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Civil Rights Investigator Training

Enhancing Skills in Addressing Non-Title IX Discrimination Complaints

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What are civil rights?

- Personal rights guaranteed and protected by the U.S. Constitution and laws
  - Federal
  - State

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Agenda

- Institutional Considerations
- Legal Foundations and Obligations
- Grievance Resolution Process
- Investigations and Decision-Making
- Report Structure and Content

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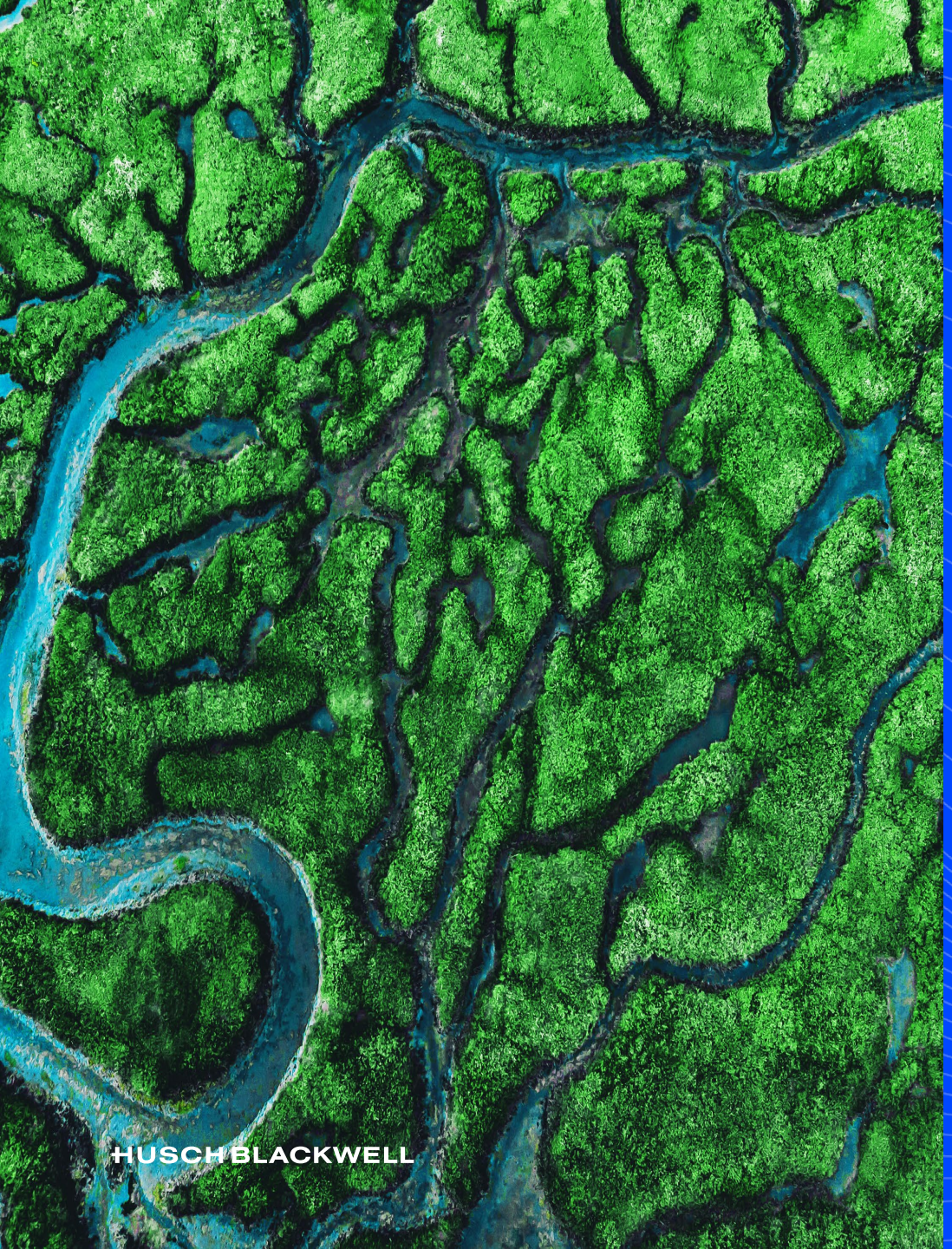

Institutional Considerations

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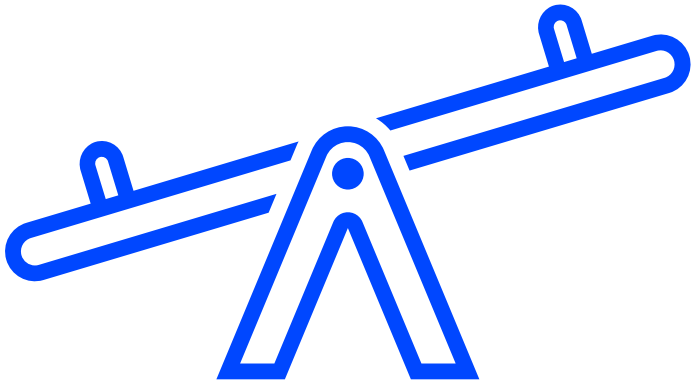
Important Institutional Considerations

Why does this matter?

