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Title VI and Civil Rights Investigation Foundations Level One for Educational Settings

Training & Certification Course

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Strategic Risk Management Solutions

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Introduction

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This training equips practitioners with an opportunity to explore the critical components of a thorough, neutral, and compliant civil rights investigation.



Practitioners will explore examples and unique considerations for investigating disparate treatment, hostile environment, and retaliation complaints.



The goal of this course is to introduce the essential knowledge, skills, and best practices that will equip practitioners for success as a civil rights Investigator.

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Federal Civil Rights Laws

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Federally Protected Characteristics

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- Race
- Color
- Religion or Creed
- National Origin or Ancestry
- Sex
- Age
- Disability (physical and mental)
- Veteran Status
- Predisposing Genetic Information
- Citizenship

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Title VI of the Civil Rights Act of 1964

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"No person in the United States shall, on the ground of **race, color, or national origin**, be **excluded from participation in, be denied the benefits of, or be subjected to discrimination** under any **program or activity receiving federal financial assistance**."

- 42 U.S.C. § 2000d



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ATIXA Model Policy Definitions

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Race	▪ Actual or perceived membership in a group characterized by shared physical, cultural, or ethnic traits ▪ Includes those groups that may be defined by ancestry, ethnic identity, or perceived racial affiliation
Color	▪ Actual or perceived pigmentation, complexion, or shade/tone of a person's skin regardless of race or ethnicity
National Origin	▪ Actual or perceived place of origin, ancestry, ethnicity/ethnic characteristics, language or accent, cultural heritage, surname or name associate with a nation, or association with people of a particular nation or origin, regardless of citizenship or immigration status

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Civil Rights in Education Settings

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- Institutions receive federal funds and are subject to enforcement from various federal agencies
  - The Department of Education's (ED) Office for Civil Rights (OCR) is one of the most prominent enforcement offices
  - For discrimination complaints involving employee Complainants, many enforcement-related tasks are funneled to the Equal Employment Opportunity Commission (EEOC)
- Institutions may be subject to lawsuits for failing to comply with civil rights laws
- Intersecting state laws should also be considered

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Sources of Title VI Compliance Obligations

- The compliance environment is evolving
  - Currently, there are no comprehensive Title IX-style regulations
- Title VI and other federal civil rights compliance sources are a combination of:
  - Executive Orders
  - Federal agency sub-regulatory guidance
  - Federal agency resolution agreements
  - Court cases
  - State laws



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Related Civil Rights Laws

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- **Title VII** of the Civil Rights Act of 1964:
  - Prohibits discrimination on the basis of **race, color, religion, sex,** and **national origin** in **employment**
  - Enforced primarily by the Equal Employment Opportunity Commission (EEOC)
- **Title IX** of the Education Amendments of 1972:
  - Prohibits discrimination on the basis of **sex** in **education**
  - Enforced primarily by the OCR
- **Title VIII - Fair Housing Act (FHA)**
  - Prohibits discrimination on the basis of **race**, **color**, **religion**, **sex**, **national origin**, **familial status,** or **disability** in dwellings
  - Enforced primarily by the Department of Housing and Urban Development (HUD)

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Related Civil Rights Laws, Cont.

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- **Section 504** of the Rehabilitation Act of 1973
  - Prohibits discrimination on the basis of **disability** in all programs/activities receiving federal financial assistance
  - Requires persons with a disability receive equal opportunities in benefits/services
- **Americans With Disabilities Act** (ADA; 1990)
  - Prohibits discrimination on the basis of **disability** in employment, by state and local governments, entities, and by places of public accommodation (including private schools/institutions)
- **Age Discrimination in Employment Act** (ADEA; 1967) and the **Age Discrimination Act** (1975)
  - Prohibit **age** discrimination in employment and in federally funded education programs

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Essential Compliance Elements

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Title VI policy and procedures should permit the school/institution to **promptly** respond to actual or constructive notice of discrimination or harassment on the basis of race, color, or national origin.

1

STOP discriminatory conduct

2

PREVENT recurrence, on both individual and school/institutional levels

3

REMEDY the effects of discrimination, on both individual and school/institutional levels

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Forms of Discrimination

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Discrimination Defined

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The act of treating an individual differently, or less favorably, based upon actual or perceived protected characteristics

Can be intentional or unintentional

Always based on a protected characteristic(s)

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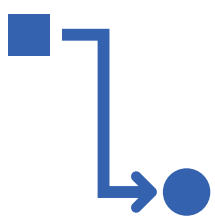
Types of Discrimination

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Disparate Treatment

- Intentional
- Usually requires adverse action
- Affiliation or perception of affiliation to protected characteristic



Disparate Impact

- Occurs with unintentional discrimination
- Impact disadvantages certain groups



Harassment

- Severe OR pervasive OR persistent behavior that limits a person's benefits, services, or opportunities

Retaliation

- Prohibited if engaged in protected activity
- Suffered adverse academic or employment action

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Civil Rights Investigation Process Overview

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Investigation Process Overview

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PRE-INVESTIGATION

- Initial Assessment
- Jurisdiction Determination
- Supportive Measures/ Remedies
- Interim Actions

INVESTIGATION

- Notice of Investigation and Allegations
- Interviews
- Evidence Collection
- Draft Report
- Share Draft and Evidence
- Review/ Comment
- Final Report

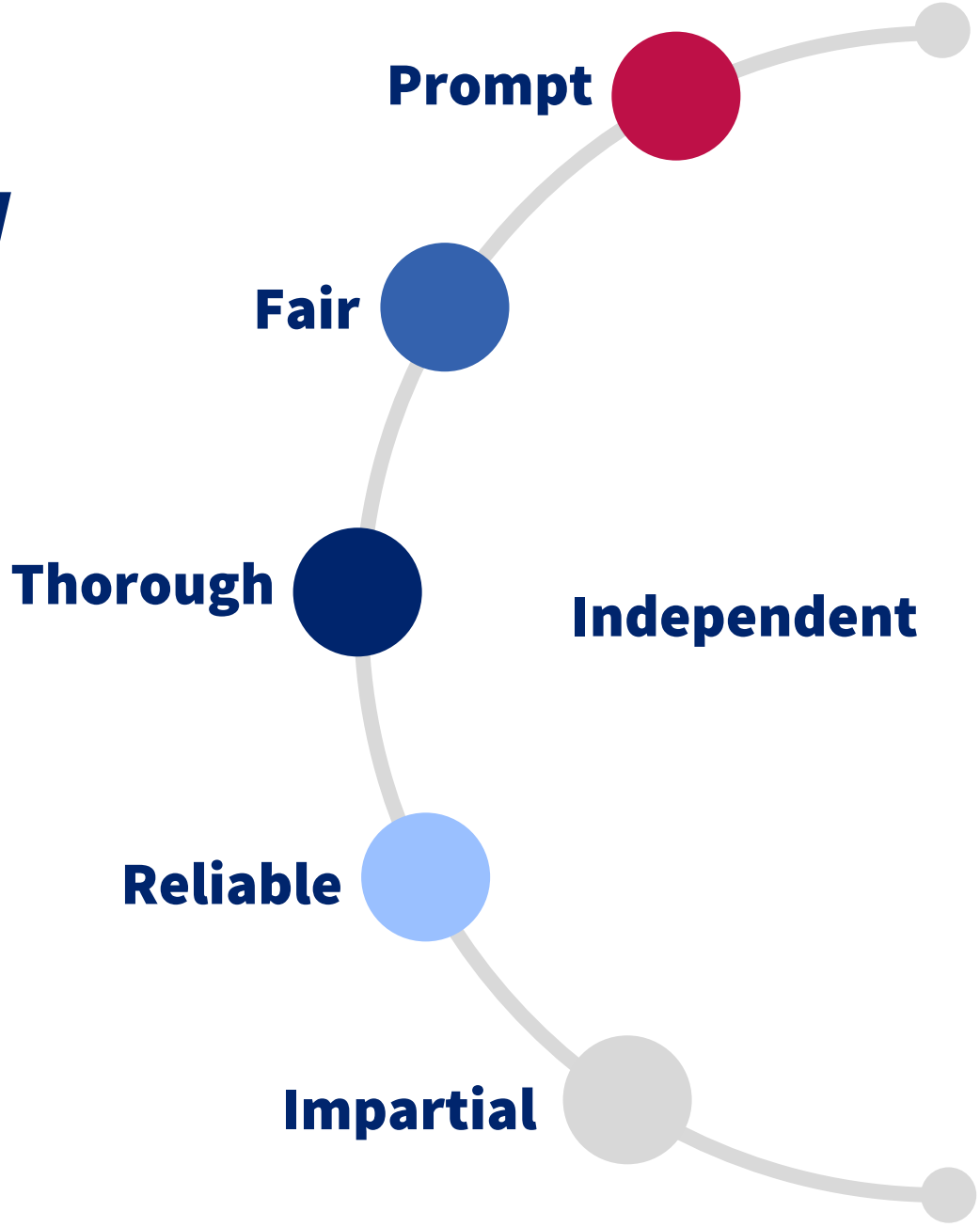
DETERMINATION

- Credibility Assessment
- Determination and Rationale
- Sanctions
- Remedies
- Live Hearing (Optional)
- Appeal (Optional)

