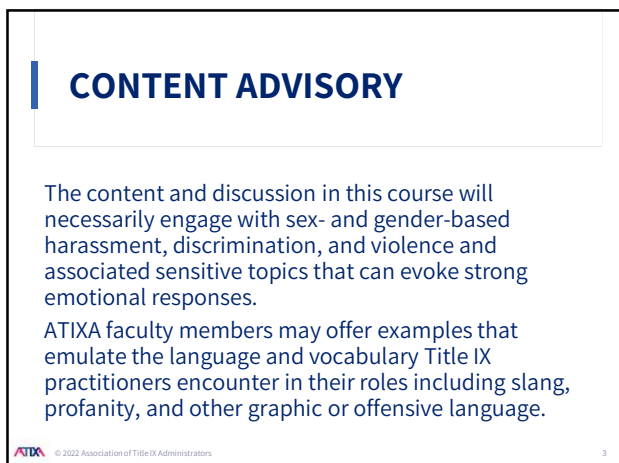




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AGENDA

- 1 Title IX Overview & Legal Basis for Title IX Liability
- 2 When Does Title IX Apply
- 3 Definitions of Sexual Harassment
- 4 Grievance Process Model Overview
- 5 What Happens Before the Formal Investigation?

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AGENDA

- 6 Beginning the Investigation
- 7 Rights of the Parties
- 8 Evidence
- 9 Case Study

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TITLE IX NOTICE OF PROPOSED RULEMAKING 2022

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TITLE IX REGULATIONS

- Congress passed Title IX of the Education Amendments in 1972
- Since 1980, the Department of Education's Office for Civil Rights (OCR) has had primary responsibility for enforcing Title IX
- November 2018: OCR proposed the most detailed and comprehensive Title IX regulations to date¹
- August 2020: Significantly amended, due-process oriented Regulations took effect (proposed in Nov. 2018)
- June 2022: OCR published the Notice of Proposed Rule Making (NPRM) outlining proposed changes to the Title IX regulations
- On July 12, 2022, the NPRM was published in the Federal Register and the 60-day comment period began

¹ U.S. Office of the Federal Register, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, <https://www.federalregister.gov/documents/2018/11/29/2018-25314/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

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NPRM PROCESS TIMELINE

- Official publication in the Federal Register July 12, 2022
- Review and comment period
 - 60-day comment period ended September 12, 2022
 - Submit comments to the Department of Education's Office for Civil Rights (OCR)
- Final Rule expected to be issued in Spring 2023
- Effective Date approximately Summer/Fall 2023
- Watch for ATIXA webinars and other opportunities ☺
- There will be a separate NPRM for Athletics

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PREPARING FOR IMPLEMENTATION

- Must continue to fulfill obligations under the current regulations for the 2022-2023 academic year.
- Anticipate OCR will expect schools to implement the new Title IX regulations before the start of the 2023-2024 academic year.

Steps to Take Now:

- Prepare to educate your community on the changes
- Identify stakeholders that will need to be involved in making policy decisions
- Determine how you will manage policy changes
- Plan for the training needs for your community
- Consider state laws, court decisions, and other regulations that may affect your institutional approach

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TITLE IX OVERVIEW & LEGAL BASIS FOR TITLE IX LIABILITY

- The Law
- The IX Commandments
- Significant Cases

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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.”

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THE IX COMMANDMENTS

INVESTIGATION ➡	Thorough	Reliable	Impartial
PROCESS ➡	Prompt	Effective	Equitable
REMEDIES ➡	Act reasonably to stop discrimination	Act reasonably to prevent recurrence	Act equitably to remedy effects

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GEBSER V. LAGO VISTA INDEP. SCHOOL

524 U.S. 274 (1998)

The Supreme Court ruled individuals cannot recover monetary damages against the school unless:

- 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.**”

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DAVIS V. MONROE COUNTY BD. OF ED.

526 U.S. 629 (1999)

Finding in favor of Davis, the Supreme Court expanded on 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.**”

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WHAT DOES THIS MEAN FOR INVESTIGATIONS?

- Areas that may give rise to a claim of deliberate indifference
 - Failing to conduct an investigation
 - Includes deferring to law enforcement as the sole investigation
 - Conducting an inadequate investigation
 - Unreasonable delays during the investigation
 - Failing to follow school/district policies and procedures
 - Lack of documentation to indicate that an investigation was conducted

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WHEN DOES TITLE IX APPLY?

- Jurisdiction
- Definitions of Sexual Harassment
- First Amendment Protections

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WHEN DOES TITLE IX APPLY?