- Care for community
- Public Relations
- Policy (contract)
- Enforcement Action (Avoid and Respond)
- Litigation



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Role of Various Offices

- Depending on how report is received and nature of the allegations, multiple offices may be involved
  - Office of Equal Opportunity
- Know who to ask to weigh-in on scope/procedure
- Matter may include referral or parallel investigations/resolutions
- Ensure various stakeholders know processes and understand need for communication

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Questions/Discussion

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Legal Foundations and Obligations

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Key Laws & Regulations

- Constitution of the United States: First Amendment, Fourteenth Amendment
- Americans with Disabilities Act (ADA)
- Section 504 of the Rehabilitation Act
- Title VI of the Civil Rights Act
- Age Discrimination Act
- Federal Religious Liberty Rights/Laws
- Employment-Specific Laws (Title VII, Age Discrimination in Employment Act)
- State constitutions, and state and local laws

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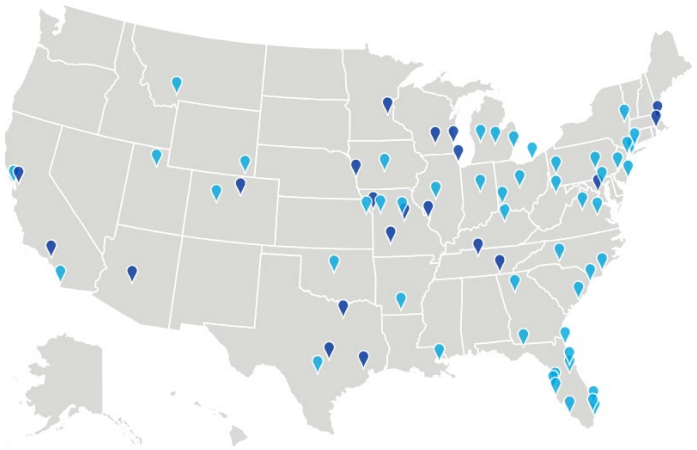
State Statutes, Local Laws



- Many states and localities have nondiscrimination rules that may apply
- May add nondiscrimination categories/definitions
- May have grievance procedure requirements
  - These requirements are **usually** much more flexible than Title IX's prescriptive procedures

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Policy Initiatives

- Executive orders and announcements
- Agency guidance (Dear Colleague Letters, Electronic Announcements)
- Grant/contract conditions

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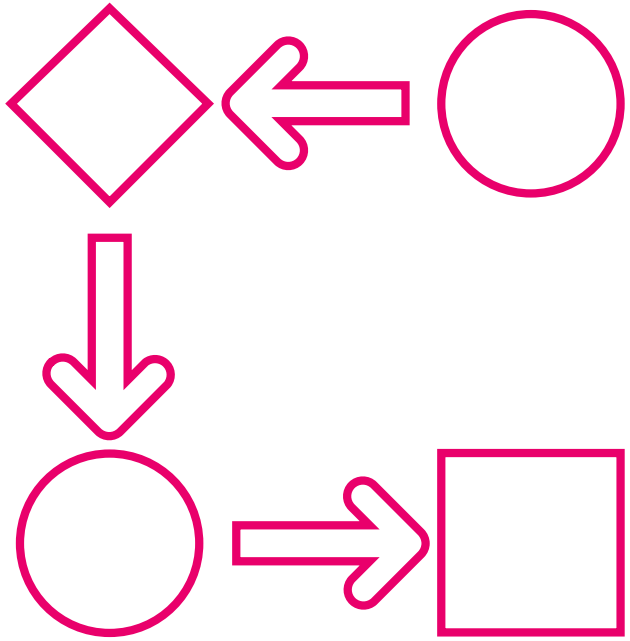
What is discrimination?

- Adverse treatment of a person based on a protected category
- Limits or excludes the person from participating in the institution's education program or activity or denies or limits the benefits thereof



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Types of Discrimination

- Programmatic Discrimination
- Individualized Discrimination
- Harassment
- Failure to Accommodate
- Related Retaliation

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What is programmatic discrimination?

- When discrimination occurs in a systematic way due to an *institutional* policy or practice
- Programmatic discrimination adversely affects persons as a group or by category, rather than by individualized decision
- Programmatic discrimination is usually *not* attributed to an individual perpetrator (*i.e.*, a “respondent”)

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Example

An institution's business school creates a special mentorship program that pairs students with a mentor who is a successful business executive. Only male students of a specific race are allowed to participate. The program significantly improves the odds of a participant receiving a job on graduation. In addition to the mentor relationship, the program includes special seminars held on campus, paid travel to a national summit, a small scholarship, and a plaque awarded to the participant at the program's conclusion.

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ED Dear Colleague Letter (February 14, 2025) (institutions of higher education)

VACATED 8.14.25

- Title VI
- Awarding any benefit, or assigning any detriment, based on race are prohibited
- Segregating based on race is prohibited
- Facially neutral programs that are motivated by racial considerations are prohibited
- Content that stigmatizes or stereotypes based on race constitutes illegal harassment

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DOJ Guidance (July 29, 2025) (Title VI, Title VII, Title IX)

Facially neutral initiatives are illegal if:

- Motivated by protected status
- Correlate with protected status
- Intend to advantage/disadvantage individuals based on protected status

E.g.,

- Race-exclusive programs
- *Preferential hiring:* any policy that sets racial benchmarks or mandates demographic representation in candidate pools, such as requiring a certain percentage of finalists to be from "diverse" backgrounds
- Access to resources
- “Geographic or Institutional Targeting”
- “A federally funded program requires applicants to describe obstacles they have overcome"

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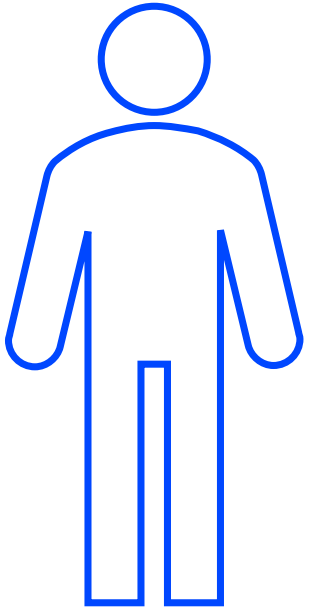
What is individualized discrimination?

