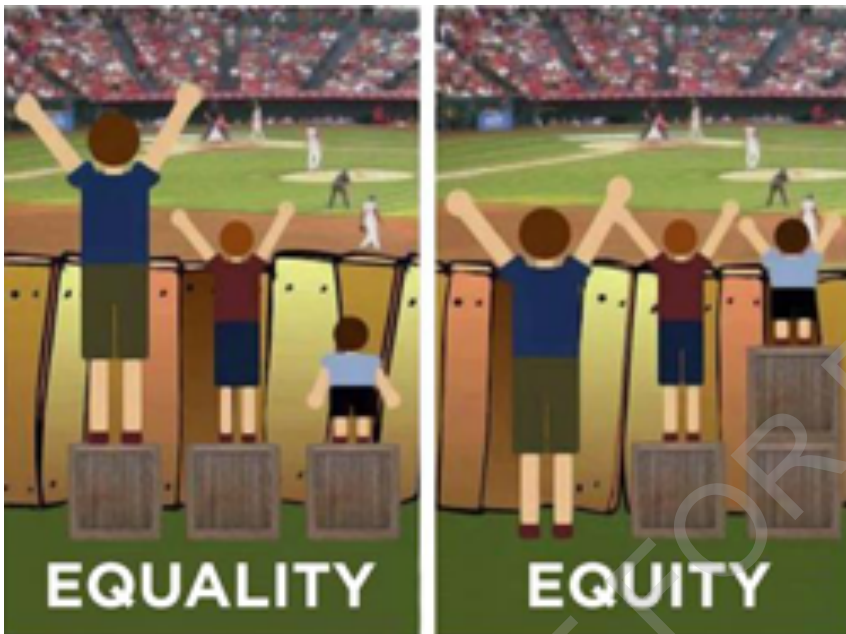


In the second image, individuals are given different supports to make it possible for them to have equal access to the game. They are being treated equitably.



In the third image, all three can see the game without any supports or accommodations because the cause of the inequity was addressed. The systemic barrier has been removed.

# EQUITY BY AND THROUGH THE PROCESS



- You will get this right when you can do equity through equity.
- Each party's rights, privileges and opportunities need to be balanced.
- Not exactly parity, but equitable procedures that reach equitable outcomes that impose equitable remedies.
- Equitable = fair under the circumstances.
- What you do for one party, ask whether you need to do for the other(s).



# LEGAL BASIS FOR TITLE IX LIABILITY

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



# SIGNIFICANT CASES



- *Franklin v. Gwinnett Public Schools*
- *Gebser v. Lago Vista*
- *Davis v. Monroe County Bd. of Education*
- *Jackson v. Birmingham Bd. of Education*
- *Fitzgerald et al., v. Barnstable School Committee et al.*

# FRANKLIN V. GWINNETT PUBLIC SCHOOLS

503 U.S. 60 (1992)



- Christine Franklin alleged that during her junior year (1986), an economics teacher, Andrew Hill, engaged her in sexually explicit conversations, forced kissing, and coercive sexual intercourse on school grounds.
- District and Circuit Court of Appeals dismissed the case, finding Title IX does not allow for award of monetary damages.
- U.S. Supreme Court decided that sexual harassment constituted sex discrimination under Title IX.
- *Gwinnett* also provided a private right for recovery of monetary damages under Title IX.
- *Gwinnett* did not address issues concerning the educational institution's liability.



# GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



- Case involved teacher/student sexual harassment.
- Supreme Court created high standard that students must meet to prevail on a sexual harassment claim against institutions 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.

# GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)



- Three-part standard:
  1. An official of the educational institution must have had “actual notice” of harassment;
  2. The official must have authority to “institute corrective measures” to resolve the harassment problem; AND
  3. The official must have “failed to adequately respond” to the harassment and, in failing to respond, must have acted with “deliberate indifference.”

# DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- Prolonged pattern of student/student sexual harassment of a fifth-grade girl by a classmate.
- Parents complained to three teachers and principal.
- The school took no action until the boy was charged with, and pled guilty to, sexual battery.
- Filed Title IX action, alleging that persistent harassment and deliberate indifference resulted in her inability to attend school and participate in activities.



# DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)



- 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.”

# JACKSON V. BIRMINGHAM BD. OF ED.

544 U.S. 167 (2005)



- A deeply divided U.S. Supreme Court decided this landmark case in 2005.
- Involved a claim of retaliation for filing complaints of sex discrimination under Title IX.
- Roderick Jackson, a high school teacher and coach, complained to school officials about the school's inequitable treatment of the girls' basketball team.
- Retaliation-based case.
- The federal district court and appellate court ruled against Jackson.

# JACKSON V. BIRMINGHAM BD. OF ED.

544 U.S. 167 (2005)



- The Supreme Court overturned lower courts, stating that:
  - Private parties can seek damages for intentional sex discrimination under Title IX.
  - Retaliation against a person who complains about sex discrimination is in itself a form of “intentional discrimination,” even if plaintiff is not an “actual” recipient of gender-based discrimination.
  - It is discrimination based on gender because it is “an intentional response to the nature of the complaint: an allegation of sex discrimination.”

# FITZGERALD V. BARNSTABLE SCHOOL CMTE.

555 U.S. 246 (2009)



- This case represents legal challenge brought against a school district by parents of a kindergarten child subjected to student/student sexual harassment.
- Parents challenged the school did not respond adequately, under Title IX requirements, to daughter's allegations of sexual harassment by older student.
- The parents also brought a §1983 claim against the school superintendent and the school committee.

# FITZGERALD V. BARNSTABLE SCHOOL CMTE.

555 U.S. 246 (2009)



- Supreme Court ruled on whether Title IX provides the exclusive remedy for addressing gender discrimination in the school, or if a §1983 action could be brought as a means of enforcing the federal rights.
- It held that Title IX is not the exclusive mechanism for addressing gender discrimination, nor a substitute for a §1983 action.
- It stated that Title IX provides for both an administrative remedy (OCR) and civil damages actions against an institution, but not school officials, teachers, or other individuals.

# FITZGERALD V. BARNSTABLE SCHOOL CMTE

555 U.S. 246 (2009)



- However, §1983:
  - Provides means to enforce the rights of aggrieved person against school officials, teachers, or other individuals in their **personal capacity**.
  - Creates the path to hold individuals personally liable, providing for award of damages, injunctive relief, **and attorney fees**.
  - Follows that the courts apply school-focused Title IX case law similarly to colleges and universities.

## OTHER RELEVANT CASES



- ***DeJohn v. Temple University***, 3rd Circuit Court of Appeals, Aug. 2008.
- ***Jennings v. University of North Carolina at Chapel Hill***, 4th Circuit Court of Appeals, April 2007.
- ***Williams v. University of Georgia System et al.***, 11th Circuit Court of Appeals, Feb. 2007.
- ***Lisa Simpson, Anne Gilmore v. University of Colorado Boulder, et al.***, 10th Circuit Court of Appeals, Sept. 2007.



# 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.



# TITLE IX AND TITLE VII INVESTIGATIONS



- Consider:
  - 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.
- Ability to merge/combine investigatory and hearing processes.
- Coordination of remedies in student/employee and employee/student resolution processes.
- What happens when employee is a student or student is an employee?

# DUE PROCESS FOUNDATIONS

## DIXON V. ALABAMA



## Dixon v. Alabama State Board of Education

294 F.2d 150 (5th Cir. 1961)

- Due Process:
  - Notice and hearing required prior to expulsion from a state college or university.
- Rights adhered to responding parties because of the posture of the case.
- All due process cases flowing from Dixon attached additional rights to the responding party.
- Responding parties in Dixon were actually civil rights victims.