- Regulations emphasize 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/out-of-school conduct, study abroad programs, or school-sponsored international trips – “nothing in the regulations would prevent...”

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WHEN DOES TITLE IX APPLY?

- 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”
- **Note:** The Title IX Coordinator makes the determination about jurisdiction before a case is assigned to the Investigator

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DEFINITIONS OF SEXUAL HARASSMENT

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

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REQUIRED DEFINITIONS – TIX REGULATIONS

Sexual Harassment is conduct on the basis of sex that satisfies one or more of the following:

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

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HOSTILE ENVIRONMENT: "UNWELCOME"

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

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HOSTILE ENVIRONMENT: “REASONABLE PERSON”

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

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HOSTILE ENVIRONMENT: “SEVERE”

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

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HOSTILE ENVIRONMENT: “PERVASIVE”

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

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HOSTILE ENVIRONMENT: “OBJECTIVELY OFFENSIVE”

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

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HOSTILE ENVIRONMENT: TOTALITY OF THE CIRCUMSTANCES

- Hostile environment analysis requires that you evaluate the “totality of the circumstances.”
- In evaluating the totality of the circumstances, consider:
 - Severe, pervasive, and objectively offensive factors
 - Size of the school, location of the incidents, and context in which they occurred
 - Effect on the Complainant’s mental or emotional state
 - Whether the conduct was directed at more than one person
 - Whether the conduct unreasonably interfered with the Complainant’s educational or work performance
 - Whether the statement was an utterance of an epithet which was offensive or offended by discourtesy or rudeness
 - Whether the speech or conduct deserves the protections of academic freedom or First Amendment protection
 - “Constellation of surrounding circumstances.”

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SEXUAL ASSAULT

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

- **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 their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.
- **Sodomy** - Oral or anal sexual intercourse with another person, 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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SEXUAL ASSAULT (CONT.)

- **Sexual Assault with an Object** – The use of 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 (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.
- **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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SEXUAL ASSAULT (CONT.)

- **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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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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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].

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DOMESTIC VIOLENCE (CONT.)

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

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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.

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STALKING (CONT.)

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

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NAVIGATING FIRST AMENDMENT PROTECTIONS

"Congress shall make no law... abridging the freedom of speech..."



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TINKER V. DES MOINES INDEP. COM. SCH. DIST. 393 U.S. 503 (1969)

Free speech rights in public schools

- Group of students wore black armbands to school in protest of the Vietnam War
- Students suspended after refusing to remove armbands
- 2020 Title IX regulations reaffirm First Amendment protections

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TINKER V. DES MOINES INDEP. COM. SCH. DIST.

393 U.S. 503 (1969)

- Conduct must “**materially and substantially interfere with the requirements of appropriate discipline in the operation of the school**”
 - Actual interference, not based on fear of a potential interference
 - “More than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint”
 - Substantial interference with the school’s work
 - Intrusion upon the rights of other students

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MAHANAOY AREA SCHOOL DISTRICT V. B.L.

141 S. CT. 2038 (2021)

Facts

- B.L., a student, tried out for the varsity cheerleading team and instead only made the junior varsity team. While away from school she posted a picture of herself on Snapchat with the caption “Fuck school fuck softball fuck cheer fuck everything.”
- B.L.’s snap violated team and school rules, which B.L. acknowledged before joining the team, and she was suspended from the junior varsity team for a year.
- B.L. sued the school under 42 U.S.C. § 1983 alleging that (1) her suspension from the team violated the First Amendment; (2) the school and team rules were overbroad and viewpoint discriminatory; and (3) those rules were unconstitutionally vague.

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MAHANAOY AREA SCHOOL DISTRICT V. B.L.

141 S. CT. 2038 (2021)

Decision

- Schools retain a special interest in regulating speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others,” but the interest is diminished for off-campus speech.
- The school’s interest here was insufficient to justify regulation of the cheerleader’s speech, which involved complaints about school which were outside of school hours, took place off-campus, and was directed at the student’s Snapchat friends.
- Schools may regulate student speech on campus and in school:
 - indecent, lewd, or vulgar speech
 - speech promoting illicit drug use during a class trip
 - speech that others may reasonably perceive as “bear[ing] the imprimatur of the school.”