- A particular decision is made, or particular action taken, that results in adverse treatment of a particular person that limits or excludes them from participation or denies or limits benefits
- Typically, individualized discrimination has an identifiable “respondent” who makes the discriminatory decision



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Adverse Treatment, Harassment and Failure to Accommodate

Adverse Treatment: Treating someone differently, in an adverse way, because of their membership in a protected category	*Harassment:* Defined by law and/or policy, generally to include some measure of actionable intensity	*Failure to Accommodate:* Refusal to adjust existing requirements to avoid discrimination based on protected status
• *E.g.*, “materially adverse treatment”	• *E.g.*, “severe or pervasive”; “unreasonable”	• Most commonly, disability, religion, or pregnancy

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Resource

U.S. Department of Education, Office for Civil Rights, *Recent Resolution Search*, https://ocrcas.ed.gov/ocr-search

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The ADA

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ADA – Title I

- *Title I:* Prohibits private employers from discriminating against qualified individuals with a disability regarding employment
- Qualified individuals are those who can perform the essential functions of the job with or without reasonable accommodation
- Employers are required to provide reasonable accommodations to qualified individuals with a disability who can perform the essential functions of the job with or without accommodation, but not if such an accommodation would constitute an undue hardship

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Example

A staff member in the Student Services Office requires medication for a disability that causes extreme nausea approximately 45-60 minutes after ingestion. The staff member requests a 45-minute break when nausea occurs.

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ADA – Title II

- *Title II:* Prohibits disability discrimination by public entities (including public schools)
- "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subject to discrimination by such entity"
- A public entity's programs, activities, and services, viewed in their entirety, must be readily accessible to, and usable by, persons with disabilities

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Example

Complaint alleges that school district segregates students with disabilities into classes and in the cafeteria and limits their ability to select certain courses. The complaint also alleges that the district does not provide modifications to allow students to participate in non-academic and extracurricular activities.

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ADA – Title III

- *Title III:* Prohibits “places of public accommodation” from discriminating “on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation . . . .”
- Includes private schools and colleges and universities
- Must make reasonable accommodations in policies, practices, and procedures

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Example

A private college requires freshmen and sophomore students to live on campus and purchase a meal plan. The college does not allow modifications to these requirements for students who have severe allergies or who have accommodations allowing them to live off-campus for disability-related reasons.

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Section 504 of the Rehabilitation Act

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Section 504 of the Rehabilitation Act

- The first statute to require disability accommodations (1973)
- Makes it illegal for the federal government, federal contractors, and any entity receiving federal assistance to discriminate on the basis of disability
- "No otherwise qualified individual with a disability . . . shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity . . . ."
- Implementing regulations at 34 C.F.R. Part 104

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Adverse treatment	• Treating someone differently based on disability status
Harassment	• Treatment on the basis of disability that is sufficiently severe/pervasive to deny access to programs
Failure to provide reasonable accommodations	• Failure to engage in interactive process or provide approved accommodations

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Example

Basketball player filed a complaint alleging the coach made her discuss her grades publicly, speak about her medical issues in front of the team and made comments about the player's disability status during her exit interview. On a team group chat including the coach, several students made comments targeting basketball player, including one who accused the basketball player of faking illness and purposefully scheduling doctors' appointments to avoid conditioning. The basketball player also alleged that after making her complaint to the equity office, her playing time decreased and the coach engaged in harsher coaching towards her.

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Section 504/ADA Grievances

- Students have the right to file a grievance/complaint:
  - When the student believes reasonable accommodations should be granted but were denied
  - When the student believes accommodations have not been implemented properly
  - When the student believes they have been discriminated against based on their disability

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Example

Student filed a complaint alleging that a professor encouraged them to drop a course because of frequent absences. Student alleged the college did not engage in the interactive process with them to provide academic adjustments, and the college did not excuse their disability-related absences. During their intake meeting, student said professor also made derogatory comments to the student about their absences and told the student they should decide if they are "up to the challenge" of meeting the program requirements.

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Example

Complaint alleges that school district does not grant excused absences for medically prescribed appointments. In addition to challenging the blanket policy imposing unexcused absences, the complaint alleges the district did not refer students for evaluation or re-evaluation in cases of repeated absences for therapy appointments.

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Resources

- *Individualized Assessments for Students with Disabilities in Postsecondary Education, U.S. Department of Education Office for Civil Rights, January 2025*
  - Emphasizes individualized consideration and interactive process
  - Academic adjustments cannot be limited to students with certain disabilities
  - Do not exclude academic adjustments from consideration based on policy or practice alone
  - Do not rely on administrative convenience to offer one-size-fits-all adjustments

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Drafting Allegations Scenario

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Draft the allegations and applicable policy references for this hypothetical:

Basketball player filed a complaint alleging the coach made her discuss her grades publicly, spoke about her medical issues in front of the team, and made comments about the player's disability status during her exit interview. On a team group chat including the coach, several students made comments targeting basketball player, including one who accused the basketball player of faking illness and purposefully scheduling doctors' appointments to avoid conditioning. The basketball player also alleged that after making her complaint to the equity office, her playing time decreased and the coach engaged in harsher coaching towards her.