# DUE PROCESS: CURRENT ISSUES



- Due Process is at the heart of current litigation and OCR regulatory guidance. Processes are becoming increasingly complex
- Current key issues:
  - Standard of Proof
  - Detailed Notice of Allegations/Investigation
  - Hearings & Investigations
  - Cross-examination
  - Attorney involvement
  - Providing copies of report and evidence for review
  - Bias by Investigators, Hearing Officers, Appellate Officers
  - Training: Biased training; insufficient training
  - Improper influences impacting decision (E.g.: Athletics; Social Media; Power/Position)

# TITLE IX COORDINATOR OVERSIGHT

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

# SUPERVISOR OF THE INVESTIGATION STRUCTURE



- The Title IX officer is responsible for:
  - The appointment of investigators.
  - Training investigators, hearing boards, and appeals officers.
  - Supervision of investigators and investigations.
  - Strategizing investigations.
  - Assurance of initial remedial actions.
  - Timeline compliance.
  - Communication and coordination of investigation teams.
  - Providing institutional memory to investigators.
  - Retaining a record of all activities.

# SUPERVISOR OF THE INVESTIGATION PROCESS



- The Title IX officer or designee is responsible for:
  - Notice of investigation.
  - Gatekeeping.
  - Determining extent of investigation.
  - Notice of charge/allegation.
  - Notice of hearing.
  - Notice of outcome.
  - Duty to warn.
  - Assurance of remedies.
  - Recordkeeping of all activities.



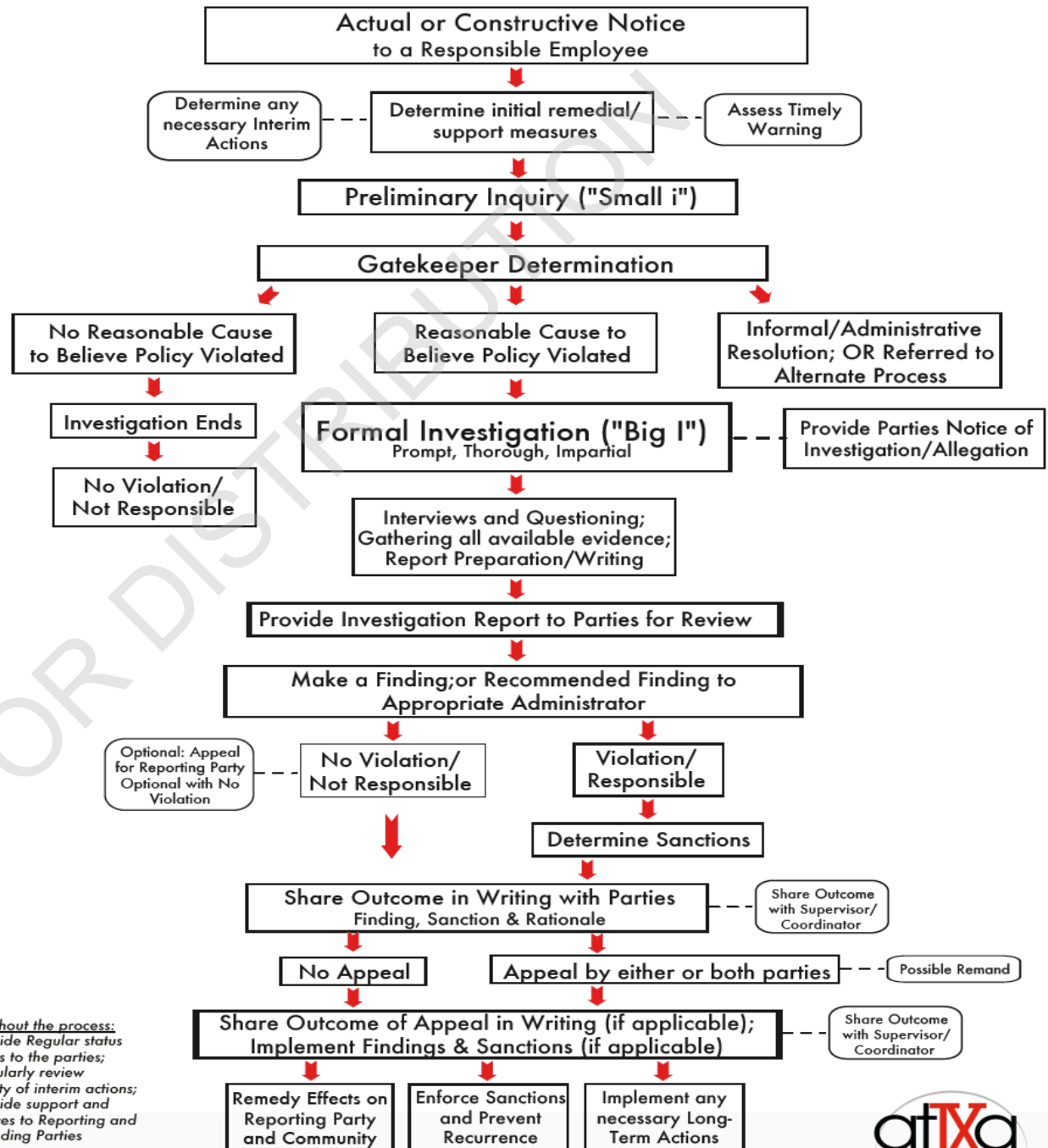
# CIVIL RIGHTS INVESTIGATION AND RESOLUTION MODEL: AN OVERVIEW

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- Civil Rights Investigation Model
- Investigation & Hearing Panel Model
- The Process & Ten Steps
- Jurisdiction
- Who Should Investigate?
- Confidentiality & Privacy

