# Please log in to your ATIXA Event Lobby each day to access the course slides, supplemental materials, and to log your attendance.

The ATIXA Event Lobby can be accessed by the QR code or visiting





## Training & Certification Course

the state of a





(610) 993-0229 | inquiry@tngconsulting.com | www.tngconsulting.com

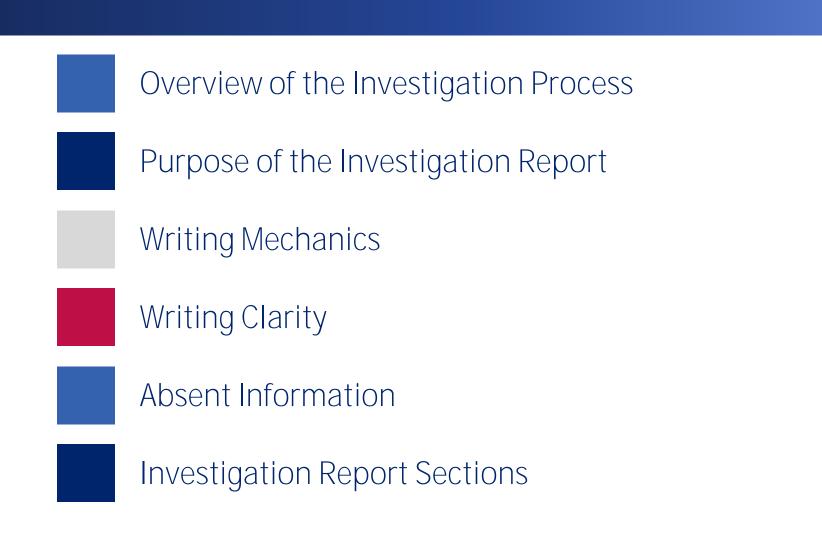
The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.



# Why this topic?

"It's a process of asking questions and then pruning and splicing and editing the transcribed answers, and it takes a tremendous amount of time and labor." – William Zinsser







#### 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 date<sup>1</sup>
- 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

<sup>1</sup> 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



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.

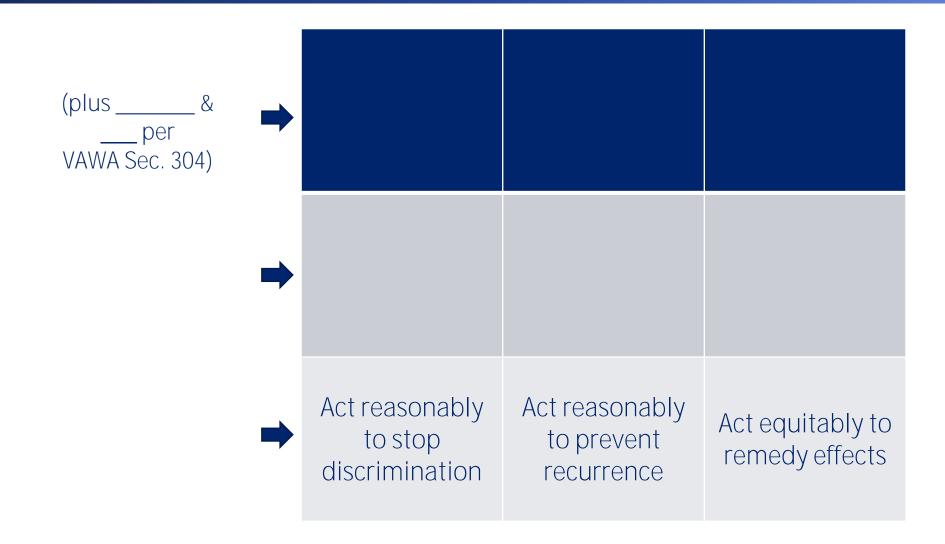
Prepare to educate your community on the changes Identify stakeholders that will need to be involved in making policy decisions (e.g., whether to have hearings) Determine how you will manage policy changes Plan for the training needs for your community Consider state laws, court decisions, and other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



### 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."







- 1. Receive Notice/Complaint
- 2. Initial Assessment and Jurisdiction Determination
- 3.