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Title VI of the Civil Rights Act

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Title VI

- *Title VI of the Civil Rights Act states:* "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
- *Implementing regulations are at 34 C.F.R. Part 100*

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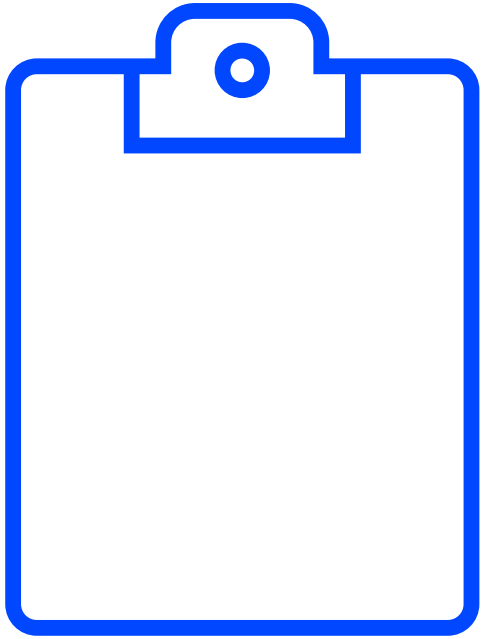
Application

- *Title VI prohibits discrimination based on:*
  - Race
  - Color
  - National origin
- *Applies to both public and private institutions that receive federal funding*



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Institutional Obligations Under Title VI

- Operate in a non-discriminatory manner
- No retaliation against anyone who participates in any complaint action under Title VI
  - Recipients of federal funds are prohibited from intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege secured by Title VI
- Schools must promptly and effectively address alleged acts of discrimination, including harassment

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Discrimination and Complaints: Program and Activities

Admissions	Recruitment	Financial Aid	Academic Programs	Student Treatment and Services
Counseling and Guidance	Discipline	Classroom Assignment	Grading	Vocational Education
Recreation	Physical Education	Athletics	Housing	Employment

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Discrimination Under Title VI

Intentional Discrimination	*Disparate Treatment*
• Alleges that a recipient intentionally treated persons differently or otherwise knowingly caused them harm because of their race, color, or national origin.	• Alleges that a facially neutral policy or practice had a disproportionately adverse effect on minorities and are otherwise unjustified by a legitimate rationale.

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Example

Student was removed from group chats and ostracized after controversial statements about race; he continued mass communications despite warnings and was disciplined. Student claimed he was treated differently than Black students who used the listserv. School offered EEO process, designated an investigator and responded to his complaints.

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Harassment Under Title VI

- *Harassing Conduct:*
  - Unwelcome conduct that may include verbal abuse, graphic or written materials, physical assault, or other conduct that may be threatening, harmful or humiliating
- *Hostile Environment Harassment:*
  - Unwelcome conduct based on race, color, or national origin that, based on the totality of the circumstances, is:
    - Subjectively and objectively offensive; and
    - So severe or pervasive that it
    - Limits or denies a person's ability to participate in or benefit from the recipient's education program or activity

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Example

Complaint includes instances of alleged racial harassment occurring in classrooms and on the bus over the course of two years. Allegations include references to confederate flags in slide presentations unrelated to discussion the course, use of racially derogatory terms and students shaking the bus as Black students exited the bus. Complaint includes references to students reporting several instances over the course of two years, but the district record-keeping does not reflect documentation of such reports.

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Example

College student alleged repeated racial harassment, including an incident in which an instructor slapped the student's hand and asked if their response was typical of individuals of their race. Student experienced ongoing stress, and their attempts to resolve the issue through the University's complaint system failed. During the resolution discussion, student shared information about impact on the student, but that process did not include fact gathering about the race-based nature of the instructor's conduct and comments.

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OCR Fact Sheet on Protecting Students from Discrimination on Shared Ancestry or Ethnic Characteristics (January 2023)

Title VI's protection from race, color, or national origin discrimination extends to students experiencing discrimination, including harassment, based on actual/perceived:

Shared ancestry or ethnic characteristics	Citizenship/residency in country with dominant religion/distinct religious identity

Includes discrimination against students of any religion, such as students who are Jewish, Christian, Muslim, Sikh, Hindu, or Buddhist, when alleged discrimination involves, *e.g.*:

Slurs or stereotypes	Appearance or dress	Foreign accent, foreign name, or speaking a foreign language

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Example

Multiple students complained to office of institutional equity about campus protests regarding conflict in the Middle East. The complaints include information about campus protests being confrontational and physically violent. Multiple students have expressed concern about fear related to additional protests. In addition, students have complained about comments on social media on various student's personal accounts. *(continued on next slide)*

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Example *(cont.)*

How do these details affect your thinking about required institutional response?

- **The school's policy states that complainants will receive a response, but two of the students never receive a communication from the office.**
- **Some of the students express general discomfort, but did not allege educational harm (such as missed classes, grades, needing counseling).**

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OCR Dear Colleague Letter (May 2023)

If a hostile environment exists based on shared ancestry, and

The school knew or should have known,

OCR will evaluate immediate and effective steps reasonably calculated to:

- End the harassment
- Eliminate any hostile environment and its effects
- Prevent harassment from recurring

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Harassment Expansion

OCR Dear Colleague Letters (November 2023, May 2024) & Fact Sheet on Harassment (July 2024)

- Sufficiently severe, pervasive, or persistent so as to interfere/limit ability to participate/benefit
- Assessed based on totality of circumstances (context, nature, scope, frequency, duration, and location of harassment, as well as identity, number, age, and relationships-power differential)
- Subjectively and objectively offensive
- May occur when conduct of multiple offenders, taken together, meets the definition above
- Need not be directed at a particular individual
- May be based on association with others of a different race, color, or national origin
- May be physical, verbal, graphic, other conduct that may be threatening, harmful, or humiliating
- May occur in classrooms, residence halls, hallways, athletics facilities, bathrooms, on the internet, and on social networking sites and apps