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GRIEVANCE PROCESS MODEL: AN OVERVIEW

- The Process
- Due Process
- Title IX Team
- Title IX Coordinator Oversight
- Bias & Conflict of Interest

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THE PROCESS

Incident	Initial Assessment	Formal Investigation & Report	Determination (Hearing)	Appeal
<ul style="list-style-type: none"> • Complaint or notice to the Title IX Coordinator • Contact Complainant • Offer supportive measures • Discuss process to file a formal complaint • Strategy development 	<p><i>Following a formal complaint</i></p> <ul style="list-style-type: none"> • Jurisdiction? • Dismissal? • Policy violation implicated? • Emergency Removal? • Reinstatement to another process? • Informal or formal resolution? 	<ul style="list-style-type: none"> • Notice to parties • Identification of witnesses • Interview scheduling • Evidence collection • Report drafted • Evidence and draft investigation report shared • Investigation report finalized and shared 	<ul style="list-style-type: none"> • Exchange of written questions and answers • Determination • Sanction? • Remedies • Written outcome and rationale drafted and shared 	<ul style="list-style-type: none"> • Standing? • Vacate? • Remand? • Substitute? • Written outcome and rationale drafted and shared

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“REASONABLY PROMPT” TIMEFRAMES FOR GRIEVANCE PROCESS

- 30+ days to resolution given procedural requirements in the 2020 Title IX regulations
 - No set requirement in the regulations other than to have “reasonably prompt timeframes” for the conclusion of the process designated in Recipient’s procedures
 - Timeline starts from notice, not from the incident itself
 - Goal is to avoid undue delay
 - Document delays

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CIVIL RIGHTS INVESTIGATION MODEL AND STUDENT CONDUCT MODEL

- How does this model alter the traditional student conduct model?
 - An active gathering of information by the Investigator; 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
 - Provides a right of appeal for all parties to the complaint, not just the Respondent

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DUE PROCESS – TIX REGULATIONS

Due Process concerns are at the heart of the 2020 regulations:

- Applies to both public and private Recipients, which is a shift in legal paradigm
- Standard of Evidence
- Requirements for “Emergency Removal”
- Detailed Notice of Investigation and Allegations (NOIA)
- Providing investigation report and evidence for review/response
- Live hearing with cross-examination (optional for K-12)
- Advisor involvement (possibly including attorneys)

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DUE PROCESS – TIX REGULATIONS (CONT.)

- Bias: TIXC, Investigators, Decision-makers, and Informal Resolution Facilitators
- Biased Training or Insufficient Training
- Requirement to publicly post training materials


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TITLE IX TEAM

- Team Members
- Role of the Title IX Coordinator in the Investigation Process
- Bias and Conflict of Interest Among Team Members


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THE TITLE IX TEAM


- Title IX Coordinator(s) (TIXC)
 - Deputy Title IX Coordinator(s)
- Investigator(s)
- Decision-Makers
 - Policy Violation
 - Appeal
- Informal Resolution Facilitator(s)


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TIXC AS SUPERVISOR OF THE INVESTIGATION STRUCTURE

- The Title IX Coordinator is responsible for:
 - The appointment/engagement of Investigators
 - Training Investigators and Decision-makers
 - Supervising Investigators and investigations
 - Helping Investigators develop investigation strategy
 - Coordinating supportive measures
 - Timeline compliance
 - Communication and coordination of investigation teams
 - Providing institutional memory to Investigators
 - Retaining a record of all activities
- The Title IX Coordinator may serve as an Investigator but may **not** be a Decision-maker.


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TIXC AS SUPERVISOR OF THE INVESTIGATION PROCESS

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

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ROLE OF THE INVESTIGATOR

- Conduct reliable, prompt, fair, and impartial investigations
 - Work with TIXC to develop investigation strategy
 - Identify and interview parties and witnesses
 - Identify, organize, and compile relevant information
 - Maintain accurate and thorough investigation records and notes
 - Share the evidence with the parties and their Advisors
 - Provide notices to the parties (may be done in conjunction with TIXC)
- Create an investigation report that fairly summarizes all relevant evidence

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REQUIRED TRAINING TOPICS FOR INVESTIGATORS

- The definition of sexual harassment
- The scope of the Recipient's education program or activity
- How to conduct an investigation and grievance process, as applicable
- How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Issues of relevance for questions and evidence, including when questions and evidence about the Complainant's prior sexual behavior are not relevant
- Understanding "relevant evidence" in order to create an investigation report that fairly summarizes all relevant evidence

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BIAS AND CONFLICTS OF INTEREST

- Bias and conflicts of interest are expressly prohibited in the 2020 Title IX regulations
- The Title IX Coordinator, Investigator(s), Decision-maker(s), or any person designated by a Recipient to facilitate an informal resolution process must not:
 - Have a conflict of interest or bias for or against Complainants or Respondents generally, or
 - For or against an individual Complainant or Respondent
- Among the most significant problems for Title IX team members
- **Bias and/or conflict of interest by Investigators that impact the outcome are grounds for appeal.**