## 7. Draft report

- 8. Meet with Title IX Coordinator (or legal counsel) to review draft report and evidence
- 9. Provide draft report and all evidence directly related to the allegations to the parties and their Advisors for inspection and review with 10 days for response
- 10. Complete final report

Synthesize and analyze relevant evidence\*

Send final report to the parties and Advisors for review and written response at least 10 days prior to hearing/determination

\*The 2020 Regulations permit, but ATIXA does recommend, that Investigators





# Copies of the policies and procedures in place at the time of the incident and at the time of the investigation

Notice of Investigation and Allegations (NOIA) All subsequent NOIA updates

# File for each party and witness

- Approved interview transcripts
- Associated evidence (e.g., screenshots, written statements)
- Correspondence with the Investigator(s)
- Other collected evidence (log)

Background information (education, employment, etc.) Witness flowcharts Issue tracking list Investigator notes Timelines for incident and investigation Contact log



### Investigation Report

- Relevant evidence
- Investigation timeline
- Appendices including review and comment by parties and any response from Investigator(s)

### Evidence File

Includes relevant and directly related evidence Index or other organizational structure for file



### Title IX Regulations Requirements

Federal regulations require an investigation report that fairly summarizes relevant evidence (34 C.F.R. § 106.45(b)(5)(vii))

While the regulations use the term "summary," the preamble specifies the report will summarize relevant evidence, meaning the report is comprehensive, not skeletal

Any individual designated as an Investigator may not have a conflict of interest or bias for or against complainants or



Evidence is generally considered relevant if it has value in proving or disproving a fact at issue

While directly related evidence (DRE) is not defined by the regulations, it may be helpful to think of DRE as evidence connected to the complaint, but which is not inculpatory or exculpatory, and/or which is explicitly excluded by the regulations

Under the Title IX regulations, evidence of the Complainant's sexual predisposition is relevant



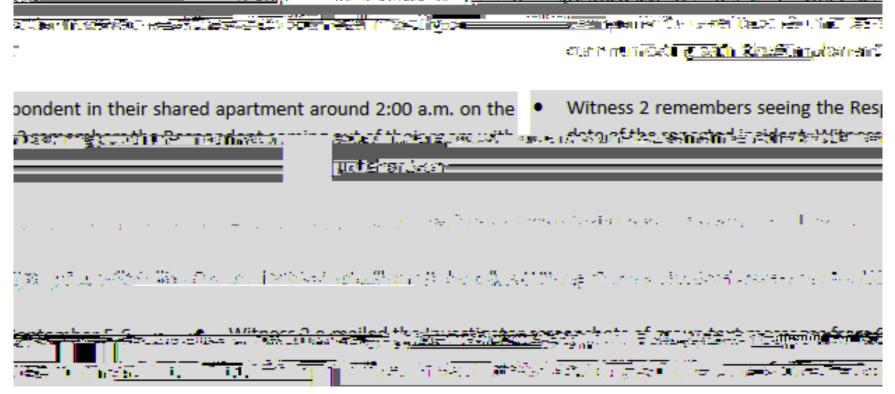
Evidence of the Complainant's prior sexual behavior is explicitly and categorically relevant except for two limited exceptions:

- 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

The regulations do not require the same analysis applied to the Respondent so that consideration of pattern behavior is possible



 Witness 2 is the roommate of the Respondent. Witness 2 and the Respondent share membership in several student organizations. Witness 2 is also a senior and knows the



### Investigation Report = only relevant evidence

- Evidence File = all relevant evidence and DRE
- The report is the narrower document, and the evidence file is a broader file
- When a portion of an interview/document/etc. is relevant, and another portion is DRE, the content needs to be separated
- ATIXA recommends an approach that separates the evidence so that all participants know what is what but all evidence can still be seen in the DRE file in a complete form