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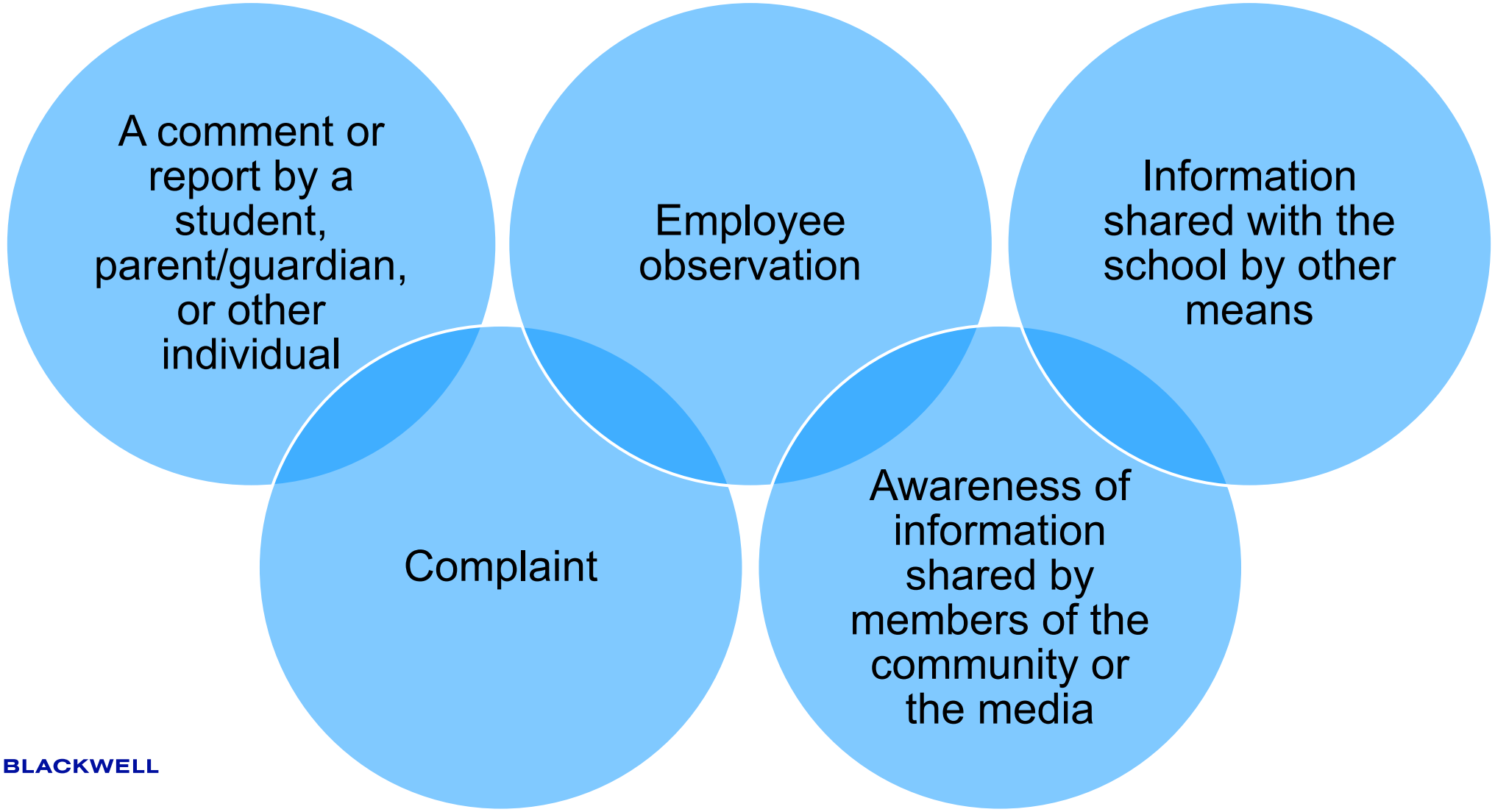
Knew or Should Have Known

OCR Dear Colleague Letters (November 2023, March 2024) & Fact Sheet on Harassment (July 2024)



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OCR Resolution Agreements: Example

Findings

- Specific incident did not involve antisemitic conduct
- In response to incident and others, university took proactive steps (multiple public statements, offering resources, convening meeting with campus Jewish and Muslim leaders, increased security patrols, investigative staff training)
- 35 incidents in 18 months showed evidence of growing hostile environment
- University failed to assess whether collective incidents created hostile environment or misapplied legal standard

Requirements

- New/revised policies
- Climate surveys
- Continue to provide training to investigators
- Annual training for all faculty, staff, and students
- *File review:* Every instance 2022-2024, analyze results, create action plan subject to OCR approval
- Provide OCR with information regarding complaints of alleged discrimination through 2025-26, address OCR feedback

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Themes from Resolution Agreements

1

Individual incidents

- May not lead to policy violation finding (insufficient evidence to investigate, lack of preponderance)
- May involve protected speech (discipline not appropriate)
- May be appropriately addressed (*e.g.,* findings, discipline, supportive measures for complainant)

2

Incidents must be considered collectively

- Clear reporting processes
- Respond to each incident
- Assess for overall environmental impact (broad consideration of hostile environment)
- Remediate as possible
- Continuing monitoring
- Show your work

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Resources

- U.S. Department of Education

  January 2023 Fact Sheet: https://www.ed.gov/sites/ed/files/about/offices/list/ocr/docs/ocr-factsheet-shared-ancestry-202301.pdf
  November 2023 DCL: https://www.ed.gov/sites/ed/files/about/offices/list/ocr/letters/colleague-202311-discrimination-harassment-shared-ancestry.pdf
  May 2024 DCL: https://www.ed.gov/media/document/colleague-202405-shared-ancestrypdf
  July 2024 Fact Sheet: https://www.ed.gov/media/document/colleague-202405-shared-ancestrypdf

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First Amendment/Expression

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The First Amendment

"Congress shall make no law respecting:

- an establishment of **religion**, or **prohibiting the free exercise** thereof; or
- **abridging the freedom of speech**, or of the press; or
- **the right of the people peaceably to assemble**, and **to** petition the government for a redress of **grievances**."