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BIAS

- Bias can represent any variable that improperly influences an investigation or decision
- There are many forms of bias and prejudice that can impact investigations:
 - Pre-determined outcome
 - Partisan approach by Investigators in questioning, findings, or report
 - Intervention by senior-level administrators
 - Not staying in your lane
 - Improper application of district policies/procedures
 - Confirmation bias
 - Implicit bias
 - Animus of any kind
 - Biased training materials; reliance on sex stereotypes

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CONFLICTS OF INTEREST

- Types of conflicts:
 - Wearing too many hats in the process
 - Legal counsel as Investigator
 - Investigators who are not impartial
- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised
- Previously disciplining a student or employee is often not enough to create a conflict of interest

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WHAT HAPPENS BEFORE THE FORMAL INVESTIGATION?

- Actual Knowledge/Notice
- Formal Complaint
- Initial Assessment
- Supportive Measures
- Informal Resolution

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NOTICE/ACTUAL KNOWLEDGE – TIX REGULATIONS

Actual Knowledge

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

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FORMAL COMPLAINT – TIX REGULATIONS

Formal Complaint

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

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INITIAL ASSESSMENT IN SUMMARY

- Upon receipt of a report or complaint, the TIXC should conduct an initial assessment to determine the following:
 - Has there been a formal complaint?
 - Does the TIXC need to sign/initiate a formal complaint?
 - Does the alleged conduct meet the required definitions?
 - Does jurisdiction exist?
 - Is informal resolution an option?
- If the TIXC determines that the complaint will proceed under Title IX, the TIXC will:
 - Establish basis of investigation:
 - Incident or pattern, and/or climate/culture
 - Establish a preliminary timeline for the investigation
 - Assign the complaint for investigation

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SUPPORTIVE MEASURES

- Throughout process:
 - Provided to Complainant and Respondent
 - Non-disciplinary, non-punitive
 - Individualized
 - Restore or preserve equal access
 - Without unreasonably burdening other party
 - Protect safety of parties or environment, or deter sexual harassment
- Inform Title IX Coordinator if parties express a need for supportive measures

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COMMON SUPPORTIVE MEASURES

- | | |
|---|--|
| <ul style="list-style-type: none"> ▪ Referral to counseling, medical, and/or other health services ▪ Referral to the Employee Assistance Program ▪ Visa and immigration assistance ▪ Education to the community or community subgroup | <ul style="list-style-type: none"> ▪ Altering housing situation (if applicable) ▪ Altering work arrangements for employees ▪ Safety planning ▪ Providing school safety escorts |
|---|--|

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COMMON SUPPORTIVE MEASURES (CONT.)

- Transportation accommodations
- Implementing contact limitations (no contact orders) between the parties
- Academic support, extensions of deadlines, or other course-related adjustments
- Trespass orders
- Emergency notifications
- Increased security and monitoring of certain areas of school
- Other tailored measures appropriate to the circumstances

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INFORMAL RESOLUTION

- The Title IX regulations include a provision that encourages informal resolution, and it is a worthy practice, when voluntary
 - Following formal complaint
 - Allowed at any time prior to a final determination at TIXC's discretion
 - Voluntary, written consent of the parties and their parent/guardian
 - Regulations preclude informal resolution of allegations that an employee harassed a student
- Should the investigation continue or pause during informal resolution?
- Can/should you use information disclosed during the informal resolution process in a formal process?

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BEGINNING THE INVESTIGATION

- Who Should Investigate?
- When Do You Investigate?
- Formal Comprehensive Investigation
- 10 Steps of an Investigation
- Notice to the Parties
- Investigation Strategy

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WHO SHOULD INVESTIGATE?

- Investigations of sexual harassment must be impartial, thorough, and reliable. Investigators must be **well-trained**.
 - Title IX Coordinator?
 - Standing panel of Investigators?
 - Human Resources?
 - Student Services?
 - Administrators/Staff?
 - Teachers/Faculty?
- Coaches?
- Outside/External Investigator?
- NOT Legal Counsel

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SHOULD THERE BE MORE THAN ONE INVESTIGATOR?

No specific requirement, but:

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

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TEAM INVESTIGATIONS

Other benefits:

- Allows for strategic selection of Investigators based on complaint elements and parties
- Ability to brainstorm investigation steps and lines of questioning
- Co-facilitate interviews
- Flexibility if there is any conflict with Investigators and parties
- Share the heavy lift of required documentation and recordkeeping

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WHEN DO YOU INVESTIGATE?