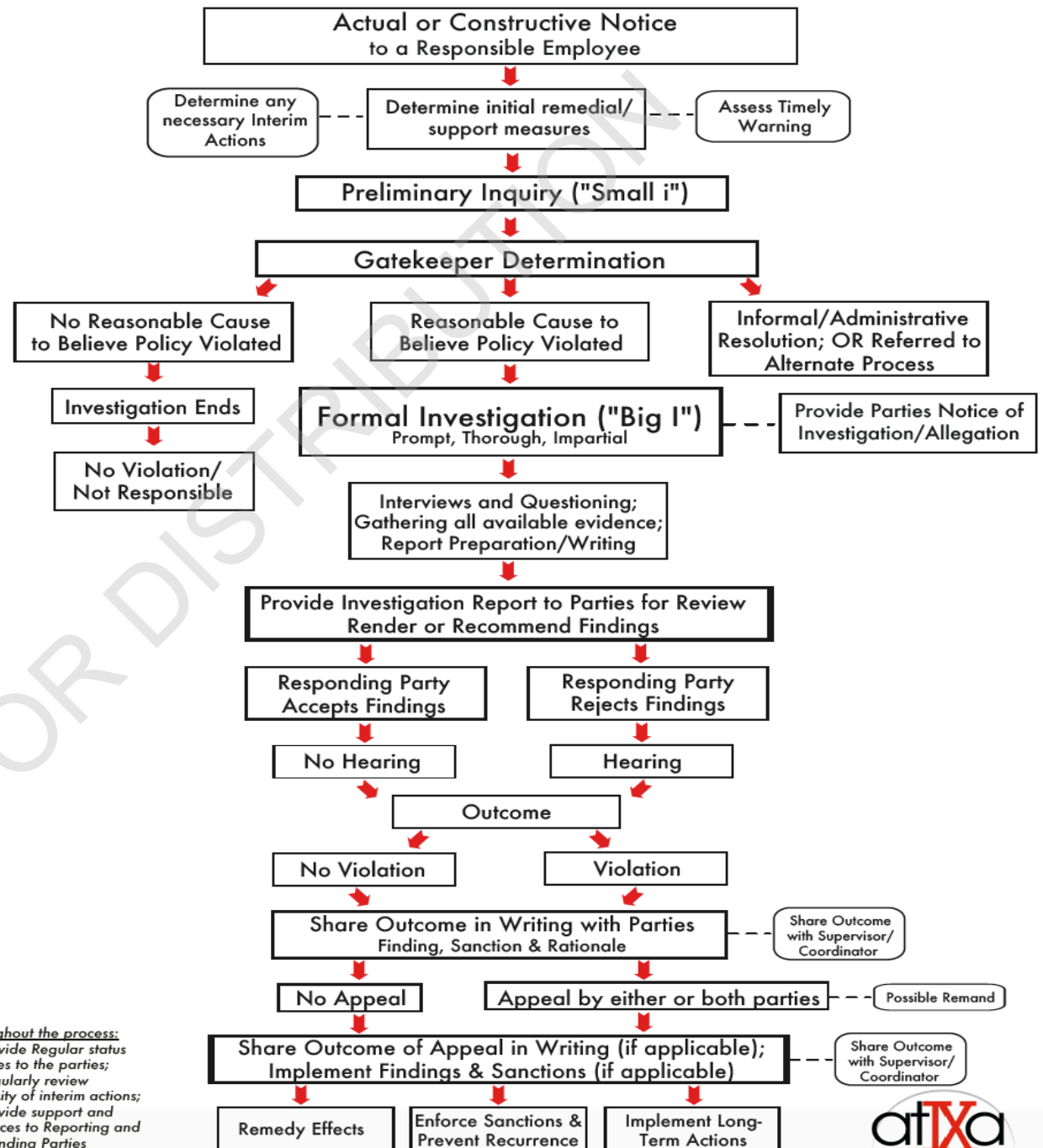
## ATIXA CIVIL RIGHTS INVESTIGATION MODEL FLOWCHART

# CIVIL RIGHTS INVESTIGATION MODEL



# INVESTIGATION AND HEARING PANEL HYBRID MODEL

## INVESTIGATION AND HEARING PANEL HYBRID MODEL FLOWCHART



# THE PROCESS



# CIVIL RIGHTS INVESTIGATION PROCESS IN 10 STEPS



1. Allegation (complaint) or notice.
2. Preliminary inquiry (initial strategy).
3. Gatekeeper determination (earliest point).
4. Notice of investigation and/or allegation to the parties (earliest point).
5. Strategize investigation.
6. Formal comprehensive investigation.
7. Interviews of parties and witnesses.
8. Evidence gathering.
9. Report Writing (including a review of the report by parties).
10. Finding (followed by resolution and remedies).

*\*provide support and resources to the parties throughout*

# CIVIL RIGHTS INVESTIGATION MODEL AND STUDENT CONDUCT MODEL



- How does this model alter the current student conduct model used to address sexual assault, stalking, intimate partner violence, etc.?
  - An active gathering of information by the investigator or investigators; not intended to “build a case.”
  - Does not impact the implementation of informal or alternative dispute resolution approaches.
  - Characterized by an intentional effort to enhance due process protections for the parties and make procedural and support mechanisms equitable.
  - Typically provides a right of appeal for all parties to the report, not just the responding party.

# WHEN DOES TITLE IX APPLY?



- Proposed Regs say Title IX does not apply outside the U.S., but more accurate to say that OCR will not enforce extraterritorial complaints.
  - Implications for Study Abroad
  - Contrary case law
- *Davis* standard --Title IX applies and jurisdiction is required when the institution has:
  - Control over the harasser (discriminator); AND
  - Control over context of the harassment (discrimination)...
  - There is also likely a requirement that the reporting party experiences discrimination in a federally-funded educational program.



# 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 an employee and employee?
  - Hourly vs. salaried?

# WHEN DOES TITLE IX APPLY?



## Jurisdiction for Off-Campus Incidents:

- For Sexual Harassment and Discrimination cases.
  - There is an expectation that you should exercise SOME jurisdiction over off-site/off-campus incidents - “Nexus.”
- 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.

# WHEN DOES TITLE IX APPLY?



## Jurisdiction for Off-Campus Incidents:

- This means you will be taking discretionary jurisdiction over incidents off-campus or on non-school property.
  - See, e.g. *Simpson v. Colorado*.
- When?
  - Whenever your policy says.
  - Nexus.
    - When the behavior occurs on property you own or control.
    - When the behavior occurs in programs/events you sponsor.
    - When the downstream effects of purely off-site conduct cause a discriminatory impact at school/on campus.

# WHO SHOULD INVESTIGATE?



- Investigations of sex discrimination 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

# 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 make a determination.
- A pool of investigators may help to ensure that your investigation meets these requirements.

# TEAM INVESTIGATIONS



- Other benefits:
  - Who investigates may be strategic to each specific case.
  - 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.
  - Documentation.

# 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.
- Depending on your process, make a finding or recommendation (will vary by school).
  - May recommend sanction.
- Provide report to the parties for review, then edit as needed and provide report and investigation file to the decision-maker



# RELUCTANCE TO REPORT



When a reporting party is reluctant to make a formal allegation, or seeks to withdraw a formal allegation, the Coordinator will determine if the institution will honor that request.

- A risk or threat assessment of some kind, as well as consideration of the reporting party's reasons will usually influence the Coordinator's determination.
- A comprehensive investigation and/or resolution does not automatically need to involve the reporting party, as it may, in many circumstances, be conducted without their involvement, if sufficient independent evidence allows, or a remedial response will suffice.

# RELUCTANCE TO REPORT



- Privacy vs. Confidentiality vs. Privilege
- The reporting party should be notified as to their options:
  - That the process will still be available to them, regardless of how long they wait.
  - That the institution will support them in any way it can (e.g. housing, classes, no contact orders, etc.).
  - That, if information is brought to attention of the institution that may involve a threat to community, the school may be forced to proceed with an investigation, but that reporting party will be notified of the process and treated as if they are fully participating, if they wish.

# REQUESTS FOR CONFIDENTIALITY



- The institution should explain to the reporting party that:
  - Its responsive action/remedial abilities may be limited based on the level of confidentiality or privacy requested by reporting party.
  - It cannot guarantee privacy if doing so would jeopardize the safety of the reporting party 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
  - **If the responding party is an employee, the institution may need to proceed under Title VII.**
  - **If the incident involves a minor, the institution may also need to proceed**

# REQUESTS FOR CONFIDENTIALITY



- If a reporting party requests confidentiality and/or does not want the institution to investigate:
  - The institution should take all reasonable steps to respond and investigate consistent with that request
  - So long as doing so does not prevent the school from responding effectively and preventing the harassment of other students or the reporting party.
  - Institution will offer support and resources
  - Proceeding without a reporting party's participation has due process implications for the responding party
  - If the reporting party does not participate in the hearing, according to the Proposed Regs, none of their evidence from the investigation will be admissible in the hearing.

# NOTICE TO THE INSTITUTION

- Responsible Employee
- Notice to the Institution
- When do you Investigate?