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Civil Rights Investigations Overview

- Investigations focus on gathering all available, relevant information
- The school/institution is responsible for gathering evidence, not the parties



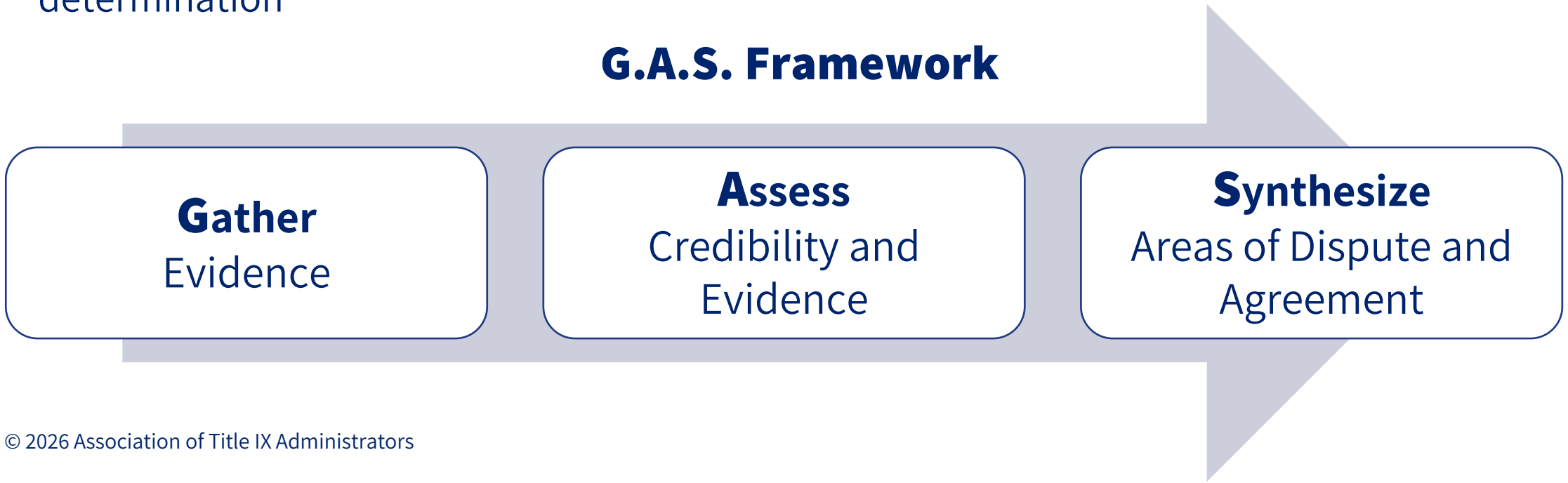
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Role of the Investigator

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- **Input:** all available, relevant evidence
- **Output:** a comprehensive, detailed written investigation report that fairly summarizes all relevant evidence **and** the investigation
- Follow the G.A.S. Framework to well-position the Decision-maker for reaching a determination



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A Fair and Prompt Resolution Process

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- **Treat all parties fairly**
  - If the school/institution affords a right, privilege, benefit, or opportunity to one party, consider whether it should be provided to other parties
  - Ensure parties have opportunity to **fully participate** in the resolution process
- Ensure all employees involved in administering the civil rights resolution process **operate without bias and/or conflicts of interest**
- Should be reasonably prompt to enable the school/institution to fulfill its obligations to address harassment and discrimination under applicable laws and policies
- As with Title IX, due process rights may pertain, especially at public institutions

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Parties' Rights

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Parties should have the right to:

- A thorough, fair, and impartial resolution process free of bias or conflicts of interest
- Notice of the allegations and, if appropriate, any investigation
- Obtain and present evidence and witnesses
- Discuss allegations and consult with confidential resources, parents/guardians, or an Advisor
- Review relevant evidence and the investigation report (if applicable) that the Decision-maker (DM) will consider
- Appeal (if offered in other grievance procedures)
- Choose an Advisor (if allowed in other grievance procedures)

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Investigation Phase One: Pre-Investigation

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Initial Report/Complaint Assessment

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- Any individual can report potential discrimination under Title VI
- **Upon receiving notice, the school/institution may:**
  - **Require additional information** to determine appropriate next steps
    - Discrimination reports/complaints typically need to identify a protected characteristic – race, color, national origin, disability, age – an adverse action of some kind, and a causal element
      - "Prima facie"
      - Outreach to individual making disclosure for more information
      - Perform an initial inquiry to gather more information
  - **Have an obligation** to implement supportive measures immediately, particularly for hostile environment complaints
    - Supportive Measures should be non-punitive

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Implementing Remedies

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- OCR Resolution Agreements emphasize the need for immediate, direct remedial actions, if possible
  - Common practice to immediately provide supportive measures to the parties
  - **Providing remedies is a broader responsibility** outside of just the parties
- Remedies take on additional importance when the report/complaint identifies conduct protected by the First Amendment
  - Sometimes disciplinary proceedings may not be available
  - Remedies may be the most valuable tool
- Investigators need to be aware of the obligation to take remedial action

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Supportive Measures

- Individualized measures designed to:
  - Restore or preserve access
  - Protect safety of parties or educational environment
    - Can be provided to Complainants, Respondents, or others (e.g., student organization or program) at any time
    - Witnesses may, in rare circumstances, also be provided supportive measures
  - Provide support during investigation process
- Investigator(s) may learn about parties' needs during the investigation
  - Concerns or needs that arise during the investigation should be immediately shared with the TVIC or the individual overseeing the complaint

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Investigation Scope

- **Scope** refers to the investigation allegations, timeframes, and parties
- **TVIC (or designee) determines the footing and scope** of the investigation (e.g., incident, pattern, culture/climate)
- **Considerations:**
  - Allegations outside of jurisdiction
  - Individual vs. group
  - Multiple Complainants or Respondents
  - Counter-complaints
  - Complaint consolidation
- May need to adjust scope during process
  - ATIXA recommendation: Provide written notice to the parties related to any changes in investigation scope

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Notice of Investigation and Allegations

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- If a formal investigation is initiated, **ATIXA recommends sending written Notice of Investigation and Allegations (NOIA) to all parties**, simultaneously
- **The NOIA should include:**
  - Notice of the allegations and known details, such as identities of the parties
  - A detailed description of the alleged conduct
    - Who, what, where, and when
  - Relevant policy provisions
  - Information about resolution process, including informal resolution options
  - Presumption of non-responsibility
  - Statement prohibiting retaliation
  - Statement about parties' rights (e.g., Advisor, to present and review evidence)

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Investigation Strategy

- TVIC consults with Investigator(s) to strategize and plan the investigation
- The structure of the investigation process will look different based on the type of complaint:
  - Disparate Treatment (DT)
  - Harassment
  - Program equity/fairness
  - Retaliation



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Investigation Phase Two: Conducting the Investigation

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Formal Investigation Overview

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- The primary method of investigation is through interviews with parties and witnesses
  - **Collect relevant documentary evidence** and other available evidence
  - **Burden of evidence collection** is on the school/institution, **not** the parties
  - **Written investigation report**
  - Opportunity for parties to review and respond to the report
- **Investigation models**
  - Hand-off model with separation of roles **(ATIXA recommendation – Process B)**
  - TVIC serves as Investigator
  - Investigator as DM

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Interview Sequencing

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- Conduct interviews as promptly as possible to capture fresh recollections
  - Generally, do **not** interview Respondent before providing the NOIA
- Identify an initial witness list and solicit additional witness suggestions from parties and other witnesses
- Investigator retains discretion to determine whether a suggested witness has relevant information
  - When unsure, err on the side of conducting the interview
- When addressing minors, consider getting parent/guardian permission
  - May be required by state law or school/district policy

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Process Delays

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- Investigations must be completed within a **reasonably prompt timeframe,** avoiding undue delays
  - Expectation to proceed during breaks, including summer
  - Consult with TVIC if circumstances cause more than a short process delay
- Provide parties with written notice and rationale for any delays
- Parties may request reasonable extensions on a case-by-case basis
  - Grant or deny extensions fairly and equally
  - Extensions must be documented

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Working with Advisors

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- ATIXA recommends: Allowing parties to use an Advisor of their choice
- Parents/guardians may serve as Advisors or may accompany their student in addition to a separate Advisor (in K-12 setting)
- Investigators may establish participation ground rules; must be applied equally
- The Advisor role differs from that of an attorney in most circumstances, though an Advisor may be an attorney
  - The parties are expected to answer questions, respond to emails, and drive participation in the process
- Consult with human resources regarding additional considerations for employee parties and witnesses (e.g., union representatives)

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Interviewing Skills

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Building Rapport

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- Rapport is meant to create a level of transparency and trust
  - Establishes expectations
  - Reinforces neutrality and impartiality
  - Sets the tone for the interview
- Building and maintaining rapport occurs throughout the interview, not just in the first five minutes
- Do not sacrifice professionalism or neutrality to build rapport

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Introductory Spiel Inclusions

- Process and interview flow
- Investigator role
- Expectations
- Retaliation
- Amnesty, if applicable
- Interviewee rights
- Advisor role
- Privacy and confidentiality and their limits
- Need for truthfulness



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Introductory Spiel, Cont.