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

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FORMAL COMPREHENSIVE INVESTIGATION

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

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10 STEPS OF AN INVESTIGATION

1. Establish basis for investigation (Incident, Pattern, and/or Culture/Climate)
2. Notice of Investigation/Notice of Formal Allegation(s) to Parties (NOIA)
3. Establish investigation strategy
4. Formal comprehensive investigation
 - Witness interviews
 - Evidence gathering
5. Draft investigation report
 - Gather evidence
 - Assess credibility and evidence
 - Synthesize areas of dispute/agreement and all questions asked

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10 STEPS OF AN INVESTIGATION (CONT.)

6. Meet with Title IX Coordinator (and/or legal counsel) to review draft report and evidence
7. Provide all evidence directly related to the allegations to parties and their Advisors for inspection and review with 10 days for response
8. Revise (as needed) and finalize the investigation report
 - Gather, assess, and synthesize relevant evidence
9. Meet with Title IX Coordinator (and/or legal counsel) to review final investigation report
10. Send final report to Decision-maker and parties/Advisors for review and written response at least 10 days prior to Decision-maker making their determination of responsibility

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NOTICE TO THE PARTIES – TIX REGULATIONS

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

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

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NOTICE TO THE PARTIES – TIX REGULATIONS (CONT.)

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

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TIMELINES

- Ensure that all steps in the investigation are conducted according to the timelines in the Recipient's procedures
 - Procedures should provide some flexibility at the discretion of the TIXC
- Parties and witnesses should be interviewed as soon as possible:
 - So that recollections are as fresh and accurate as possible
 - To secure necessary remedies as soon as possible
 - But not before Notice of Allegations/Investigation is sent

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TEMPORARY DELAYS/EXTENSIONS

- For good cause:
 - Absence of a party
 - Absence of a party's Advisor
 - Concurrent law enforcement activity
 - Language assistance
 - Accommodation of disabilities
- What about breaks?
- Injunctions?
- Provide written notice of delays and extensions to all parties

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ROLE OF LAW ENFORCEMENT AND ISSUES OF CONCURRENT CRIMINAL ACTION

- Criminal investigations do not relieve the school of its duty to respond promptly and effectively
- Can law enforcement be the Title IX investigatory arm?
 - Should it be? (not a best practice)
 - Legal standards for criminal investigations are different
 - Police investigations or reports may not be determinative of whether harassment occurred under Title IX
- What if law enforcement requests you delay your process?
- What if law enforcement is the sole source of evidence collection?
- What if a party files a lawsuit or complaint with OCR?

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INVESTIGATION STRATEGY

- The Investigator, in consultation with the Title IX Coordinator or designated Deputy, strategizes throughout the entire investigation.
- Elements to consider in developing your strategy include:
 - Was notice already sent to the parties?
 - What is the investigation timeline?
 - Whom to interview?
 - When/In what order?
 - What information/evidence can be obtained?
 - How do we maximize the quantity/quality of evidence?
 - How and when do we notify witnesses?

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INVESTIGATION STRATEGY (CONT.)

- Elements to consider in developing your strategy include:
 - Who needs to be aware of the investigation?
 - When and how do we share evidence/information with the parties?
 - What additional documentary evidence will be important to the investigation?
 - Handling the involvement of parents/guardians
 - Handling the involvement of Advisors
 - Considerations when interviewing younger students (e.g., K-5)
 - Considerations when interviewing students with a disability

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WHEN TO INTERVIEW PARTIES AND WITNESSES

- Notifying the Respondent of the complaint:
 - "Upon receipt of formal complaint"
 - Any allowance for interviewing witnesses and accumulating evidence?
- Must provide parties with written notice of the date, time, location, participants, and purpose of all hearings, investigation interviews, or other meetings, with sufficient time for the party to prepare to participate

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WHEN TO INTERVIEW PARTIES AND WITNESSES (CONT.)

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

*Every complaint is different

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ESTABLISH PRE-INTERVIEW GROUND RULES

- Who will attend?
- How will records be kept?
 - Recording?
 - Access?
- Role of Advisors (who may be Attorneys)
- Involvement of parents/guardians, union reps, friends, etc.
- FERPA (students)/Employment records/confidentiality

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PREPARE FOR EACH INTERVIEW

- Outline interview questions in advance but be flexible. Be prepared to deviate from your script and insert a logical follow-up question, if necessary.
- Plan the order of interviews
- Most beneficial to conduct interviews in person, if conditions permit
- Interviews should be conducted in a neutral, quiet, and private setting with no or minimal likelihood of interruptions