# NOTICE TO THE INSTITUTION



- In the context of harassment, a school has notice if a responsible employee knew, or in the exercise of reasonable care, should have known about the sexual harassment or violence.
- OCR enforcement of Title IX currently uses both an actual notice and constructive notice standard because OCR investigations are an administrative enforcement process – different than a civil lawsuit for monetary damages.
- But note that 2019 Proposed Regs would do away with constructive notice as basis for OCR enforcement

# ACTUAL NOTICE



- Individual files a Title IX complaint.
- Individual notifies the Title IX Coordinator or other Responsible Employee.
  - In PreK-12, this includes all teachers
- Individual reports to school/campus police or security official/SRO.

# RESPONSIBLE EMPLOYEE



- A **Responsible Employee** includes any employee who:
  - Has the authority to take action to redress the harassment; or
  - Has the duty to report harassment or other types of misconduct to appropriate officials; or
  - Someone a student could reasonably believe has this authority or responsibility;

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



# RESPONSIBLE EMPLOYEE



- Proposed Regs shift Responsible Employee definition to:
  - Anyone who has the authority to take action to redress the harassment
  - All PreK-12 teachers when conduct is student-on-student
- This is only the standard for when OCR would deem a school to have received actual notice that creates an obligation to act.
- It is the bare minimum requirement.
- ATIXA still recommends that institutions require all employees to report harassment or discrimination, unless confidential
- ATIXA recommends that institutions use discretion to investigate a broader range of allegations than is required by OCR Regs, which set the floor, not the range of best practice.

# WHEN DO YOU INVESTIGATE?




- Upon receipt of a formal, written, signed complaint
- When the Coordinator deems an investigation is warranted
- Rumors, gossip, social media, etc. can be notice
  - Investigating on these bases is discretionary (but often recommended), particularly in light of the Proposed Regs.
  - OCR may not think they are, but will a court agree?
- Once actual notice exists, the further action is required.
  - Small “i” preliminary inquiry, and maybe...
  - Big “I” comprehensive investigation.

# PRELIMINARY INQUIRY

- Preliminary Inquiry
- Gatekeeping
- Interim Actions


# PRELIMINARY INQUIRY



- 
- A large, stylized red number '1' is positioned on the left side of the slide, with a red circle above it.
- This is an initial inquiry to determine if a comprehensive investigation is desired or necessary.
  - Checking background, obvious patterns, indicia of predatory, violent, or threatening behavior.
  - Push one Domino™ over at a time.
  - How much involvement does reporting party want?
  - Can we remedy informally or without discipline?
  - Give reporting party as much control as possible in the process.
  - May help to determine if there is reasonable cause to move process forward, and what policy violations should the responding party be noticed on.

# PRELIMINARY INQUIRY



- 
- A large, stylized red number '1' with a circular dot above it, serving as a visual indicator for the first point.
- Establish a preliminary timeline for the investigation.
  - Investigate all allegations to determine:
    - The extent of the harassment.
    - The acuity of the threat it represents to students or employees.
    - What might be necessary to put an end to it.
  - Be able to show that a comprehensive civil rights investigation was completed and documented.
  - Responding to anonymous reports:
    - Determine if a trend or pattern may be apparent.
    - You may have a duty to attempt some form of remedial response, even to an anonymous report.

# GATEKEEPING IN INVESTIGATIONS



- The Gatekeeper of the process determines the extent and development of the investigation, moving it from preliminary to full investigation and identifying timing for charges and strategy development.
  - Equity, due process, essential fairness, and equal dignity all demand substantiating evidence before dragging a reporting party through the entire process.
  - A charge (complaint) must be supported by reasonable cause to permit its **full** pursuit.

# MAJOR GATEKEEPING GUIDEPOSTS



Notice.

Preliminary investigation.

Comprehensive investigation.

Charge/allegation.

Finding.

Sanction.

Appeal.

# ALLEGATIONS



- Prepare and deliver the notice of investigation (and possibly notice of allegation, if appropriate) on the basis of the initial inquiry.
  - Should provide the sufficient detail of the allegations to allow the parties to meaningfully prepare for their meetings.
  - Also include details applicable policies, applicable procedures, etc.
  - Notice of investigation should be shared verbally and sent in writing to all parties.
    - Notice of allegation (charge) should also be shared with all parties.
  - Usually notice is given in advance (minimum of 2-3 days), and Proposed Regs would limit surprise interviews.



# HOW IS NOTICE OF INVESTIGATION GIVEN TO THE RESPONDING PARTY?



- Who is the responding party?
  - Student.
  - Staff.
  - Teacher/Faculty.
  - Visitor (e.g. contractor, invitee, alumnus, etc.).
  - Visitor (e.g. non-affiliated, guest, etc.).
- How is notice typically provided?
  - Written (i.e. electronic and/or paper).
  - Verbal.

# INTERIM ACTIONS AND REMEDIES



- Throughout process:
  - Investigate.
  - Stop behavior.
  - Prevent re-occurrence:
    - Consider the effect of “educational” sanctions...typically insufficient for more serious violations
    - Consider what education/training needs to be implemented, changed, etc.
- Remediate impact (often not sanction-based).
- *NOTE: Remember to provide support and resources to reporting and responding parties throughout the process, and don't forget to remedy on behalf of community, not just parties.*

# COMMON INTERIM ACTIONS



- Providing a campus escort.
- Minimizing interaction between reporting party and responding party (e.g.: shifting classes, work, etc.).
- Relocating to a different classroom, residence hall, work space, course group, etc.
- Providing counseling services.
- Providing medical services.
- Providing academic support services, such as tutoring.
- Transportation options.
- Offering no-contact orders.
- Arranging for the reporting and/or responding party to re-take a course/withdraw from a class without penalty.
- Reviewing any disciplinary actions taken with respect to reporting party to assure they are non-retaliatory.
- Holding school-wide training and education initiatives.
- Interim suspension.
- Change supervisor.

# BEGINNING THE INVESTIGATION

- Timeframes for resolution
- Informal or formal resolution process?
- Role of law enforcement
- Formal comprehensive investigation
- Notice to the Parties
- Strategize the investigation



# PROMPT TIMEFRAMES FOR RESOLUTION



- 60 days to resolution is a good guide for more complex cases in higher ed.
  - Timeline starts from notice, not from the incident itself.
  - No set requirement, other than to have prompt, designated timeframes in your procedures.
  - Goal is to avoid undue delay.
  - **For K-12, the timeframe is likely <10 days**
  - 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 institution's procedures.
  - Procedures should provide some flexibility to timeframes
- 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.
- Document and communicate unavoidable delays.
- Provide notice of extensions.

# INFORMAL AND FORMAL RESOLUTION PROCESS



OCR endorses and encourages informal resolution, and we believe it is a best practice, when voluntary.

- Some minor incidents can be resolved through confrontation, documentation, and/or intervention.
- More significant discrimination can also be resolved informally, by process in which responding party accepts responsibility, and/or by some forms of ADR or conflict resolution.
  - Mediation is **typically not** appropriate or effective as a stand-alone resolution mechanism for sexual assault or violence.

# STRATEGIZE THE INVESTIGATION



- Common questions to consider:
  - Which process is appropriate?
  - Whom to interview?
  - When/In what order?
  - What information/evidence can be obtained?
  - How and when do we notify the parties and witnesses?
  - Who needs to be aware of the investigation?
  - When and how do we share evidence/information with the parties?



# 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 with sworn officers.
  - Add value by supporting institutional 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



- 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.
  - Finding.
  - Presentation of finding.
- Complete the investigation promptly, and without unreasonable deviation from the timeline.