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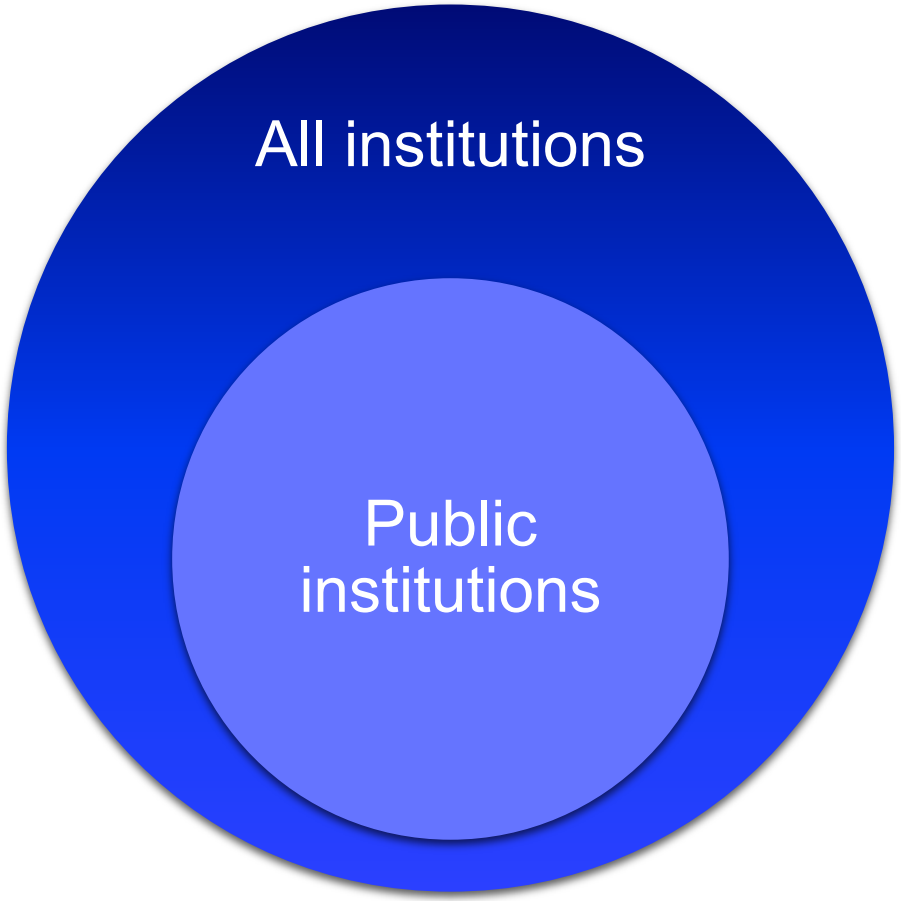
"First Amendment" Rights and Institutions



- Public schools are subject to Constitutional obligations
- All schools are subject to **applicable**
  - Other laws
    - *E.g.*, California's Leonard Law
  - Contractual duties (*e.g.*, grant agreements)
  - Policies and procedures (often not a contract but often other reasons to follow)
  - Some exemptions (*e.g.*, religious institutions)

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What is protected speech?

- *Protected*
- Spoken words
- Written words
- Expressive imagery and art
- Clothing with messages
- Expressive performance
- Photography/video recording
- Monetary contributions
- Others?

- *Not Protected*
- Defamation, slander, and libel
- “Fighting words”
- “True threats”
- Incitement
- False advertising
- Child pornography
- Obscenity
- **No general protection for offensive, inappropriate, nasty, etc. “hate speech” protection**

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Examples

Students at a public high school wear black armbands to protest the Vietnam War.

A citizen standing on a public sidewalk films police arresting a homeless person.

A website publishes fake and satirical news articles mocking current politicians and world leaders.

A student at a public college engages in religious speech on the sidewalk in front of the main administration building.

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What are some key Freedom of Speech concepts?

- Hierarchy of speech (added protections for political, religious, and matter-of-public concern speech)
- Viewpoint discrimination (targeting speech because of the viewpoint it expresses)
- Speech forum (indicates how much regulation/restriction permissible)
    - Traditional/nontraditional public forum (*e.g.*, public outside spaces or places designated as public fora)
    - Limited forum (*e.g.*, typically, classrooms)
    - Closed forum (*e.g.*, offices)
- Reasonable time, place, manner restrictions
- Government speech
- Non-expressive qualities of speech

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Example

A local religious group comes onto the campus of a public university and marches on a public sidewalk with signs that have various messages including statements indicating "[God] Hates ____."

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Example

A public university's student code of conduct prohibits students from engaging in acts that impede administrative processes. Students hold a protest that involves speech criticizing various decisions made by the president. The students are charged with a conduct violation. If the students had engaged in speech praising the president, they would not have been charged.

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What other conduct may be protected by the First Amendment?