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SHARING INFORMATION WITH PARTIES AND WITNESSES DURING INVESTIGATION

- Decide how much information you will share in advance of each interview and have a rationale for what information will be shared and what will not be shared
 - Remember that prior to a final determination, the parties must have an opportunity to review all “directly related” evidence
 - You may be challenged on a decision not to share, so have a rationale
 - When in doubt, provide the parties with evidence

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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

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RIGHTS OF THE PARTIES

- Rights of the Parties During the Investigation
- Advisor of Choice
- Working with Advisors

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RIGHTS OF THE PARTIES DURING THE INVESTIGATION – TIX REGULATIONS

- Right to present witnesses, including fact and expert witnesses
- Right to present inculpatory and exculpatory evidence
- Right to discuss the allegations under investigation without restriction
- Right to gather and present relevant evidence without restriction
- Right to be accompanied to any related meeting or proceeding by Advisor of their choice, who may be, but is not required to be, an attorney

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RIGHTS OF THE PARTIES DURING THE INVESTIGATION – TIX REGULATIONS (CONT.)

- Right to written notice of the date, time, location, participants, and purpose of investigation interviews or other meetings, with sufficient time to prepare
- Right to inspect and review directly related evidence and investigation report, including evidence not used to support determination

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ADVISOR OF CHOICE

- Parties have the right to have an Advisor of their choice to assist them throughout the process, to include attending any meetings and interviews
- Advisor of choice may be anyone, including attorney
- Advisor of choice is in addition to the student's parent/guardian
- May restrict participation of Advisors equally

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WORKING WITH ADVISORS

- The Advisor does not control the process. The Advisor is present to assist the party.
- Develop expectations for Advisor role that are applied equitably to the parties
 - Should be communicated to parties and Advisor at the outset
- The parties should answer questions directly for themselves
- The level of participation of an Advisor will vary based upon the age of parties and if the party has a disability
- Involvement of attorneys may necessitate the involvement of your legal counsel

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EVIDENCE

- Investigation Philosophy
- Understanding Evidence
- Evidence Gathering
- Relevance
- Specific Evidence Issues
- Relevant vs. Directly Related vs. Irrelevant Evidence
- Sharing Evidence and the Investigation Report

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INVESTIGATION PHILOSOPHY

- The burden of proof and burden of gathering evidence rests with the school, not the parties
 - It is not required that a Respondent prove welcomeness or consent, the Recipient must prove unwelcomeness or non-consent
- "Sufficient to reach a determination"
- Evidence collected by law enforcement or any other source
- Contracted/outsourced Investigators do not absolve the school of responsibility for this provision

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UNDERSTANDING EVIDENCE

Investigators gather and assess different types of evidence for relevance and credibility:

- Documentary evidence (e.g., supportive writings or documents)
- Electronic evidence (e.g., photos, text messages, and videos)
- Real evidence (i.e., physical objects)
- Direct or testimonial evidence (e.g., personal observation or experience)
- Circumstantial evidence (i.e., not eyewitness, but compelling)

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UNDERSTANDING EVIDENCE (CONT.)

- Hearsay evidence (e.g., statement made not from personal observation or experience but presented as important information)
- Character evidence
- Impact and mitigation statements (typically only considered relevant in sanctioning)

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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 the examination of factual, circumstantial, and hearsay evidence, and ensure that all evidence has been examined, and all leads exhausted
- Credibility assessments may not be based on a person's status as a Complainant, Respondent, or witness
- No limits on types/amount of evidence that may be offered, except must be relevant and respect "rape shield" laws and privilege provisions

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RELEVANCE

- **All** relevant evidence must be objectively evaluated and considered – inculpatory and exculpatory
- Evidence is generally considered relevant if it has value in proving or disproving a fact at issue
 - Regarding alleged policy violation
 - Regarding a party or witness's credibility
- Investigator(s) will have made initial relevance "decisions" by including evidence in the investigation report...
- But relevance is ultimately up to the Decision-maker, who is not bound by the Investigator's judgment

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RELEVANCE (CONT.)

- If the Investigator indicates an opinion on credibility, outcome, whether policy was violated, how evidence should be weighed, etc., that opinion or recommendation is not binding on the Decision-maker
- The Decision-maker may consider it, but must be objective and independent, and is free to accept or reject any recommendation of the Investigator (or ask them not to make one)
 - Should the Decision-maker ask for it or ask the Investigator to clarify their recommendations?