- Answer questions
  - About the interview or process
- Anticipate reluctance or fear
- Avoid playing “cat and mouse” with the complaint contents or allegation details
- Encourage interviewee to refrain from filtering language
- Provide option to take breaks



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Practical Considerations

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- Attire
- Location
- Notetaking
- Recording
- Support Person/Advisor
- Duration
- Breaks
- Entry/Exit

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Trauma-Informed Practices

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Key principles of trauma-informed practice:

- Safety
- Trustworthiness and transparency
- Collaboration and mutuality
- Empowerment, voice, and choice
- Cultural and historical considerations

ATIXA Recommendation: Incorporate trauma-informed methods without compromising impartiality or ability to gather credible, relevant evidence

- Trauma-informed practices should not significantly influence evidence evaluation

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Questioning Considerations

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- An interview is a non-adversarial conversation designed to elicit information
- Ask questions directly to the party; it is critical that they, not their parent/guardian or Advisor, answer (younger children may be an exception)
- Start with broad questions, but focus on timelines and details as well
  - Explore all gaps in information; obtain answers to all questions
  - Ask logical follow-up questions based on answers
- Ask purposeful questions:
  - What do I need to know?
  - Why do I need to know it?
  - What is the best way to ask the question?

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Questioning Considerations, Cont.

- Use policy definitions to inform questions
  - "What specific derogatory language was used related to your race?"
- Avoid unnecessary repetition or traumatic re-triggering, but get the details you need
- Choose or blend effective questioning strategies/methodologies
  - Cognitive interviewing techniques are likely to be helpful
- Be mindful of age and use developmentally appropriate questioning techniques and language



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Questioning Tips

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- Adjust your questions based on the **type** of alleged discrimination
  - Motive is important with Disparate Treatment complaints
  - Timeline evidence is important with Retaliation complaints
  - Totality of the circumstances is part of a Hostile Environment Harassment analysis
- Some allegations may require targeted and specific questions, but others require broader questions that speak to context or other variables
- When asking direct questions, it's okay to explain them
  - E.g., explain the Retaliation definition and why it is important to know when the underlying complaint was submitted and who knew about it

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Collecting Evidence of Motive

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When necessary, an Investigator should look for direct evidence of a motive

- Motive is often found in various sources of evidence:
  - Documentary evidence
    - Emails, performance reviews, text messages, grading patterns, etc.
  - Testimonial evidence
    - Party and/or witness statements
  - Indirect or circumstantial evidence
    - Similarly situated individuals
    - Deviation from previous practices
    - Inaction despite known discriminatory practices or policies
    - Close-in-time actions may make it easier to assess intent

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Interview Challenges: Resistance, Reluctance, and Lying

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- Recognize difficulty in discussing issues of race, color, and national origin or other protected characteristics
  - "I know this is difficult, and I really appreciate your willingness to discuss this matter with me."
- Offer a reminder of Investigator's role as a neutral fact-gatherer
  - "I am sensing some reluctance to share information, which is understandable. What questions do you have for me about the process?"
- Maintain rapport and avoid accusations
  - "I think I'm missing something…"
- Offer a situational change, if available
  - "Sometimes it's easier to write the actual words rather than say them. Do you think that would help you?"

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Interview Challenges: Resistance, Reluctance, and Lying, Cont.

- Reframe or restate what the interviewee has told you
- Allow opportunity for the interviewee to restate (e.g., in cases of lying)
- Review retaliation protections, amnesty policies (if applicable), and expectation of truthfulness
- Avoid statements reflecting moral judgment
- Attempt to understand the barrier and remove or remedy it

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Example Interview Wrap-Up Questions

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- "Is there anyone else that you think we should talk to?"
- "Are there any questions you expected that we didn't ask?"
- "Is there anything else you think we need to know?"
- "What questions should I pose to other witnesses/parties?"
- **FOR THE PARTIES**: "Are there any questions that you would like us to ask a witness or party?"
  - Keep a running list of the questions suggested/requested by each party
    - Whether the question was asked and rationale when question not asked
    - Rationale for not asking any question(s)

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Interview Documentation and Review

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- Maintain interview transcripts or written summaries
  - **Transcript:** word-for-word documentation of a recorded interview
  - **Summary:** Investigator's summation of all information gathered during entire interview (may be several paragraphs or pages, depending on interview length)
- Recording is an increasingly common practice; no real downside
- Parties and witnesses should be invited to review their interview transcript/ summary
  - Verify accuracy, clarify where needed, and/or provide additional information
  - Not an opportunity to remove information that was provided

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Disparate Treatment Investigations

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Disparate Treatment
ATIXA Model Policy Definition

- Any intentional differential treatment of a person or persons that is based on a person's actual or perceived race, color, or national origin (OR protected characteristic(s)) and that:
  - Excludes a person from participation in;
  - Denies the person benefits of; or
  - Otherwise adversely affects a term or condition of a person's participation in a Recipient's program or activity

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Disparate Treatment Examples

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When based on protected characteristics, the following can constitute disparate treatment:

- Abusive verbal or physical behavior
- Benching/lack of playing time
- Differential discipline for similar misconduct
- Differential protest or posting policy enforcement
- Demotion/Termination
- Funding disparities for student orgs or programs
- Limiting program access
- Poor performance reviews
- Promotion/Tenure denial
- Recommendation letter/reference denial
- Student leadership opportunity denial
- Unfair grading

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Disparate Treatment Construct

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Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?

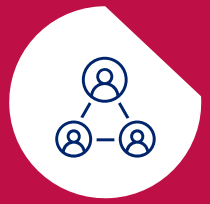
Step 2: Does the Respondent offer a non-discriminatory reason for the adverse action?

Step 3: Is there evidence that the offered reason is pretext for discrimination?

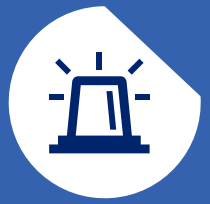
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Disparate Treatment
Step One: Initial Assessment

Step 1: Does the complaint satisfy the required elements for a disparate treatment complaint?



1(a)
Does the complaint implicate a protected characteristic?



1(b)
Does the complaint identify an adverse action?



1(c)
Does the complaint assert that the protected characteristic status caused the adverse action?

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Disparate Treatment
Step One: Initial Assessment, Cont.

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- A complaint may implicate multiple Respondents, a department, a division, or an entire school/institution
- When receiving a report or complaint of disparate treatment:
  - Determine whether the allegations, if proven, have all three elements
  - If not, conduct an initial inquiry to gather more information
    - May be conducted by an Investigator or the Coordinator
- Cannot disregard because the Complainant's initial report does not "check all the boxes"
  - Examples of how to obtain additional information during this step:
    - Meet with the Complainant to learn additional information
    - Consult with human resources or a department chair (if appropriate)
    - Perform a preliminary data review

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Disparate Treatment
Step One: Initial Assessment Evidence

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Some evidence must connect the adverse action to the protected characteristic

- Examples:
  - "Similarly situated individuals" outside the protected characteristic group are treated differently than those in the protected group (comparator analysis)
    - Any individual is **"similarly situated"** if it is reasonable to expect that they would receive the same treatment as the Complainant, within context
    - Fact-specific analysis
  - Direct evidence of a connection
    - Documents or witnesses who have evidence of discriminatory intent/animus
    - Can also be circumstantial or indirect evidence
  - Satisfactory academic or job performance data

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Similarly Situated Individuals

- **"Similarly situated"** is not precisely defined
  - Individuals may be similarly situated in one context but not another
  - Generally, the similarly situated comparison is most useful if the similarly situated individuals **are not** part of the Complainant's protected group
- Investigators must determine which individuals, in the same context as the Complainant, should receive the same treatment as the Complainant
  - Make the **most relevant comparisons possible** based on the available evidence

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Similarly Situated Individuals, Cont.

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- **Consider the scope of the complaint**
  - If a student reports an individual faculty member, similarly situated students may be the other students in that course and students in the faculty member's other courses
  - If a student reports a student organization leader's bias in membership decisions, similarly situated students may be students in a related organization or students from the prior years' membership cycles
- If there are no individuals in the same position as the Complainant, the Investigator should consider other individuals in the most similar situations
  - Do not force a comparison where there really is no comparator

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Comparative Evidence

- Investigators may use a variety of tools to obtain comparative evidence from similarly situated individuals
- Example Tools:
  - Focus groups
  - Historical data
  - Grading records/reviews
  - Performance reviews/other evaluations
  - Policy reviews
  - Previous complaints
  - Surveys



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Disparate Treatment Example

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"The College of Engineering denied my application to the program because I am a White woman. All candidates who applied who were people of color, even those who had less experience and had fewer letters of recommendation, were admitted. All the White candidates were denied."