- Color-coding the evidence in the evidence file for what is DRE and what is relevant (thus also contained in the report) for easy visual distinction, and
- 2. Adding footnotes or internal notes to the investigation report to indicate where the information is located in the evidence file

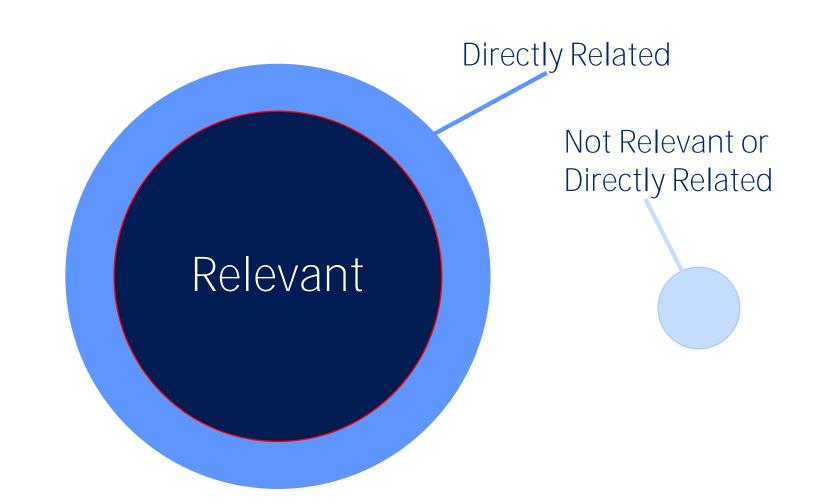
Any time a partial record is removed from the report because it is DRE and not relevant, the report should cross-reference to where this information can be found in the evidence file If an entire record is removed as not relevant, it should

only appear in the evidence file and not the investigation report



While the investigation report can feel stilled because DRE context is missing/removed, that context can be provided by reviewing the evidence file, which is clearly cross-referenced for ease of use

DRE can't be relied upon by the Decision-maker, but it can offer some additional coherence and/or context















Point of View Formal vs. Informal Language Active vs. Passive Voice





expresses anything that is happening now, or is ongoing, constant, or habitual

indicates past events, prior conditions, or completed processes

indicates actions or events that will happen in the future

Investigation reports are a narrative of events which have previously occurred

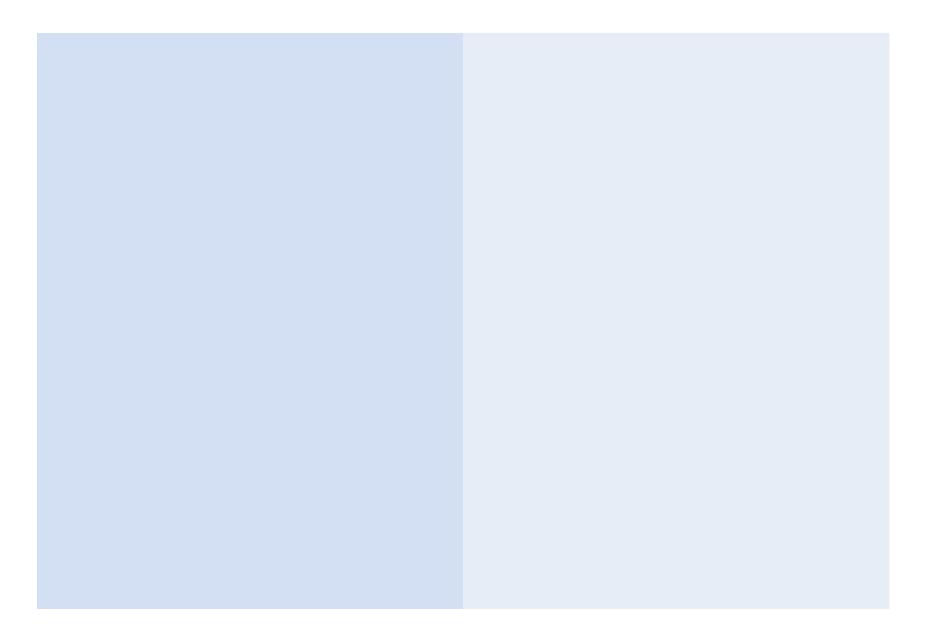
- Written in past tense as an industry convention
- Avoid changing tenses
- Exception: Investigator actions for the present or future