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SPECIFIC EVIDENCE ISSUES UNDER THE 2020 TIX REGULATIONS

- Evidence of the Complainant's **sexual predisposition** is never relevant.
- Evidence of the Complainant's **prior sexual behavior** is explicitly and categorically not relevant except for two limited exceptions:
 - Offered to prove that someone other than the Respondent committed the conduct alleged, or
 - Concerns specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent
- Even if admitted/introduced by the Complainant
- Does not apply to Respondent's prior sexual behavior or sexual predisposition

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SPECIFIC EVIDENCE ISSUES UNDER THE 2020 TIX REGULATIONS (CONT.)

Additional permissions required for:

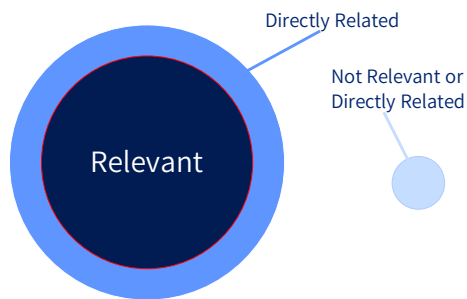
- Records made or maintained by a:
 - Physician
 - Psychiatrist
 - Psychologist
- Questions or evidence that seek disclosure of information protected under a legally recognized privilege must not be asked without permission
 - This is complex in practice because you won't know to ask for permission unless you ask about the records first

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UNDERSTANDING EVIDENCE



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BUCKET 1: RELEVANT EVIDENCE



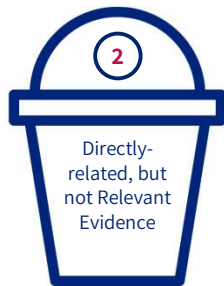
- Evidence is relevant when it tends to prove or disprove an issue in the complaint
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 2 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers within the investigation report via secure technology

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BUCKET 2: DIRECTLY RELATED, BUT NOT RELEVANT EVIDENCE



- Evidence is directly related when it is connected to the complaint but is neither inculpatory nor exculpatory and will not be relied upon in the investigation report
- Parties may make case to Investigators/Decision-makers that this evidence should be shifted to Bucket 1 or 3
- Once finalized, this evidence should be provided to the parties/Advisors/Decision-makers in a separate file via secure technology

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BUCKET 3: NEITHER RELEVANT NOR DIRECTLY-RELATED EVIDENCE



- Evidence should be maintained by the Investigator(s) but disregarded for purposes of the process
- Parties/Advisors/Decision-makers don't get to know about it
- Redact from evidence files shared with the parties/Advisors/Decision-makers

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SHARING EVIDENCE AND THE INVESTIGATION REPORT

- Regulations mandate creation of an investigation report
 - Report fairly summarizes all relevant evidence
- Two 10-day review and comment periods

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EVIDENCE AND REPORT REVIEW BY PARTIES, PART 1

Prior to the completion of the Investigation Report:

- Evidence directly related to allegations must:
 - Be sent to each party and Advisor
 - Be in an electronic format or hard copy
 - Include evidence upon which the Recipient does not intend to rely
 - Include exculpatory and inculpatory evidence
 - Be made available at any hearing
- **Best practice:** Provide the draft investigation report at the same time.
- After sending the evidence, the investigator must:
 - Allow 10 days for written response
 - Consider response prior to completion of report

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EVIDENCE AND REPORT REVIEW BY PARTIES, PART 2

At least 10 days prior to making a determination regarding responsibility:

- The final Investigation Report summarizing relevant evidence must be sent:
 - To each party and Advisor
 - In an electronic format or hard copy
 - For the parties' review and written response
- **Best Practice:** Provide the investigation report to the TIXC and/or legal counsel to review for completeness prior to being shared with the parties
- For K-12 schools, with or without a hearing, this review is followed by, or in conjunction with, the exchange of relevant written questions and responses facilitated by a Decision-maker

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CASE STUDY: IVAN & JUANITA

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CASE STUDY

- Ivan & Juanita

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CASE STUDY: IVAN & JUANITA

- Juanita, a freshman member of the girls' soccer team, made a Title IX report directly to the Vice Principal.
- On the morning of October 11, her teammate, who was checking her email in the school computer lab, yelled for Juanita and the other teammates to come look at something on the computer.
- Juanita saw an email sent from the boys' soccer team email address, boyssoccer@school.com, which said "Greetings new freshman, meet the girl next door."
- The email included a photo of Juanita's face photoshopped onto an image of a naked woman's body with huge breasts.