- Complaint identifies a protected characteristic, an adverse action, and points to comparators to connect the admissions decisions to the alleged disparate treatment
- Establishes all three required elements of disparate treatment for Step One

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Disparate Treatment
Step Two: Non-Discriminatory Reason

- Interview the Respondent about the allegations to elicit an explanation:
  - Ask about the **why** behind the adverse action or disparate treatment
    - "Why didn't Olivia make the basketball team?"
    - "Why did John get into the music program when Sally didn't?"
  - Gather any evidence that supports the stated reason(s)
- Investigator should seek corroboration of any offered non-discriminatory reason(s)
  - Analyze the Respondent's offered reason in light of relevant evidence
    - Statistical evidence may also be used to rebut a discriminatory motive

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Common Rebuttal Arguments

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Respondent may offer evidence that:

- Complainant's allegations are **factually incorrect**
  - Examples:
    - A Complainant's pay disparity allegations are based on inaccurate compensation information
    - Complainant, a student with a disability, was offered housing with private bathrooms at no additional cost but chose their room with community bathrooms
- Complainant has been **improperly compared** to individuals not similarly situated
  - Example: A Complainant alleges student conduct outcome disparities, but Complainant had previous violations, while comparators did not
- Complainant was compared to **some**, but not **all**, similarly situated individuals

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Common Rebuttal Arguments: Favoritism, Inference

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Respondent may offer evidence that:

- Actions were based on **favoritism**
  - Investigator should consider whether favoritism is **pretext** for discrimination
- Statistical evidence the Complainant relied upon **does not raise an inference** of disparate treatment because:
  - Comparison group in the statistical data is not appropriate
  - Disparity is not statistically significant enough to derive conclusions
    - Example: The hiring pool is 50/50 but successful candidates are 55/45

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Common Rebuttal Arguments: Not All, Different

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Respondent may offer evidence that:

- Not **all** members of a group have received disparate treatment
  - This could be a red herring
  - The question is whether the **Complainant** was treated less favorably than similarly situated persons outside the protected group
- Respondent treated Complainant the same as a member of a **different** protected group
  - Unless that other individual is **similarly situated**, this is not a justification

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Common Rebuttal Arguments: Better Fit, Mixed Motives

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Respondent may offer evidence that:

- A Complainant was qualified for a position but asserts that another person was selected because that person was **better qualified or a better fit**
  - This type of argument requires close examination
  - Respondents should articulate why the other person was more qualified than the Complainant
  - An expert witness may be helpful in these situations; deference to academic judgments may be reasonable
  - Qualifications can be multifaceted and subjective

Mixed motives for adverse actions are possible

- If any one of the motives is discriminatory, even if other motives are non-discriminatory, a policy violation occurred

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Step Three - DT: Pretext Analysis

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- If the Respondent offers a non-discriminatory reason for the adverse action, the Investigator must then seek relevant evidence to determine if that reason is "legitimate"
  - Is the Respondent's stated reason just pretext for discrimination?
  - **Pretext** occurs when an adverse action occurred for discriminatory reasons, but an individual nonetheless (falsely) asserts a legitimate reason for the action
- Provide the Complainant with an opportunity to respond to the Respondent's reasoning
  - Use follow-up interview to identify any evidence to rebut the Respondent's reasoning
    - Direct evidence (e.g., data, video, emails)
    - Other witnesses or documents
- Consider other sources to thoroughly investigate whether the reasoning is pretextual
  - Inherent plausibility is useful tool for assessing credibility in such contexts

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Putting it all Together: Evelyn and Inés

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Inés makes a complaint that contains the following information:

- Evelyn is a Resident Assistant (RA), and Inés lives in Evelyn's building, though she is not one of Evelyn's residents
- Inés has Incan and Ecuadorian heritage
- Evelyn has been an RA in Inés's building for six months
  - Over that period, Evelyn has documented Inés four times: twice for underage drinking and twice for noise violations

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Evelyn and Inés

- Inés has several friends in the same residence hall, all of whom identify as White, Black, or Asian
  - After the fourth documentation, Inés was complaining to her friends about how Evelyn is so much stricter than the other building RAs
  - Her friends were surprised to hear Inés say that, as Evelyn has confronted them all about alcohol use and noise before, but they were never documented for it

Did Inés allege all the elements of a disparate treatment complaint?

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Evelyn's Response

- Evelyn explained that she documented Inés because Inés is always disrespectful when confronted about policy violations
- Evelyn asserted that she prefers to give warnings if residents are polite and refrain from shouting or swearing

Has Evelyn provided a **non-discriminatory** reason for documenting Inés?



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Evelyn and Inés: Pretext

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- Inés believes Evelyn's non-discriminatory reason is pretextual
- Inés offers the testimony of two of her friends who stated that Inés is usually silent or cries when Evelyn confronts her about policy violations because Inés is scared about how her parents will react
  - Evelyn counters that someone can be rude and disrespectful even when they are crying
- Evelyn's reports documenting the policy violations do not contain any details about Inés being rude or disrespectful

Does the evidence suggest that Evelyn's offered reason was pretext?

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Hostile Environment Harassment Investigations

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Title VI Hostile Environment Definition

- **Title VI Hostile Environment**
  - Harassing conduct that is
    - sufficiently severe, pervasive, **or** persistent
    - so as to interfere with or limit the ability of an individual to participate in or benefit from the services, activities, or privileges provided by a school/institution

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ATIXA Model Definition: Hostile Environment Harassment

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- **Hostile Environment Harassment:**
- Unwelcome conduct on the basis of actual or perceived Protected Characteristic(s),
  - based on the totality of the circumstances,
  - that is subjectively and objectively offensive, and
    - is so severe or pervasive,
  - that it limits or denies a person's ability to participate in or benefit from the Recipient's program or activity

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Hostile Environment Explained

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- Hostile environment harassment complaints are primarily incident- and context-based and involve one or more Respondents
  - Investigators should consider prior/subsequent incidents re: pattern charges
- A hostile environment can exist even if Respondent did not target any individual
- A person can also experience a hostile environment based on their association with someone from a particular protected group
- Harassment must usually consist of more than isolated, minor incidents
- Unwelcomeness is a subjective standard, but logical to treat as rebuttable if significant evidence shows that conduct was in fact welcomed

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Hostile Environment Construct

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Step 1: Did the behavior occur as alleged?

Step 2: Did the Respondent engage in the behavior?

Step 3: Is the behavior on the basis of a protected characteristic?

Step 4: Is the behavior subjectively and objective offensive?

Step 5: Is the behavior sufficiently severe or pervasive?

Step 6: Does the behavior limit or deny Complainant's ability to benefit from or participate in Recipient's education program or activity?

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Totality of the Circumstances

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Totality of the circumstances pervade and apply to all steps of the analysis

- Frequency, nature, and severity of the conduct
- Identity of and relationship between the parties
- Age of the parties
- Size of the school/institution, location of the incidents, and context in which they occurred
- Whether the conduct unreasonably interfered with Complainant's educational/work performance
- Effect on the Complainant's mental or emotional state
- Whether the expression was the (mere) utterance of an epithet
- Whether the speech or conduct is protected by academic freedom or the First Amendment

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Subjectively and Objectively Offensive

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- **Subjectively Offensive:**
  - Typically relies on statements made or evidence provided by Complainant and others
  - Usually established by the Complainant's testimony or the fact that they made a report/complaint
- **Objectively Offensive:**
  - "Reasonable Person" standard
  - Context in which the alleged incident occurred and any similar, previous patterns that may be evidenced
  - Usually look at similar grade level, age, and protected characteristic as the Complainant
    - "In the shoes of the Complainant"

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Severity

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- Egregious; more than just hateful, rude, or insulting behavior
- Actions are more likely to be severe when they are accompanied by physical conduct, threats, and/or violence
- Consider the circumstances/context (e.g., the ability for Complainant to remove themselves from the situation)
- Some symbols are “inextricably connected” to such acts of discrimination and hatred that a single incident involving them can meet the standard
  - Ex. A noose used to represent the hanging of Black people
  - Ex. Swastikas painted on the residence hall room door of Jewish students

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Pervasiveness

- Pervasiveness hinges on whether the behavior is:
  - Widespread
  - Openly practiced
  - Well-known among students or employees
    - Impacting the reputation of a department, person, etc.
  - Distributed
- Behavior that occurs in public spaces and information posted online or shared electronically is more likely to be pervasive
- Persistence, the quality of repetition (especially when acts are concentrated in time rather than dispersed), can also likely satisfy the standard

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Out-of-Program and Online Harassment