Format & Structure Quotations Sensitive Information Redaction Word Choice Bias-Free Writing Footnotes Attachments, Appendices, Exhibits, etc.



"Your ethical duty to the person being interviewed is to present [their] position accurately...but after that your duty is to the reader. [They] deserve[] the tightest package." - William Zinsser





### If words are omitted from a quotation, use an ellipsis



If words are inserted or altered in a quotation, use square brackets [] to indicate the change

- May include:
- Letter case or verb tense
- Replacing a word to clarify meaning
- Example:
- <u>Original</u>: "He made me question if I was imagining everything that happened."
- <u>Revised</u>: "[Respondent] made me question if I was imagining everything that happened."

Enclose "sic" in square brackets to indicate that the quote is verbatim, even if there are spelling or other syntax errors

- Example:
- "I notified [sic] that she was starting to feel the effects of alcohol."

When a quote includes an error in word choice or grammar, there is no need to identify the error or include [sic] unless the meaning is unclear as a result, in which case, the Investigator should clarify as in the example above, or check with the interviewee to ensure they correctly captured the meaning.



## Title IX investigations are inherently sensitive and personal

Accounting for the fact that investigation reports will include details of private exchanges between others, what considerations should be made in report writing?

- Use of offensive, triggering, or explicit language (i.e., slurs)
- Graphic images\*
- Forensic photographs
- Nude images

Variety of methods to incorporate images
Medical information, including test results
Sex assigned at birth vs. gender identity
Chosen name vs. legal name

#### Full redaction vs. replacement with an identifier

Example:

- <u>Original</u>: Teagan stated that Jesse smacked her with an open hand.
- <u>Full</u>: stated that smacked her with an open hand.
- <u>Identifier</u>: Complainant stated that Respondent smacked her with an open hand.
- Full redaction is a common practice in law enforcement, but is not recommended for Title IX investigations

Other options:

- Include full name for first mention
- Use initials
- Use one or two-letter identifiers (C, R, W1, W2, etc.)

 Create a full version of the report and evidence file that includes all names and personally identifiable information (PII)

This version goes to the Decision-maker(s)/Panel and is for the comprehensive file (including any review by the TIXC and/or legal counsel)

2. Create redacted versions of the rep9 0 7BT/F2 246

### Use a secure file-sharing platform

- Consider functional and time limit restrictions as appropriate for your community and process
- Downloading
- Saving
- Printing

Include a separate watermark for each party/Advisor

Ensure the parties have a user-friendly method for providing feedback









The Respondent The Respondent The Respondent to answer the question. to answer the question. to answer the question.

The Complainant Respondent. The Complainant massage the Respondent. The Complainant Respondent.

offering to massage the

offering to

offering to massage the

"On September 21, 2016, four upperclassmen male students brought unwelcome sexual activity to Jane Doe and another female student in a stairwell at Maplewood." (*Doe v. Metropolitan Government of Nashville and Davidson County*, No. 20-6225 (6th Cir. May 19, 2022).)

Four male upperclassmen engaged in unwelcome sexual activity with Jane Doe and another female student in a Maplewood stairwell on September 21, 2016. Investigation report construction is largely built with the first-person accounts of the parties and witnesses

- What are ways in which these voices are included that does not minimize their experiences or indicate bias?
  - Example: pejorative use of the term "female" by a party in an interview
    - How is this communicated in a report? What if it is used in a hearing?