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CASE STUDY: IVAN & JUANITA

- Everyone in the room laughed and Juanita ran from the room crying, embarrassed that others would think it was her.
- She immediately contacted Ivan, a member of the boys' soccer team, who she believed sent the email.
- Earlier in the year, Ivan asked Juanita out several times, but she didn't like him.
- Juanita found Ivan really annoying, and while she knows it wasn't nice, she called him a total loser in front of his friends.
- She knows that he sent the email to hurt and embarrass her, so Juanita filed a formal complaint with the Title IX Coordinator.

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CASE STUDY: IVAN & JUANITA

You are beginning your formal investigation:

- What are the Title IX allegation(s)?
- What key things should you consider as part of your investigation strategy?
- Who would you want to interview at this stage?
- What evidence do you want to gather?

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CASE STUDY: IVAN & JUANITA

- You decide to interview Ivan. Ivan believes Juanita is blowing the whole matter out of proportion.
- Ivan admits to creating the photo for a class project. He reports:
 - “It was only meant to be a joke. I never put her name on it, so what’s the big deal? This is a work of art that I created for my class. I only showed my artwork to a few of my teammates.”
 - The email account is for official team business.
 - The coaches and team captains have the password. The captains have shared the password with other seniors on the team.
 - Juanita “always flashes her breasts” at him and told him she wanted breast implants.

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CASE STUDY: IVAN & JUANITA

- You also decide to interview John, assistant director of information technology.
- John was able to confirm that someone using the school computer lab sent the picture from the boys’ soccer team email account.
- The picture was inserted into the email via a flash drive, but he was unable to determine which student had logged into the computer.
- John received Ivan’s consent to inspect his personal laptop. The photo was on Ivan’s hard drive but was not sent out via email to anyone.
- John said Ivan told him when he doesn’t have his laptop with him, it is typically inside his locker, and he hasn’t given anyone else his laptop password.

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CASE STUDY: IVAN & JUANITA

- Who else might you interview?
- What other evidence do you want to gather?
- Is there any evidence that you gathered that is not relevant? If so, why?

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CASE STUDY: IVAN & JUANITA

- After you've shared the evidence you gathered with Ivan and Juanita and given them 10 days to review and respond, the following occurs:
 - Juanita tells you that she read what Ivan said in his interview about having created the photo for his art class and she knows Ivan is not telling the truth because she took the same class last year and she never had an assignment like that for class.
 - Ivan's Advisor tells you that he has a new witness he wants you to interview. Ivan's Advisor wants you to interview Ivan's friend Adam who will tell you that Juanita really is not bothered by the photo because she flashed her breasts at Ivan a few times before and told him that she wanted breast implants.

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CASE STUDY: IVAN & JUANITA

- How do you respond to Juanita?
- How do you respond to Ivan's Advisor?

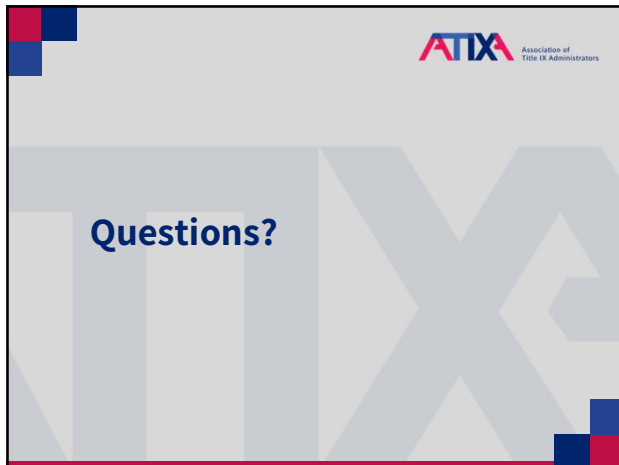
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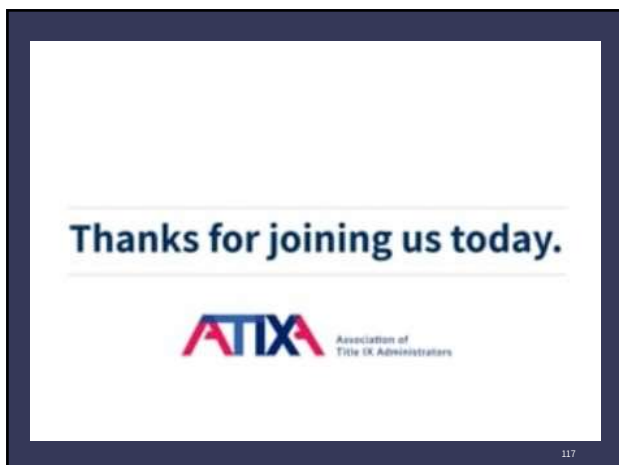
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