Assembly	Meetings Protests
Academic Freedom	Speech in academic setting pertinent to subject matter
Grievances	
Exercise of religion	
Press	

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Practical Point

- **May protected expression nevertheless violate law? Policy?**

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Example

After last year's Homecoming parade, Western Plains University revised its Homecoming parade policy to restrict political messaging. The updated rules also require all participating organizations to adhere to the parade's theme associated with promoting school spirit.

The events office denied the Greenfield Students for Environmental Justice application to participate in this year's Homecoming parade. The events office did so due to safety concerns, referencing two past incidents involving a GSEJ group member that led to a student conduct warning and campus restriction. The office also referenced unrest at environmental protests on other campuses as part of its rationale. Other groups with controversial viewpoints linked to unrest on other campuses were permitted to participate.

The GSEJ filed a grievance, arguing that the University violated its First Amendment rights by denying participation due to its views on climate change and environmental policy.

Following an internal review, the group was ultimately allowed to participate in the Homecoming parade, but, during the parade, two organization representatives displayed signs not previously approved as required by the application process, including messages about regional political candidates.

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Religion

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What federal laws protect religious liberty at institutions?

- First Amendment (various levels of scrutiny depending on nature of rule and RFRA)
- Title II of the Civil Rights Act (places of public accommodation)
- Title IV of the Civil Rights Act (public institutions)
- Title VI of the Civil Rights Act (sometimes?)
- Title VII (employment)
- Religious Freedom Restoration Act (federal + state versions)
- State human rights acts
- Other state law
- Contracts (e.g., government contracts, grant agreements)
- Institutional policies and procedures (often not a contract but often other reasons to follow)
- **Exemptions may apply*

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Title VII

- *Title VII* prohibits **employment** discrimination based on "religion"
  - Prohibits classic discrimination by adverse treatment **as well as** failure to accommodate
  - Applies to **both** public and private institutions

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Titles II and IV of the Civil Rights Act

- ***Title IV:*** Prohibits religious discrimination against students in public institutions
- ***Title II:*** Prohibits religious discrimination by places of public accommodation
  - **Some** case law suggests that this could apply to (at least) portions of higher education institutions (including private institutions)

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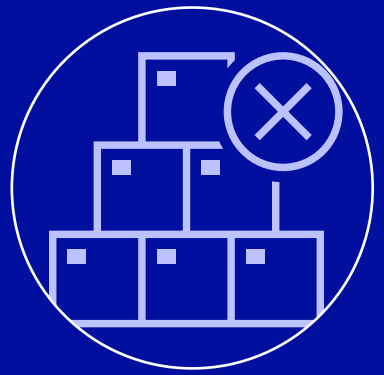
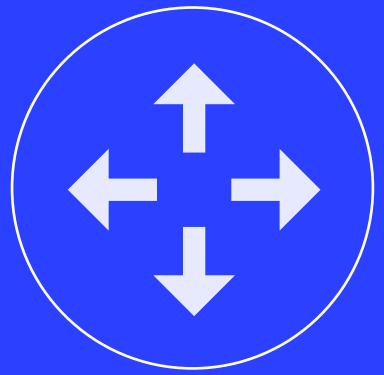
Adverse Treatment Discrimination vs. Failure to Accommodate



Adverse treatment: Treating an individual adversely with respect to the terms and conditions of employment/participation where religion is the “motivating factor” in the adverse treatment



Accommodations: Exceptions to allow exercise of sincerely held religious beliefs or practices absent an undue hardship/legitimate safety concerns

- Undue hardship: *Substantial* increased costs in relation to the conduct of employer’s particular business

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Example

Student worker at public university faces repeated, subjectively and objectively offensive, joking and denigration from co-workers about student's faith. Student complains but supervisor fails to act. Student develops anxiety and dreads coming to work. Student worker has experienced hostile work environment actionable under (at least) Title VII (and likely Title IV) by employer.

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Example

Private University, a secular institution, operates a conference center open to the public. PU has allowed religious organizations to host conventions in the center, but denied permission to members of another religious organization only because the organization's beliefs are "too controversial." There is a risk that PU is in engaged in prohibited religious discrimination.

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What does it mean to have a sincerely held religious belief?

- Personal, genuinely held belief
- Religious belief does not have to be:
  - Validated by a religious leader (priest, pastor, rabbi, imam, etc.) to be genuine
  - Part of organized religion
  - Orthodox to the employee's claimed faith
  - Absence of religion (*e.g.*, atheism) may be protected
- Religious belief can still be sincere even if recently adopted or occasionally violated

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Example

College student ambassador professes belief in the *Gospel of the Flying Spaghetti Monster,* a "carbohydrate-based religion" in which congregants are known as "Pastafarians" and wear colanders on their heads (originally a spoof). College requires ambassadors to wear College baseball caps so they can be visible on tours. The ambassador requests to wear instead a colander painted in the College's colors and logo. College's policies include a student religious accommodation policy, and state law suggests private colleges must not discriminate based on religion. Regardless of whether College is public or private, there is risk that refusing the accommodation may be found to be religious discrimination.