# NOTICE TO THE PARTIES



- In a civil rights model, notice has many phases, some or all of which may come to pass (equitably):
  - Notice of initial meeting.
  - Post-gatekeeper phase, notice of allegation and/or investigation.
  - Post-investigation, notice of hearing (if applicable).
  - Updates on status of investigation (ongoing).
  - Notice of outcome and sanctions.
  - Notice of appeal.
  - Notice of final determination.

# WHEN TO INTERVIEW PARTIES AND WITNESSES



- 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.
- Strategize notifying the responding party of the report:
  - Immediately upon receipt of the report or notice, or...
  - In other circumstances, interviewing witnesses and accumulating evidence first may be better strategy.

# WITNESS INTERVIEWS



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

\*Every case is different

# 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.



# 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
- V. Challenging Witnesses
  - i. Difficult
  - ii. Lying
  - iii. Resistant/Quiet
- VI. Helpful Investigation Documents
- VII. Investigation Report & Making a Determination
  - i. Standard of Proof
  - ii. Who Makes Determination
  - iii. Hearing
- VIII. Sanctions & Appeals

# INVESTIGATION DETAILS

- Evidence Collection and Issues of Concurrent Criminal Action
- Interviewing the Reporting Party
- Interviewing the Responding Party
- Interviewing Witnesses
- Difficult Witnesses



# 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 the responding party or parents threaten to call a lawyer or files a lawsuit?
- What if the reporting party files a lawsuit or complaint with OCR?

# 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.

# ESTABLISH PRE-INTERVIEW GROUND RULES



- Who will attend?
- How will records be kept? Recording? Access.
- Role of Advisors.
- Role of Attorneys.
- Difference between Advisor/Attorney role in interviews vs. in a hearing
- Involvement of Parents, Union Reps, Roommates, etc.
- FERPA (students)/Employment records/confidentiality.

# 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.

# VAWA SECTION 304 INFORMATION FOR REPORTING PARTY



- Reporting parties 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.)

# 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 should be able to review all relevant evidence.
- Explore only those facts that are relevant to the issue at hand.
- Start with broad questions, then move to narrow, more pin-point questions.
- It can be difficult for the responding party to respond effectively to broad-based or abstract allegations and can diminish trust and hurt rapport building. Provide a detailed description of the allegations.

# PREPARE FOR EACH INTERVIEW



- Outline your interview questions in advance, but be flexible.
- Plan the order of interviews; may be beneficial to interview responding party last.
- Most beneficial to conduct interviews in person.
- Interviews should be conducted in a neutral, quiet, and private setting with a minimal or no likelihood of interruptions.

# QUESTIONING

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- Goals of Questioning
- Types of Questions
- Questioning Exercise



# QUESTIONING



- 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.
- The “Gotcha” moment won’t typically come. Not your role. You are not law enforcement or prosecutors.

- 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?
  - Am I avoiding blaming or biased questions?
  - Am I the right person to ask this?

- Open-ended questions (tell us...who, what, how?)
- Close-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 accusing or argumentative.
- 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 question, take it back.

# QUESTIONING



- 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," and "had a few drinks."
- Do not ask questions that invite a reporting party to second-guess their actions, as this may be perceived as blaming.

# 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?

# INTERVIEWING SKILLS

- Demeanor of Investigator(s)
- Interview Skills
- Rapport Building
- Setting Up Reasonable Expectations
- Feedback to Witnesses
- Case Study



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

# 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.
- 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 the allegations 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.
- Recommend that the parties consult their advisors before discussing the investigation with others.
- Remind witnesses not to discuss the investigation with those outside the investigation process.

# RAPPORT BUILDING



- 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.

# 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 reporting and responding parties understand parameters of the policy, what it does and does not cover, how the process plays out, and what the process can and cannot accomplish.
- Provide ample opportunity for the reporting party and the responding party to ask questions.
- Keep the reporting party in the loop as to exactly when notice will be given to the responding party.

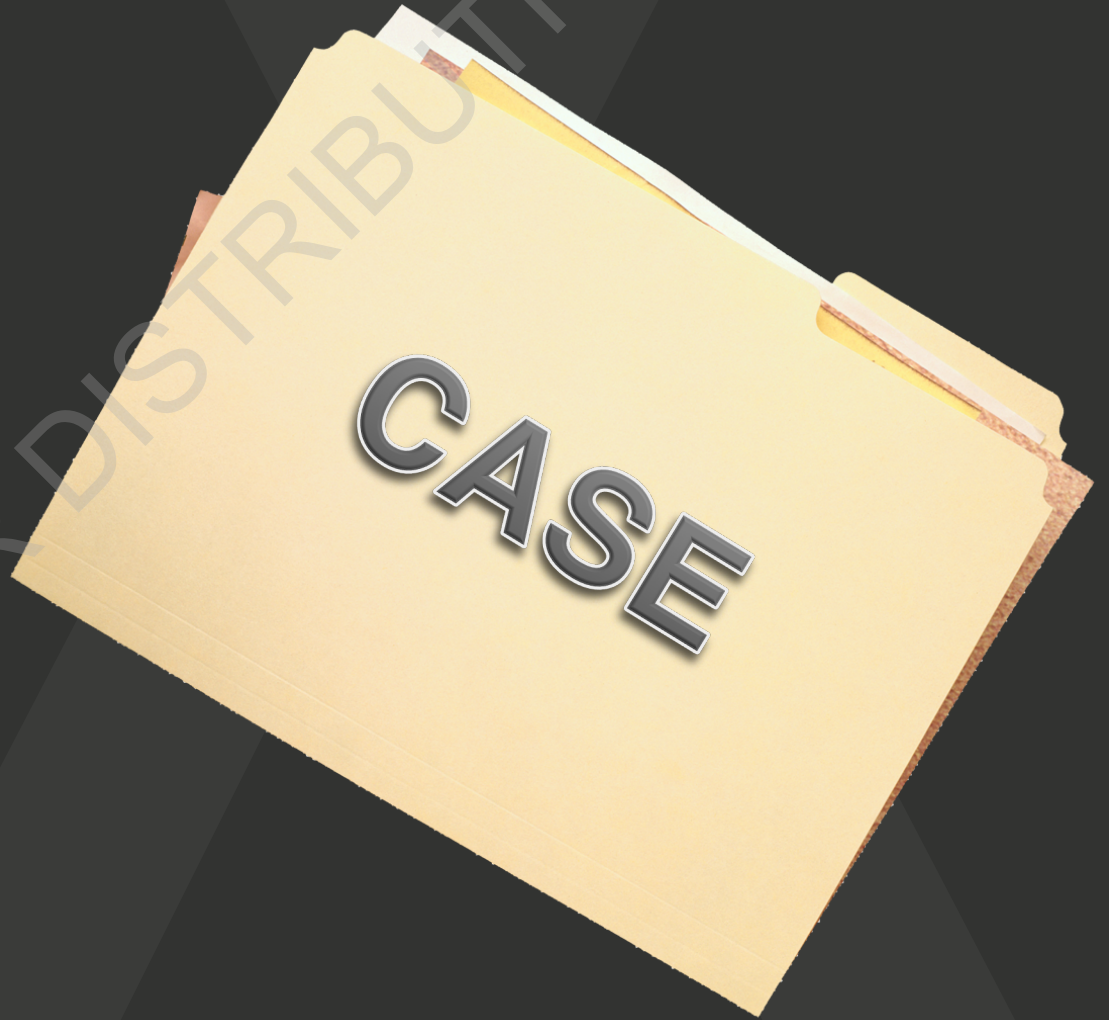
# FEEDBACK TO WITNESSES



- 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.