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- A hostile environment could be created within an education program based on the **downstream effects** of out-of-program behavior
  - Policies may not allow jurisdiction to investigate off-campus behaviors
    - However, Title VI requires Recipients to remedy the downstream effects
    - Investigators need to track any potential downstream effects
- Online harassment is increasingly becoming an issue
  - Ask for timestamped screenshots, websites, usernames, and other information to facilitate gathering information related to online harassment
  - Authenticate evidence
    - Note when authentication is not possible

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Downstream Effects

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- **Scenario 1:**
  - Out-of-program conduct occurred
  - Creating in-program effects that do **not** constitute a policy violation
  - Result: Obligation to provide a remedial response
- **Scenario 2:**
  - Out-of-program conduct occurred
  - Creating in-program effects that constitute a policy violation
  - Result: Obligation to provide a remedial response, likely jurisdiction to investigate and discipline if appropriate

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Demopolis City Schools (AL) OCR Resolution Agreement Facts

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- Complainant, the mother of two District students, was involved in a verbal altercation with the Band Director and a Band Sponsor at an away football game in September 2022, resulting in the Complainant receiving a no-trespass order from the District
  - Complainant approached the Band Director and Band Sponsor about her view that they were causing conflict between her student and the other members of the dance team
  - Conversation escalated to yelling and screaming
  - Complainant returned to the bleachers and made a comment about physically harming the Band Sponsor, which was overheard by the Band Sponsor's husband
- A teacher who witnessed the verbal altercation contacted the District on behalf of the Band Director and Band Sponsor after advising them to make a complaint
- School principal investigated the allegations, but did not contact the Complainant

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Demopolis City Schools (AL)
OCR Resolution Agreement Facts, Cont.

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- Principal contacted city chief of police, who made the decision to issue the no-trespass order against the Complainant
- Superintendent filed a second no-trespass order with additional restrictions
- Complainant alleged that the no-trespass order was:
  - Issued based on her race (Black)
  - Retaliatory and issued to prevent her from participating in special education advocacy work
- Superintendent said video participation in meetings was allowed, but this was never communicated to the Complainant

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Demopolis City Schools (AL) OCR Resolution Agreement Findings

- During the 2020-2021, 2021-2022, and 2022-2023 school years, the District issued no-trespass orders to seven individuals, including the Complainant
  - Five were Black, one was White, one was unknown
  - The five no-trespass orders issued against Black individuals were the result of threatening a staff member (four in the same incident)
  - The no-trespass order for the White woman was for failure to listen to staff requests and using inappropriate language
  - The unknown person was thought to be unhoused and was sleeping, eating, and defecating in school buildings
- District's lack of procedures and formal policy raised significant concerns around consistency and potential biases

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Demopolis City Schools (AL)
OCR Resolution Agreement Outcome

- Develop, review, and revise, as needed, its policies and procedures regarding District issued trespass warnings and trespass orders
- Provide written notice to employees, parents and guardians, volunteers, and other interested persons of any new or revised policies and procedures
- Issue a letter to the Complainant to rescind her no trespass order

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Case Study: “Squaw”

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- A student in a class argues that it is ridiculous that individuals with less than 10% Native American heritage can nonetheless claim it for purposes of scholarships and other awards
- Another student shares that she is 1/18 Sioux, and that students should not be penalized because their ancestors intermarried, were raped, or had sex with those who were not pureblood Sioux
- The faculty member jokes that he will call her “Squaw,” which snowballs into everyone in class referring to her as “Squaw,” both in person and in conversations when she is not around
- The comments are typically derisive, and mock her claim to Native American ancestry
- The jokes often include the faculty member or are initiated by the faculty member

Would this create a hostile environment? What kind of evidence might exist?

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Case Study: Lina and Tal

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- Two students, Lina and Tal, got into an argument with each other in the campus dining hall
- Lina is a Palestinian Muslim; Tal is an Israeli Jew
- During the argument, Lina accused Tal of being Islamophobic, and Tal accused Lina of being antisemitic
- Lina claimed that Jews are hateful and genocidal, claimed that Gazans have been purged from their homeland, conflated being Jewish and being Zionist, and conflated being Israeli with being Zionist
  - Lina insists that Palestine must be free from the river to the sea
- Tal objected that this is a genocidal threat and responded by insisting that Muslims are all jihadist death eaters, and that there is no such thing as a Palestinian

Would this create a hostile environment? What kind of evidence might exist?

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Case Study: Benjamin

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- Certain first year students at your institution are part of a living-learning community (LLC)
- This semester, the LLC is taking a religion class that is taught in the residence hall by a graduate assistant (GA) who also serves as the Resident Advisor for their floor
- In class, the GA shares the opinion that Mormons (LDS church members) are a cult
  - Benjamin, an LDS student in the class, files a Title VI complaint
- A few weeks later, Benjamin returns and tells you that the GA has made this comment several times and asks Benjamin whether he's trying to get anyone else to "drink the Kool-Aid?" This occurs outside of class, when Benjamin is hanging out in his room or the common areas
- Someone, Benjamin isn't sure who, also keeps writing messages on his door about whether he is trying to start his harem

Would this create a hostile environment under Title VI? Other policies?
What kind of evidence might exist?

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Retaliation Investigations

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ATIXA Model Definition: Retaliation

- The Recipient or any member of the Recipient's community,
  - taking or attempting to take materially adverse action,
  - by intimidating, threatening, coercing, harassing, or discriminating against any individual,
  - for the purpose of interfering with any right or privilege secured by law or Policy, or
  - because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the Policy and associated procedures

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Title VI Retaliation

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- Title VI prohibits a Recipient or another person from:
  - Intimidating, threatening, coercing, or discriminating against any individual making a complaint, or testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing
- A Recipient engages in unlawful discrimination when:
  - It takes an adverse action against an individual
    - Either in response to the exercise of a protected activity or
    - To deter or prevent protected activity in the future

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Retaliation Reports

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- Screen for retaliation concerns during interviews and follow-up communications
  - Direct and secondhand reports of potential retaliation
  - Note sudden changes in a desire to participate in the process
- Communicate the prohibition on retaliation at every opportunity
  - Be prepared to answer questions, including how to report retaliation
    - Retaliation is often a concern for reluctant Complainants and witnesses
  - In addition to **encouraging reporting**, also remind each person **not to retaliate**
- No guarantee someone will not be retaliated against, but Investigators should assure parties and witnesses that any retaliation will be addressed
  - Follow-up with TVIC about any potential retaliation

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Retaliation Investigation Timing

- Retaliation allegations often arise during an ongoing grievance process
- May address in a consolidated investigation with the original allegations
  - Always update NOIA
- May address separately at the end of the original grievance process
- Consider approach on case-by-case basis:
  - Timing
  - Complexity



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Retaliation Construct

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Step 1: Does the complaint satisfy the required elements for a retaliation complaint?

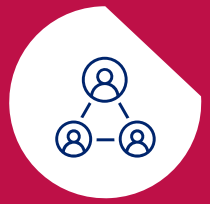
Step 2: Can the Respondent offer a non-retaliatory reason for the adverse action?

Step 3: Is there evidence that the offered reason is pretext for discrimination?

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Retaliation
Step One: Initial Assessment

Step 1: Does the complaint satisfy the required elements for a retaliation complaint?



1(a)
Does the complaint implicate a protected activity?

+



1(b)
Does the complaint identify an adverse action?

+



1(c)
Does the complaint assert that the adverse action was because of the protected activity?

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Retaliation
Step 1(a): Protected Activity

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- Engaging in **protected activity** is a required element of all retaliation claims
  - Without the protected activity, being mistreated is not enough for retaliation
- **Examples of a protected activity:**
  - Making a Title VI report
  - Initiating a discrimination complaint
  - Assisting someone reporting discrimination or initiating a complaint
  - Participating in the process (e.g., investigation, meetings, hearings)
  - Protesting discrimination

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Retaliation
Step 1(b): Adverse Action

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- If there is protected activity, move on to the next step:
  - **Did an adverse action occur?**
- An adverse action:
  - Significantly disadvantages or restricts
    - An individual in their status as a student/employee, **or**
    - Their ability to gain the benefits or opportunities of Recipient's program
  - Could deter a reasonable person from future protected activity (e.g., bringing or supporting an allegation of discrimination)
- Very broad definition
  - Could be based on action or non-action

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Retaliation
Step 1(c): Causation Element

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- If there is protected activity and adverse action, move on to the next step:
  - **Does a causal connection exist between the two?**
- While causation is required, **direct** evidence of motive or intent is not required
  - Often only indirect evidence is available
  - Consider whether the individual performing the adverse action knew of the protected activity
    - Timeline evidence

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Retaliation
Step One: Next Steps

- If the initial assessment in Step One does not establish the required complaint elements, attempt to meet with Complainant to gather more information
  - If still not met, consider dismissal and/or referral to a different process or office, as appropriate
- If an initial case of retaliation is established, the complaint moves forward
  - Step Two and Step Three roughly correspond to the investigation phase