How can we also strive to use accessible language in interviews and in report writing? For example, "rush" vs. "new member process"

# Words communicate ideas, but also reflect power, status, and privilege

- Language can reflect social capital
- Conscious and purposeful use of 22 @ OVq\$yBpE')A: D @ OyBpE0ScY



### Avoid Labels

© 2023 Association of Title IX Administrators





# Thank you for sending your written statement. We will need to meet again so that I can ask any follow-up questions I have and discuss the evidence that you may have, witnesses you'd like me to speak with, and any other outstanding process pieces. Based on your class schedule, I set an

appointment for us at 11 AM on Monday, February 7, 2022, in my office.

Refer to the list of resources at [website] if you need assistance before our meeting.

Sincerely,

Title IX Investigator

Footnotes provide definitions, context, or source information that would otherwise disrupt the flow of the investigation report

- Slang terms, regionalisms, campus-specific language
- Ex. Talking (v): when two people have established that they are mutually interested in each other and are getting to know each other better, but are both still considered to be single and not a couple

Description of electronic applications

References to appendices

Background information

 May also be its own separate section depending upon length and complexity Be mindful of assuming "common knowledge," and if the Investigator is offering context from their own knowledge, make sure it is clearly indicated as such

Consider who will be reading the report now and potentially in the future

### In text, the footnote follows punctuation except for the mdash (---)

- Example: The parties agreed that the sexual activity on the couch was consensual.<sup>1</sup>
- ATIXA recommends using footnotes to indicate the source of relevant information incorporated in the report when summarizing or synthesizing multiple sources of evidence









# Questions the party wanted asked specifically that were asked ed

**ATIX** © 2023 Association of Title IX Administrators



How should shifts between relevant evidence and DRE that are made as a result of feedback be shown?

Track changes? How much back and forth should an Investigator have with the parties versus what should be resolved by the Decision-maker(s)?

Appendix vs. evidence file

Information Unable to be Obtained

Questions Asked Yet Unanswered

Seeking information that was not successfully secured for an investigation report should be equally documented to demonstrate the lengths through which details and data were sought, even if not obtained:

- Did not exist at the time of the reported incident
- Does not exist at the time of the investigation
- Cannot be located at the time of the investigation
- Party/witness not available to be interviewed or declines to respond to question(s)
- Request for submission declined
- Was otherwise deleted, destroyed, damaged
- Unable to access without a court order
- Information that cannot be released due to an ongoing criminal and/or agency investigation

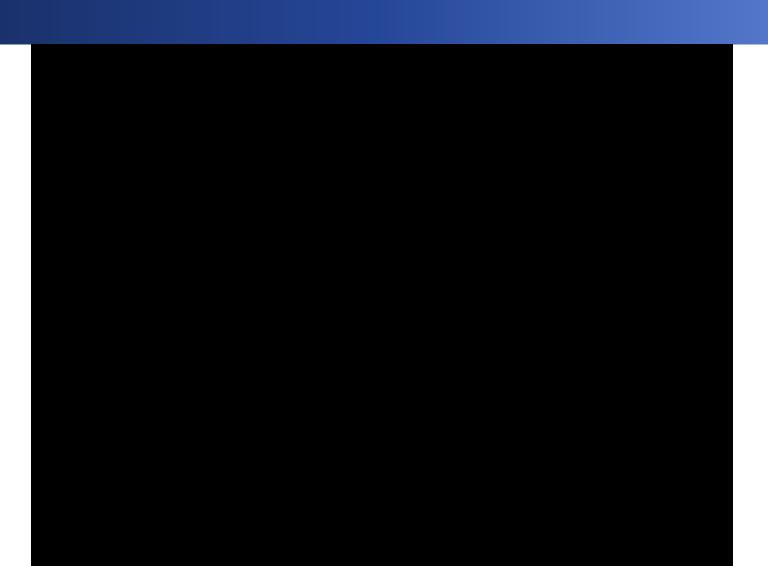
It is important to include questions which were asked but unanswered during the investigation to:

- 1) demonstrate a thorough investigation and attempts to obtain information, and
- 2) help guide the Decision-maker to topics that may need further discussion during a hearing or other resolution process.