# CASE STUDY



# INTERVIEWING THE REPORTING PARTY



- 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 REPORTING PARTY



- Ask about those they spoke to and told about the incident.
- Ask what the reporting party's motivation is for reporting and what that individual hopes to see as a result.
- Find out if the individual's academics and/or work have been affected.
- Ask how this has affected the reporting party emotionally and/or physically.
- Advise that the allegations will be discussed with the responding party and witnesses.
- Let the reporting party know next steps and when you will be in touch.

# INTERVIEWING THE REPORTING PARTY



- Considerations for Interim Actions :
  - Notify of their option to report to police; institution will help facilitate report.
  - Emotional, academic, and/or physical impact.
  - Counseling and advocacy options (on and off-site).
  - Retaliation – prohibition and to whom to report.
  - No-contact orders.
  - Work assignment alterations
  - Course/classroom/group adjustments.
  - Housing adjustments.
  - Etc.

# INTERVIEWING THE RESPONDING PARTY



- Acknowledge difficulty of the situation and thank the responding party for meeting with you.
- Provide a copy of your policies and procedures.
- Ask the person to share a complete account of what occurred.
- Question the responding party 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 RESPONDING PARTY



- Provide support and resources throughout the process as needed.
- Let the responding party know next steps and when you will be in touch.
- Discuss counseling options and other support options if the individual is not already connected.
- Discuss non-retaliation and any intermediary steps such as no-contact orders, housing moves, and exclusions.
- If interim suspension/action is employed, review the terms and provide a timeframe.
- Encourage the person to maintain privacy of the investigation or consult their advisor before sharing.

# THE PREDATORY PERPETRATOR



- It is hard to identify a predator absent evidence of pattern acts.
- We can't profile or base decisions on personality characteristics or statistics.
- Still, experienced investigators develop “Spidey sense” that informs their investigations:
  - Sociopathy (Read *The Sociopath Next Door*, by Martha Stout, Ph.D.).
  - Can the responding party empathize?
  - Do they show genuine remorse?
  - Are they able to reflect on how they have impacted another person?
  - Are their justifications of their actions rationalizations or nothing more than attacks on their accuser or other externalizations?

# 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.
- Ask questions, and address the need for complete truthfulness.
- Ask for opinions.
- Ask if either party spoke about the incidents after they happened.
  - Did they see any change in behavior?



# INTERVIEWING WITNESSES

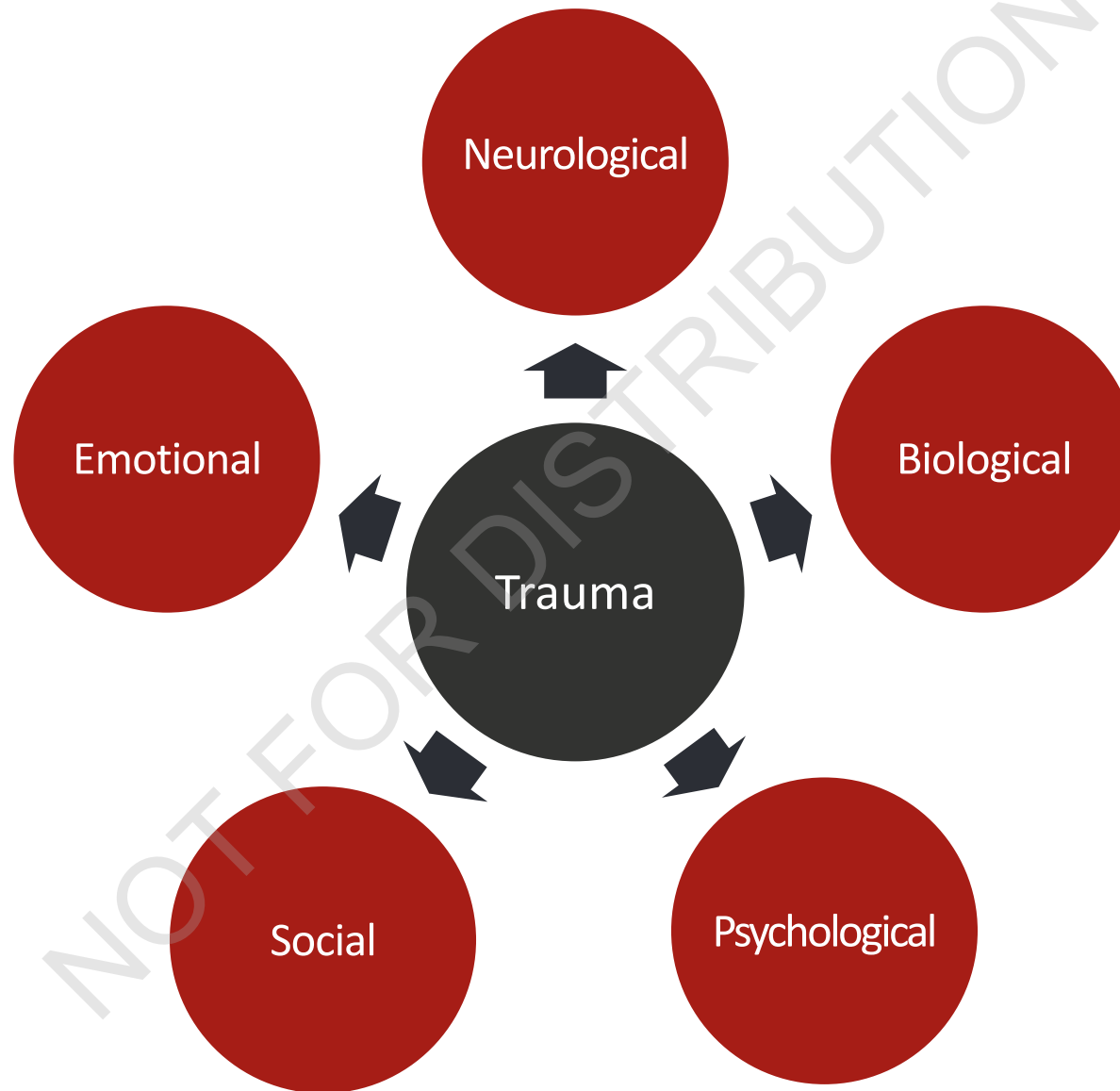


- Ask if they have been contacted already by one of the parties.
- Ask if they have made any previous statements, such as to private investigators.
- Ask if there is anything you should know that has not been covered or if there is anyone else they think should be contacted.
- Discuss non-retaliation 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.

# TRAUMA-INFORMED INTERVIEWING

- Sexual Assault as Trauma
- 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 question the credibility of the Reporting Party.

# 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).

# TRAUMA-INFORMED INTERVIEWING



- Avoid:
  - Unsupportive responses
  - Taking control any more than you have to.
  - Escalating the situation.
  - Defining or labeling a reporting party's experience.
  - Asking why questions (i.e. "Why did you . . . ?").
  - Verbalizing judgment in the moment.
  - Telling reporting party they must press charges.

# CHALLENGING WITNESSES

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



# 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.
- 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

- 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/cab drivers, and when searching for video footage.

# THE FIVE DOCUMENTS TO CREATE POST-INTERVIEW



1. Interview Transcript in Final Form (to be verified by witness).
2. Opinions & Perceptions.
3. Future Pointers Document.
  - New Witnesses.
  - New Evidence.
  - Future Questions to Ask.
  - Witnesses to Go Back to With New Information.
4. The “Drips” Document.
5. Bulleted Key Takeaways from the Interview.