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Retaliation
Step Two: Non-Retaliatory Reason

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Interview the Respondent about the allegations:

- Ask about the **why** behind the adverse action
  - "What led to the decision to deny Sally's membership application?"
  - "Describe what led to the student receiving a C+ in your class."
- Gather any evidence that supports their rationale
  - Respondent may need to direct the Investigator to potential sources for that evidence, but the burden to collect evidence remains on the Investigator and the school/institution

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Common Non-Retaliatory Reasons for Adverse Actions

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Any reason that is not based on discrimination, including:

- Poor academic or work performance
- Inadequate qualifications for role or position
- Other better qualified candidates
- Evidence of misconduct and/or history of misconduct
- Insubordination
- Budget cuts or hiring freezes
- Does not qualify for requested accommodation or adjustment

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Retaliation
Step Three: Pretext Analysis

- **Pretext** occurs when the Respondent asserts that there was a legitimate reason/justification for the adverse action, but it is not the real reason, and the action occurred for retaliatory reasons
- When determining whether an alternative explanation for the adverse action is pretextual, consider whether:
  - The explanation makes sense
  - Other actions taken are inconsistent with the explanation
  - The explanation is inconsistent with past policy or practice
  - There is evidence of other individuals being treated differently in similar situations
  - There is witness testimony, including experts
  - The timeline of events aligns

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Case Study: Stefon and Abel

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- Recently, federal immigration authorities detained an international student
- The next day, Stefon, a Senegalese student, led an on-campus protest of the detention
- Stefon has taken to TikTok, publicly and repeatedly criticizing the institution's lack of a response to the detention
- Stefon has now decided to run for student class senator because he believes international students now need a stronger voice in campus governance
  - When Stefon talked to Abel, the SGA President, about his decision to run, Abel said that class senators really need to be able to keep a low profile
  - Stefon's application for student senate was subsequently denied without explanation
- Stefon has reported this to the Dean of Students' office and is looking for help

Could this be retaliation? What kinds of evidence would you seek?

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Absent Information

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Information Not Obtained

- Investigators should **document** all efforts to obtain evidence and an explanation for any information that could not be obtained
  - Did/does not exist
  - Cannot be located
  - Party/witness not available or declines to respond to question(s)
  - Party/witness declined to submit
  - Deleted, destroyed, damaged
  - Unable to access without a court order
  - Cannot be released based on an ongoing criminal and/or agency investigation

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Unanswered Questions

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- **ATIXA recommends** including unanswered questions asked during the investigation to:
  - Demonstrate a thorough investigation
  - Help guide the DM to topics that may need further exploration
- **If relevant, document in the interview summary**
  - Example: “Witness 2 did not provide additional information regarding their text conversation with Complainant on February 19, 2024. Witness 2 was informed that Complainant voluntarily submitted screenshots of the text messages in question for purposes of this investigation.”

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Investigation Phase Two: The Investigation File and Report

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Investigation File

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- Investigator is responsible for developing and maintaining an **investigation file** throughout the duration of the investigation, including:
  - Copies of the policies in place at the time of the incident(s) and the procedures in place at the time of the investigation
  - Original NOIA and any subsequent NOIA updates
  - Verified interview transcripts/summaries
  - Correspondence with the Investigator(s)
  - Collected evidence (e.g., screenshots, written statements) and evidence log

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Investigation Report

- **ATIXA recommends** compiling an investigation report and providing it to the parties for review as best practice
  - Creates an opportunity for equal access to evidence or an accurate description of evidence
    - Enhances due process and transparency
  - Shows Investigator's work in an organized way
  - Provides a standard and consistent format for all investigations
  - Helps protect school/institution if response or process is criticized
  - Aids DM in learning the facts in a logical manner

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Possible Investigation Report Sections

- Allegations Overview
- Jurisdiction
- Applicable Policies and Relevant Definitions
- Investigation Timeline
- Incident Timeline
- Relevant Evidence Summary
- Evidence File
- Synthesis/Recommended Findings/ Determination (depending on policies and procedures)



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Format and Structure

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- Templates
- Transcripts vs. interview summaries
- Narrative vs. bulleted format
- Multi-party or multi-allegation investigations
- Use attachments, appendices, and exhibits

Enhancing User-Friendliness

- Table of contents
- Page numbers
- Line numbers
- File naming conventions
- Internal document links

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Sensitive Information

- Offensive, triggering, or explicit language (e.g., slurs)
- Graphic images/videos
- Medical information, including test results
- Mental health information



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Redaction Practices

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Full redaction vs. role identifiers

- Example:
  - **Original:** Teagan stated that Jesse called her the N-word
  - **Full:** [redacted] stated that [redacted] called her the N-word
  - **Role Identifiers:** Complainant stated that Respondent called her the N-word
- Full redaction is a common practice in law enforcement, but is not recommended for civil rights investigations
- Provide key with names for parties/witnesses, if identifiers are used

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Tips for Report and Evidence File Sharing

- Provide electronically using a secure file-sharing platform
  - Consider functional and time limit restrictions as appropriate
- Include a separate watermark for each party (parent/guardian/Advisor)
- Ensure the parties have a user-friendly method for providing feedback



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Credibility

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Credibility Overview

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- Credibility assessments weigh the accuracy and reliability of relevant information
- Primary considerations are **consistency** and **corroboration**
- Credibility is not synonymous with a person being “truthful” or “honest”
  - Avoid moral judgment phrases in reports such as “lying,” “honest,” “deceitful,” “sincere,” etc.
- Evasion, misleading testimony, or memory errors may impact credibility
- Avoid too much focus on **non-relevant** information
- Use significant caution if relying on demeanor to determine credibility

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Primary Credibility Factors

Corroboration

- Aligned testimony and/or physical evidence

Consistency

- Is a person's account consistent over time?

Inherent Plausibility

- Does the explanation make sense?
- Be careful of bias influencing sense of "logical"

Motive to Falsify

- Do they have a reason to lie?

Past Record

- Is there a history of similar behavior?



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Consistency

- Typically measures internal consistency of an individual's account over time
  - Consistent accounts may bolster credibility
  - However, consistent does not mean **truthful;** credibility is more about assessing **reliability and accuracy**
- Inconsistency may be a better tool to assess credibility than consistency
- Carefully parse words or language to assess how (in)consistent a detail may be
- Written statements, texts, and other messages are often central to consistency analysis
- When someone gives inconsistent testimony, it presents an opportunity to clarify, recognize deviations, and explore what their basis may be

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Corroboration

- Focuses on whether statements and evidence gathered from a party or witness are supported by “external” evidence (e.g., the statements or evidence provided by others)
  - Corroboration may bolster credibility
  - As with consistency, corroboration does not mean **truthful**; credibility is more about assessing **reliability and accuracy**
  - In practice, lack of corroboration may be a better tool to assess credibility
- Compare statements and evidence offered by parties or witnesses against each other
  - What consistent, reliable, and plausible external information corroborates a person’s account?

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Triangulating Credibility

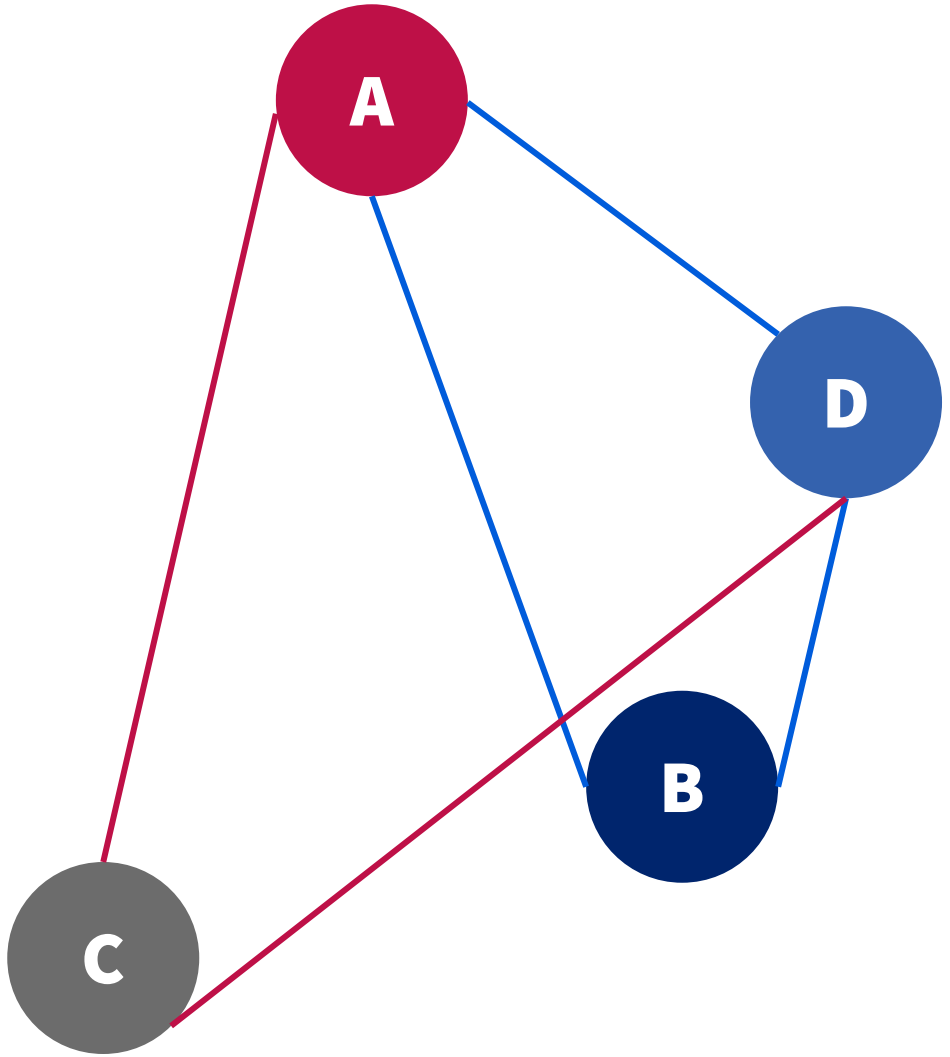
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- Logical Inference
  - Likeliest possible explanation based on incomplete facts
  - Forming the hypothesis that best explains the facts
  - “When you hear hooves, think horses, not zebras”
  - Less compelling than corroboration, but sufficient in some circumstances
- Two different but equally plausible explanations
  - Determine which may be more likely, more logical…“preponderance”
  - Use other evidence to drive the analysis
  - “In light of evidence provided by Witness C and Witness D, Respondent’s account is more likely than Complainant’s account”