If relevant, should be documented in the interview summary Example: "Witness 2 declined to provide additional information regarding their text conversation with the Complainant on February 19, 2019. W2 was informed the Complainant voluntarily submitted screenshots of the text messages in question for purposes of this investigation."

### Complaint date

- Complainant's name and recipient ID
- Initial notice date
- Initial notice received from
- Respondent name and recipient ID
- Date assigned to Investigator(s)
- Assigned Investigator(s)
- NOIA date
- Final investigation report date





Date, time, and manner of formal complaint

- Complainant's identity
- Description of alleged misconduct
- Request for a formal investigation or TIX Coordinator's decision to sign a formal complaint
- Who investigated the complaint and in accordance with which law(s) and/or policies the investigation was conducted
- Detailed account of undisputed facts
- Detailed account of disputed information
- Status of the complaint (e.g., dismissal or referral to Decisionmaker(s))
- Sections of the investigation report



# Summarize when and how the report/formal complaint was made and received

- Summarize the allegations, including applicable policies
- Include additional background information as necessary to understand relationship history, context, etc.
  - Separate by topic

#### Provide a statement of jurisdiction including: Incident date, time, and location Individuals involved

- Relevant policies and procedures related to jurisdiction
- Information and analysis for subject matter jurisdiction
- Institutional control of the context of the alleged misconduct
- Indicate whether Title IX requires the institution to investigate, or whether jurisdiction is discretionary and Title IX does not apply

According to available information, the Respondent is currently a full-time administrative employee in the College of Human Performance, and the Complainant is currently a third-year doctoral student the physical therapy program. Both parties maintained the same institutional affiliations at the time of the reported incident.

The reported incident occurred in Parking Garage Six on the University of the Northwest campus in Mulkiteo, Washington, United States. If proven, the allegations would constitute sexual assault under University policy and Title IX. the purpose of and parameters around the investigation

- Allegations it will explore
- Timeframe being considered
- Who will be involved
- Outcome

The Title IX Coordinator or designee will determine the scope of the investigation

Most investigations will originate from a formal complaint, but the content of the complaint is not the sole determiner of the scope of the investigation List the parties and relevant witnesses, while providing basic context for who the witness is in relation to the institution and the parties

Include when each individual was interviewed and by whom

If there were witnesses or parties who were contacted and were either nonresponsive or declined to participate, include that information as well The Office of Institutional Equity, which oversees Title IX and VAWA compliance, commenced an investigation to determine:

- 1. If the Respondent engaged in behavior which constitutes sexual assault under University policy in an on-campus apartment on April 7, 2021
- 2. If the Respondent engaged in behavior which constitutes sexual exploitation under University policy in an on-campus apartment on April 7, 2021

Investigator(s) Felicia Morris conducted an investigation in accordance with guidelines and requirements set forth by the U.S. Department of Education Office for Civil Rights for Title IX investigations, the Violence Against Women Act Section 304, and University policy. Her efforts were overseen by Melanie Wallace, Title IX Coordinator. Witnesses interviewed include current students and non-students.

This investigation was designed to collect all available information and to determine if the complaint should be dismissed or referred to a decision-maker for a formal hearing.