# WHAT TO DO WITH POST-INTERVIEW DOCUMENTS



- The interview transcripts go into the report, as appendices, and also into the file.
- The opinions and perceptions documents may or may not be retained, depending on the advice of counsel.
- The future pointers document is kept in the file, as a final checklist of investigation completeness.
- The drips documents are kept in the file or later destroyed, based on school policy.
- The bulleted takeaways are included in the report; no need to keep that document, but it can be kept in the file.

# INVESTIGATION RECORDS AS SMOKING GUNS IN LITIGATION



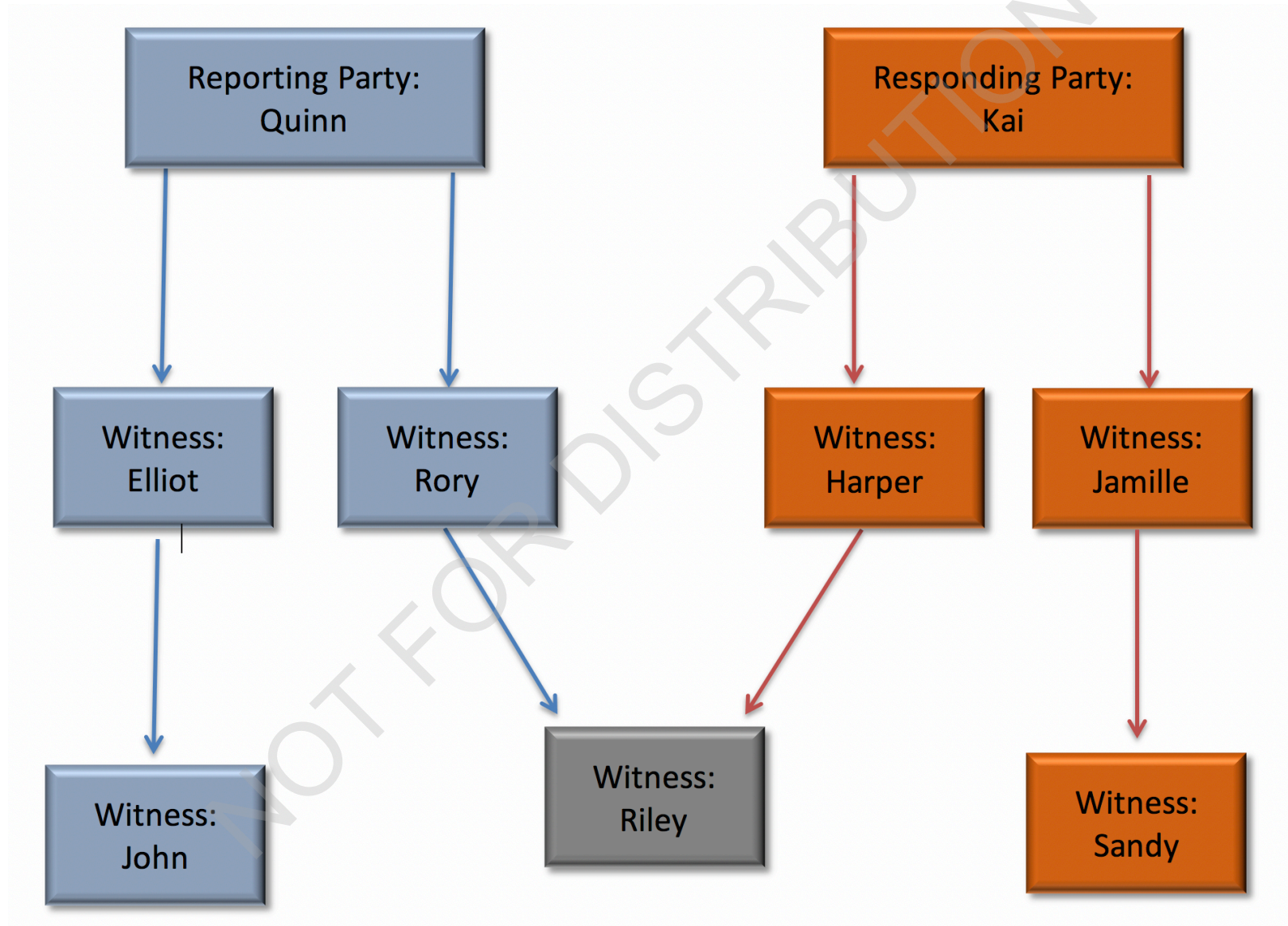
- “The File”:
  - The responding party’s file.
  - The reporting party’s file.
  - The investigation file (including investigation report).
  - Personal case notes.
  - Witness education records.
- Subpoenas:
  - If you get one, call your general counsel!
- Understand the court process and your role in it.

# WITNESS LIST AND FLOWCHARTING BEST PRACTICES



- Keep freshly updated list of your witnesses as you learn of them.
- Identify which parties or witnesses led you to other witnesses.
- Keep track of whether witnesses are neutral, loyal and biased, or loyal but objective. Include reasoning.
- In complex cases, use a flowchart to track witnesses the reporting party leads you to, the witnesses responding party 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 & MAKING A DETERMINATION

- The Investigation Report
- Standard of Proof
- Analysis and Determination
- Who Makes the Determination?
- In-Person Hearing?

# THE INVESTIGATION REPORT



- The investigation report is the one comprehensive document summarizing the investigation, including:
  - Results of interviews with parties and witnesses.
  - Unbiased summary or compilation of other information collected
    - E.g.: copies of texts, emails, and social networking messages, information from law enforcement, medical exams, video surveillance and photographs, etc.
    - Remember that the parties have the right to review ALL available evidence prior to a decision/hearing.

# THE INVESTIGATION REPORT



- Assess weight, relevance, and credibility of information gathered.
- Assess credibility of parties, witnesses.
- Explain unsuccessful attempts to collect information and/or interview witnesses.
- Highlight key factual findings for each allegation.
- The report should reference or contain all policies and procedures currently applicable.

# THE INVESTIGATION REPORT



- Develop how prior, similar acts by the responding party are relevant and to what.
- Measure the information gathered against the policies alleged to have been violated, applying the standard of proof (analysis).
- Depending on your process you may also recommend a finding on whether the policy has been violated.
  - Allow the parties to accept or reject the finding before moving to a decision-maker or in-person hearing.