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Triangulating Credibility, Cont.

- Circumstantial analysis
  - More helpful when standard of proof is the preponderance of the evidence
  - A formal way to process inherent plausibility
- Using known data points to extrapolate the likeliness of unknown facts
  - If A and D are true, is B or C more likely to be true?
  - C is a bigger stretch to get to than B, so B is more plausible



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Credibility Assessments

- Investigator should use credibility assessments to **direct** the DM to areas needing closer examination
- Focus the DM on alignment or discrepancies that may be significant for their analysis
- Summarize the evidence to provide a snapshot
- Use citations or references to help DM find the evidence within the report



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Common Credibility Errors

- Misplaced emphasis on:
  - Nonverbal indicators (e.g., nervousness, anxiety)
  - Irrelevant inconsistencies
  - Reputation
- Confusion about memory
  - Stress and emotion can complicate memory
- Parties' status as a Complainant or Respondent
- Investigator's conflict of interest or bias



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Special Considerations for Credibility

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- Disparate Treatment and Retaliation analyses rely heavily on credibility
- Investigator should seek corroboration of any-non-retaliatory reason(s) offered by Respondent
  - Provide Complainant with the **opportunity to respond** to a non-retaliatory reason
- Investigators have an obligation to investigate pretext
  - May solely be **circumstantial**
  - Look for evidence of personal or discriminatory animus
- Potential sources of corroboration may include:
  - Past practice in similar situations
  - Interviews with other employees/students
  - Verification of practice/policy by senior officials

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Discussion and Synthesis

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Discussion and Synthesis Models

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- Investigators need to understand their role per school/institutional policy and procedures
- Policies and procedures should define whether the Investigation Report will include:
  - A synthesis to guide the DM's determination without making recommendations or conclusions **(ATIXA Recommendation)**
  - Recommendations as to Findings, Final Determinations, and/or Sanctions
  - Actual Findings, Determinations, and/or Sanctions (Investigator as DM)
  - Some combination of recommendations and DM responsibilities
- Regardless of the Investigator's role, discussion and synthesis techniques are critical

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Making Recommendations: Discussion and Synthesis

- Investigation reports should discuss and synthesize the relevant information
  - Consider the elements of each policy at issue
  - Refer to relevant evidence cited
  - Refer to the credibility assessment(s)
- Create a guide or roadmap for the DM(s) determination
  - What do the parties agree upon?
  - What remains unresolved/contested?
  - What type of analysis is required based on the applicable policy provisions?
  - Especially important in complex investigations with long reports

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Making Recommendations: Findings and/or Determinations

- Did the conduct occur as alleged?
  - What is more likely than not to have occurred?
  - Who was involved in what occurred? When and where did it happen?
- Apply the credibility analysis
  - Focus on corroboration, consistency, plausibility, etc.
  - Triangulation
- Allow the relevant evidence credibility to guide findings
  - Be careful of bias
- List the recommended finding of fact for each alleged violation, applying the standard of evidence

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Report Review and Response

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Information Sharing

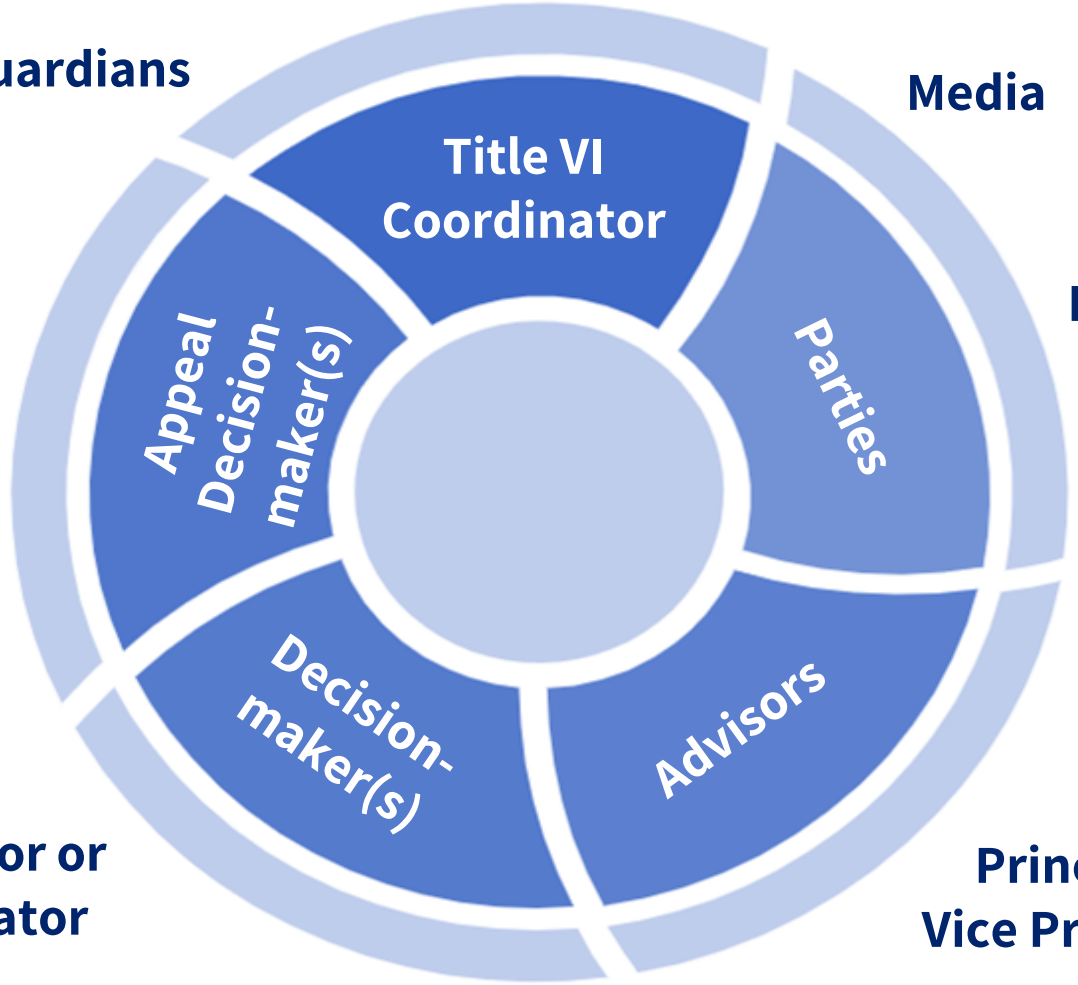
- Share relevant information with the parties in the form of an investigation report toward the end of the investigation **(ATIXA recommendation)**
- The parties should have the ability to review and comment on this information prior to the investigation being complete
- Information-sharing practices must **balance transparency, privacy, and strategy**, as well as the parties' rights



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Consider Potential Audiences for Report



Parents/Guardians

Media

Legal Counsel

Civil Court/
External Agency

Employee
Supervisor

Criminal
Court

Mediator or
Arbitrator

Principal/Dean of Students/
Vice President of Student Affairs

Law
Enforcement

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Drafting, Reviewing, and Finalizing the Investigation Report

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Phase Three: Determination and Remedies

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Decision-Making: ATIXA Recommendation

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- **ATIXA recommends** using a separate Decision-maker (DM) and an administrative resolution process without a live hearing (ATIXA's "Process B") unless you are a public school/institution
- The DM conducts a paper review of the investigation and has the option to meet, informally, with the parties and witnesses to assess credibility and ask questions
  - Then the DM uses the standard of evidence to make findings and issues a written determination
    - **ATIXA recommendation:** Preponderance of the evidence
- **Note:** A live hearing may be required by state law, a collective bargaining agreement, or a federal court

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Parsing the Policy

- The DM determines whether a policy violation occurred by applying relevant facts to the policy provisions in question
- To understand the different components of a policy provision, parse the policy into its elements
- **Note: This is also a helpful technique for Investigators to develop interview questions and perform a gap analysis on their investigation report**

Identify the elements of this policy provision:

Unwelcome conduct on the ground of actual or perceived race, color, or national origin, which, based on the totality of the circumstances, is subjectively and objectively offensive, and is so severe or pervasive, that it limits or denies a person's ability to participate in or benefit from the school/institution's education program or activity.