#### EXAMPLE





### Include the full text of ALL applicable policy sections Alleged violation(s) Relevant definitions (e.g., consent) Standard of Evide2t0 TJ/P ⊲on(s)



The Decision-maker or TIXC will need to include "a description of the procedural steps taken from the receipt of the formal complaint through the determination" in the written outcome letter provided to the parties following a hearing; this information is usually drawn from this section of the investigation report

- Notifications to the parties
- Interviews with parties and witnesses
- Site visits
- Methods used to gather other evidence
- Hearings held

Note any process delays, including rationale

Complainant notified [NAME] of allegations.
No contact order put in place between parties.
Meeting between Complainant and Title IX Coordinator

ΑΠΧ

Timelines are a visual representation or list that shows events in chronological order

- Investigators should develop one timeline for the reported incident(s) based on all information collected during interviews and submitted as evidence
- Reference evidence which substantiates with the timeline (e.g., timestamped text messages, receipts, call logs)
- Timelines are especially helpful in cases where incapacitation may be involved







The content of the investigation may dictate the most logical organization structure for this section Chronological by interview Chronological by incident timeline Parties first, then witnesses

## Specific and detailed analysis of credibility of: Each party Each witness

- Any other relevant evidence
- Point to specific details that you have considered that have aided in your assessments
- May or may not include conclusions about credibility, depending on institutional policy
- ATIXA does not recommend making conclusions



Aligned testimony and/or physical evidence.

" Does this make sense?" Be careful of bias influencing sense of "logical."

Do they have a reason to lie?

Is there a history of similar behavior?

Do they seem to be lying or te()-13ueU3\* nBT/bs/be lying





Complainant stated that she felt confused and dizzy upon awaking in Respondent's room around 4:00a.m. Witness 1 observed that Complainant seemed " totally out of it" when the two met immediately after Complainant texted Witness 1 around 4:00am. Witness 1's statements are consistent with Complainant's, and screenshots provided by Complainant are consistent with both individuals' statements.





The parties agree on the order of events on the night of the reported incident including communicating via text message, meeting at an off-campus convenience store, walking to the Respondent's on-campus apartment, consuming alcohol, and engaging in sexual activity.

The parties disagree about the following:

The amount of alcohol the Complainant consumed and whether she was incapacitated and unable to consent to sexual activity

Whether the Respondent's actions caused the bruises on the Complainant documented via photographs

During her interview, Complainant alleged that Respondent may have either videorecorded or taken photos of her without her consent while engaged in intimate activity on the couch in Respondent's residence. Respondent denies these allegations and no additional evidence was provided or available to corroborate or refute this allegation.

Complainant also alleged that Respondent may have caused her to unknowingly ingest an unknown substance that affected her capacity on the night of the reported incident. Respondent denies these allegations. The Investigators were unable to obtain a copy of the SANE report; however, a verbal conversation with the SANE provider indicated that drug and alcohol screening at the time of the exam did not indicate the presence of any substance other than alcohol. The screen does not test for all substances that could impact capacity. This section is only applicable if permitted by institutional policy

Did the conduct occur as alleged?

List recommended findings by the standard of evidence for each alleged policy violation

Include a statement that the recommended findings are not binding on the Decision-maker(s)

## This section is only applicable if permitted by institutional policy

- Did the conduct violate policy?
  - List recommended final determination by the standard of evidence for each alleged policy violation
- Include a statement that the recommended determination is not binding on the Decision-maker(s)

## Guide for the Decision-maker(s) determination Akin to jury instructions





Analysis of the allegations for the purpose of determining whether a preponderance of the evidence supports a determination that one or more of [Institution]'s policies were violated should proceed by first determining whether each allegation is supported by a preponderance of the evidence. In this particular situation, an analysis of whether consent was given, as well as whether it was withdrawn, is appropriate.

Allegations are presented separately and relevant evidence supporting and refuting each allegation is outlined within each respective section of the report. Because most, if not all, of the allegations are supported and refuted solely by the testimony of the parties and witnesses, the decision-maker should carefully evaluate the credibility of the testimony offered as well as the credibility of the individual providing the testimony.



### Include all applicable evidence and documentation Formal complaint

- Verified full transcript or complete notes from each interview
- Any written statements, photos, screenshots, etc.
- Always include a copy of the full policies in place at the time of the incident(s) and investigation

Decomination with a set of the distribution of

Table of contentsPage numbersLine numbersFile naming conventionsInternal document links







# ARX