# WHAT IS THE APPROPRIATE STANDARD OF PROOF?

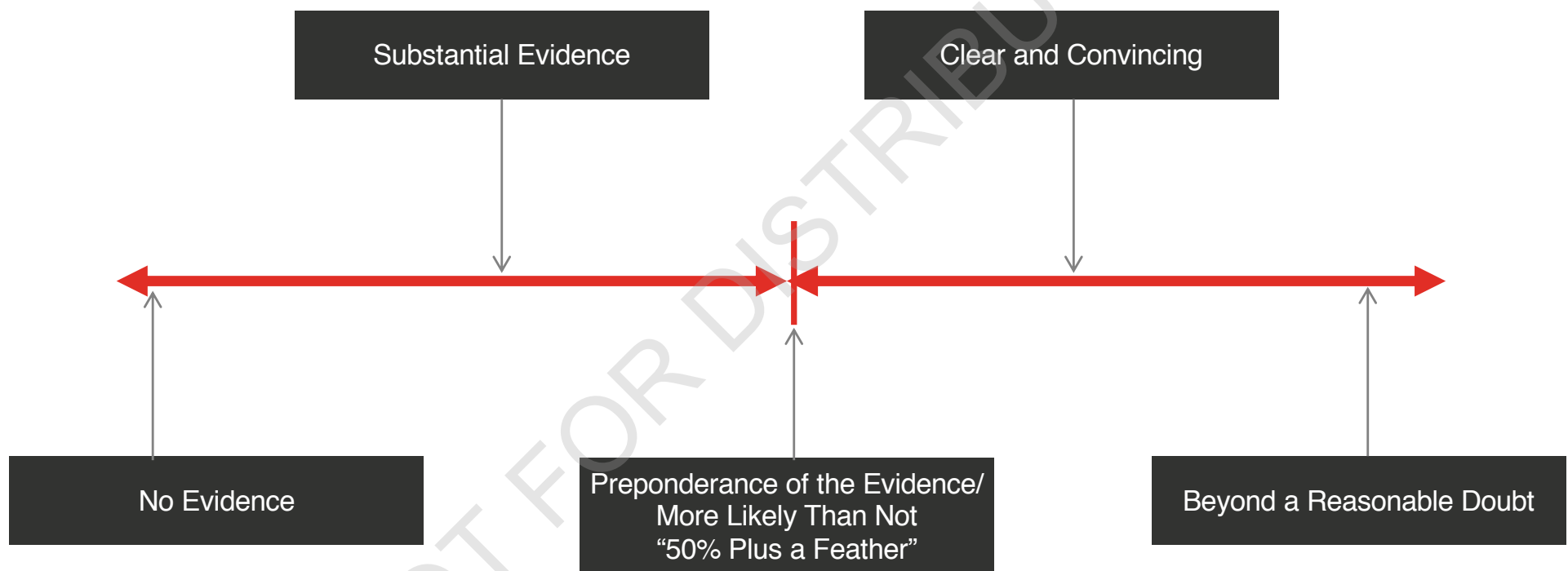


- Different Standards: What do they mean? Why do they exist?
  - Beyond a reasonable doubt.
  - Clear and convincing evidence.
  - **Preponderance of the evidence.**
- The Proposed Regs skew toward the Clear and Convincing Evidence standard (without fully requiring it), but ATIXA prefers Preponderance of the Evidence 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*; located at <https://atixa.org/wordpress/wp-content/uploads/2017/09/ATIXA-Guide-to-Choosing-Between-Preponderance-of-the-Evidence-v.-Clear-and-Convincing-Evidence-9.22.17.pdf>

# UNDERSTANDING EVIDENCE THRESHOLDS



## EVIDENTIARY STANDARDS



# ANALYSIS AND DETERMINATION



- Review the institutional policies that apply.
- List the evidence and what it shows (relevance).
- Evaluate evidence/assess credibility of evidence and witness statements as factual, opinion-based, or circumstantial.
- Make determination or recommendation based on preponderance of the evidence, whether a policy violation is more likely than not.
- Cite concrete reasons for the conclusion(s) in written report.
- Refer allegations and determination to appropriate administrator for implementation, sanctioning, and/or hearing.

# PRIOR ACTS AS EVIDENCE



- Previous conduct violations by the responding party are not generally admissible in conduct proceedings.
- BUT, they are essential (and legally required) considerations in any civil rights investigation.
- Must be considered as evidence of determination, not just of sanction.
- Previous determinations must be considered.
- The entire continuum of violence may establish pattern, but the more similarity, the stronger the weight of the evidence.

# WHO RENDERS THE DETERMINATION?



- Variations in role of decision process.
  - Investigator renders the determination (not recommended).
  - Investigator recommends the determination to an administrator or hearing panel.
  - Investigator presents investigation report to administrator or hearing panel with determination.
  - Investigator presents investigation report to administrator or hearing panel without determination.
- Importance of investigation report.
  - How much credibility assessment and analysis to include?

# WHAT ABOUT AN IN-PERSON HEARING?



- A formal in-person hearing, whether with a panel or an administrator, is increasingly viewed as necessary in higher education by the courts and OCR.
  - PreK-12 remains TBD
- Hearings facilitate the parties ability to review all available evidence and ask questions of witnesses and each other.
- A well-conducted civil rights investigation can result in an accepted determination and waiver of hearing by the responding party.
- Waivers must be freely decided and non-coerced.
- Hearings can still occur when information is contested.

# WHAT ROLE DOES THE INVESTIGATOR PLAY IN AN EVENTUAL HEARING?



- The investigator is often the key witness at any hearing.
- The investigation report is admitted as evidence (redacted).
- Other witnesses can be called, or the investigator may summarize their testimony instead.
- If credibility must be assessed, it needs to be assessed in person by the decision-maker(s).
- The investigator's determination should not influence the hearing, so may be appropriate to withhold/redact that information and allow the decision-maker to be fully objective/impartial.

# SANCTIONS & APPEALS

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



# SANCTIONING CONSIDERATIONS



The sanction must be reasonable and proportionate to the severity of the behavior.

- May consider prior misconduct.
- The role of precedent.
- May consider attitude, aggravation, mitigation, contrition, etc..
- Should be educational, but safety is primary consideration.
- Remedy for loss or injury to school or persons.
- Compliant with laws and regulations (e.g.: Title IX).
- Should consider the education impact on the parties.

# COMMON STUDENT SANCTIONS



- Warning.
- Probation.
- Loss of privileges.
- Counseling.
- No contact.
- Residence hall relocation, suspension or removal.
- Limited access to school/campus.
- Service hours.
- Online education.
- Parental notification.
- Alcohol and drug assessment and counseling.
- Training/Education
- Discretionary sanctions.
- Alternative Placement
- In-school suspension (PreK-12).
- Suspension.
- Expulsion.

# COMMON EMPLOYEE SANCTIONS



- Warning – verbal; written.
- Probation.
- Performance improvement/management process.
- Training (e.g. sensitivity training).
- Counseling.
- Loss of privileges.
- Reduction in pay.
- Loss of annual raise.
- Discretionary sanctions.
- Loss of supervisory or oversight responsibilities.
- Paid or unpaid leave.
- Suspension.
- Termination.

# 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.

# SANCTIONING IN SEXUAL MISCONDUCT CASES



- Title IX and case law require:
  - STOP – Bring an end to the discriminatory conduct.
  - PREVENT – Take steps reasonably calculated to prevent the future reoccurrence of the discriminatory conduct.
  - REMEDY – Restore the reporting party as best you can to their pre-deprivation status.
- Can be real clash with the typically educational and developmental sanctions of student conduct processes.
- Sanctions for serious sexual misconduct should not be developmental as their primary purpose; they are intended to protect the reporting party and the community.

# CONSIDERATIONS POST-FINDING



- Ensure remedies are not clearly unreasonable in light of the known circumstances.
- Avoid undue delays.
- Take immediate steps to protect reporting parties even before the final outcome of investigation (e.g. no contact orders, etc.).
- Ensure that long-term actions/remedies are equitable.
- Consider restorative justice as part of remedial process.
- 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.

# COMMUNICATING OUTCOMES



- Title IX requires institutions to apprise parties of the status of investigations, **determinations, sanctions** (or remedial actions) **and supporting rationale**.
  - Provide this information in writing and place no conditions on receiving or sharing it.
- FERPA, the Clery Act/VAWA, and OCR 2019 Regs are the primary sources of mandates for outcome notification.
  - 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.”

- Reporting and responding parties are entitled to the **same opportunities** to have a support person/advisor of their choice at **any** proceeding or related meeting.
- Reporting and responding 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 institution’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



- Equitable.
- Clearly communicated to reporting and responding parties.
- One level of appeal is best practice.
- Defined window of time to request appeal.
- Clear grounds for appeal.
- Committee versus individual determination preferred.
- Deference to original hearing authority.
- Remand.

# QUESTIONS?

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# CONTACT INFORMATION

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