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Parsing the Policy: The Elements

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Identify the elements of the policy provision:

- ❑ Unwelcome conduct,
- ❑ Ground of actual or perceived race, color, or national origin
- ❑ Which, based on the totality of the circumstances, is subjectively and objectively offensive
- ❑ Is so severe or pervasive
  - ❑ That it limits or denies a person's ability to participate in or benefit from a school/institution's education program or activity

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Applying Facts to Policy

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- Next, the DM **analyzes facts against each policy element** to determine whether the Respondent violated policy
  - Assess evidence credibility and evidentiary weight
  - Assess statements as factual, opinion-based, or circumstantial
- Apply the standard of evidence to determine if policy has been violated
  - If the **relevant, credible evidence** demonstrates that it is **more likely than not** that **each element** of the alleged policy violation is met, a policy violation occurred

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Applying Facts to Policy Example

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- Complainant was a student in Respondent's Philosophy 101 course during the Spring 2025 term
  - Toward the end of February, students organized a rally protesting the federal administration's Middle East policy
  - The rally attracted a small group of students and many community members
- During the class period immediately following the rally, Respondent made several disparaging remarks, including racial slurs, about "Arabs, terrorists, and Islam," as well as criticizing the rally participants for being ignorant pacifists

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Applying Facts to Policy Example, Cont.

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- Complainant, a Muslim student with Lebanese heritage, filed a complaint with the institution's Office of Civil Rights Compliance alleging Respondent engaged in Discrimination by uttering the statements
- After filing the complaint, Complainant failed the midterm exam
- Complainant has now filed a Complaint against Respondent alleging Retaliation

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Applying Facts to Policy Example, Retaliation

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Retaliation:

- The Recipient or any member of the Recipient's community,
  - taking or attempting to take materially adverse action,
  - by intimidating, threatening, coercing, harassing, or discriminating against any individual,
  - for the purpose of interfering with any right or privilege secured by law or policy, or
  - because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the Policy and associated procedures

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Applying Facts to Policy: 1(a)

Map relevant and credible facts to the applicable policy element

Required Element:

- 1(a): Does the complaint implicate a protected activity?

Policy Element:

- "because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under the Policy and associated procedures"

Facts:

- Complainant filed a complaint of discrimination with the TVI Coordinator on March 1, 2025, based on Respondent's in-class statements and actions
- Complainant filed a report of retaliation with the TVI Coordinator on March 21, 2025, after receiving a low grade on their mid-term exam

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Applying Facts to Policy: 1(b)

Map relevant and credible facts to the applicable policy element

Required Element:

- 1(b): Does the complaint identify an adverse action?

Policy Element:

- "Taking or attempt to take a materially adverse action"

Facts:

- Complainant is in Respondent's Philosophy class
- Complainant received an "F" on the mid-term given on March 7, 2025

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Applying Facts to Policy: 1(c)

Map relevant and credible facts to the applicable policy element

Required Elements:

- 1(c): Does the complaint assert that the adverse action was because of the protected activity?
- Can the Respondent offer a non-retaliatory reason for the adverse action?

Policy Element:

- "for the purpose of interfering with any right or privilege secured by law or policy"

Facts:

- Complainant asserts they were given a lower score on the mid-term exam because of their complaint
- Respondent reported the majority of students scored lower on the mid-term exam than on the January and February exams
- Respondent stated they grade exams without student names visible

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Applying Facts to Policy, Pretext

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Map relevant and credible facts to the applicable policy element

Required Element:

- Is there evidence that the offered reason is pretext for discrimination?

Policy Element:

- "for the purpose of interfering with any right or privilege secured by law or policy"

Facts:

- Complainant got an "A" on both the first and second exams in January and February
- TVIC notified Respondent of the complaint on March 3, 2025
- The mid-term was on March 7, 2025, and shared significant topical overlap with the January and February exams
- A witness overheard Respondent telling other faculty that Complainant would regret "these scurrilous allegations"

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Findings, Final Determination, and Sanctions

- DM must apply the standard of evidence (e.g., preponderance of the evidence) to make findings, final determinations, and sanctions
  - **Finding:** A conclusion by the standard of evidence that the conduct did or did not occur as alleged
  - **Final Determination:** A conclusion by the standard of evidence that the alleged conduct did or did not violate the policy
  - **Sanction:** A consequence/remedy imposed on a Respondent who is found to have violated the policy
- Determinations must rely only on relevant information gathered during the investigation and decision-making phases (e.g., investigation report, evidence file, any testimony provided as part of the DM process)

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Making Findings, Final Determination, and Sanctions

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- Separate the **finding** from the **final determination** from the **sanction** using the following steps (in order):
  1. Determine what happened and whether conduct occurred as alleged, then
  2. Determine whether Respondent's actions violated policy, then
  3. If Respondent violated policy, determine appropriate sanctions and responsive measures
- **Key Tips:**
  - If Respondent admits to some of the allegations, parse the policy to make findings and final determinations on the disputed allegations, then move to sanctions. For admitted conduct, go straight to sanctions.
  - Use impact-based rationales for sanctions only
  - Use prior misconduct information for sanctions only, unless a pattern is alleged/proven

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Sanctions and Remedies

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Sanctions

- Only implemented after a determination of responsibility for a specific individual or organization
- Nexus between sanctions and misconduct
- **Goal:** stop, prevent, and remedy
- TVIC assures sanction compliance
  - Failure to comply could lead to discipline

Remedies

- Implemented after a determination
- TVIC determines remedies that are fair and not clearly unreasonable given the circumstances
- **Goal:** preserve or restore access to education program and activity
- TVIC ensures remedies are implemented for both Complainant and community

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Determining Sanctions

- **Primary purpose should stop, prevent, and remedy**
  - Each sanction should have a rationale
- **DM may consider:**
  - Nature and severity of the conduct, including the circumstances surrounding the violation
    - Aggravating or mitigating circumstances
    - Precedent, prior misconduct, proven pattern (if alleged), acceptance of responsibility, collateral violations, or multiple violations
  - The Respondent's disciplinary history
  - The need for sanctions or other responsive actions to stop, prevent, and remedy the discrimination, harassment, and/or retaliation
  - The impact on the parties
  - Any other information deemed relevant by the DM

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Remedies

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- Remedies restore affected individuals to their pre-deprivation status
- Recover any lost work, education time, or economic or access impacts
- Restore opportunities, if applicable
- Repair damage from the discrimination

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Sanctioning and Remedial Considerations

- Investigations into complaints of Disparate Treatment, Hostile Environment Harassment, or Retaliation may then lead to additional allegations of intentional or unintentional discrimination
  - A directed climate survey, or a community-based program, for example, may be necessary followed by additional investigation
  - Continue to remediate and promptly respond as appropriate to:
    - Any subsequent, similar behavior
    - Additional harm disclosed
    - Failure of Respondent to comply with the assigned sanctions

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Appeals

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Appeal Overview

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- A final request from any party to review a **final determination**
- To minimize the risk of conflicts of interest or bias, Appeal DM should not have another role in the same complaint
- Not intended as a rehearing or "do-over," but if an error is found, may result in:
  - Reconsideration
  - Re-investigation (in full or in part)
  - Rehearing
  - New decision-making/hearing process

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Appeal Grounds

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Example of potential appeal grounds:

1. Procedural irregularity that affected the outcome of the matter
2. New evidence that was not reasonably available at the time of the determination that could affect the outcome of the matter
3. Conflict of interest or bias by the TVIC, Investigator, or DM that affected the outcome of the matter

Schools/Institutions have the discretion to add appeal grounds

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Recordkeeping

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Recordkeeping Practices

- Investigators should compile documentation related to:
  - Reports or complaints of discrimination and harassment
  - Resolution process
  - Hostile environment assessments
  - Supportive measures and remedies
- Records should be stored centrally by the TVIC or in a file management system
- Records should be maintained as required by state law or institutional policy (often 7 years)



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Questions

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