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Other Considerations

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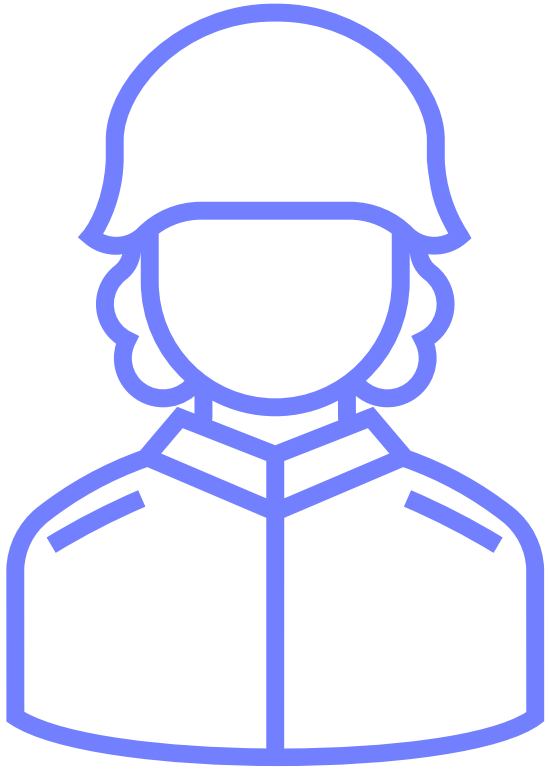
Veteran and Armed Service Protections



- In most cases, prohibitions are on discriminating against an individual because they were (vs. were not) within the category
- *Issues include:*
  - Leave
  - Aid administration
  - Disparate treatment

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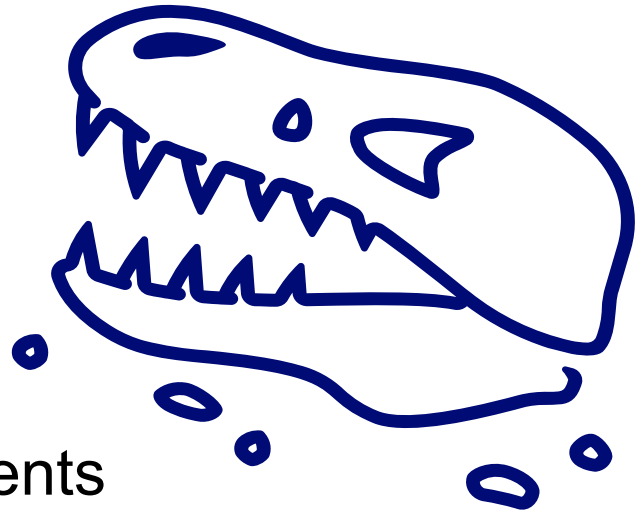
Age Discrimination



- *Age Discrimination in Employment Act:* 40+ in employment
- Age Discrimination Act:
  - *Any* age in programs or activities of federal funds recipients
  - *Except (per ED regulations):*
    - Distinction contained in federal, state or local law providing benefits/assistance based on age or establishing participation criteria
    - *"Normal operation" or "statutory objective":* reasonably taking into account age as a factor necessary to these
      - May be used as approximation of other characteristics where impractical to measure on an individual basis

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Example

A 12-year-old child prodigy applies to attend a traditional college, seeking to live on-campus.

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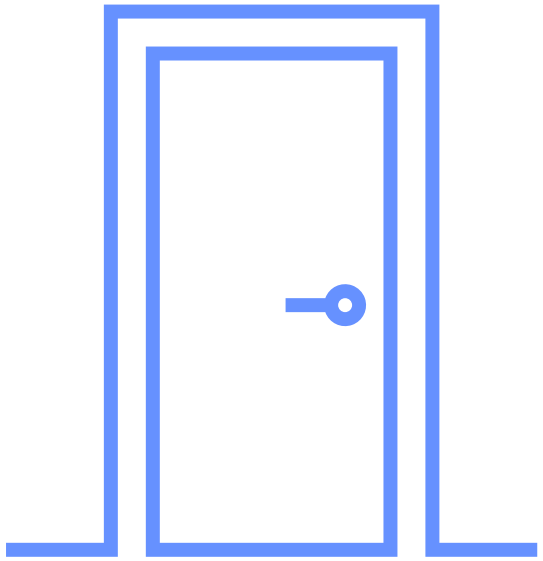
What is retaliation?



- Adverse action *for* exercising rights under rules prohibiting discrimination

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Consider All Potentially Applicable Policies and Procedures—*e.g.*,

- Nondiscrimination statements
- General nondiscrimination policies
- Protected-status-specific (*e.g.*, disability, religion, expression/speech/academic freedom, veteran/military)
- Assembly
- Protest
- Campaign
- Signage
- Security
- Investigation, discipline and grievance (may vary)
- Alternative resolution
- Retaliation and whistleblower protections

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Questions/ Discussion

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Grievance Resolution Processes

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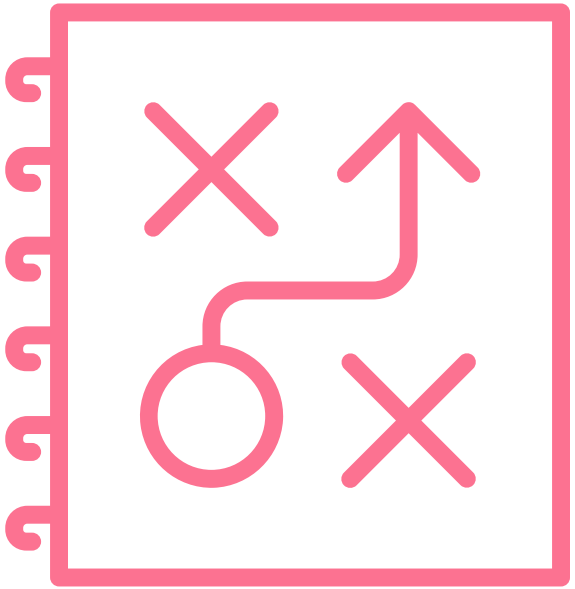
Critical Consideration

- *Relevant process will vary:*
  - By institution
  - By type of alleged discrimination
  - By jurisdiction
  - By relevant regulators
- *Consult as appropriate to determine appropriate path*



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Common Grievance Process

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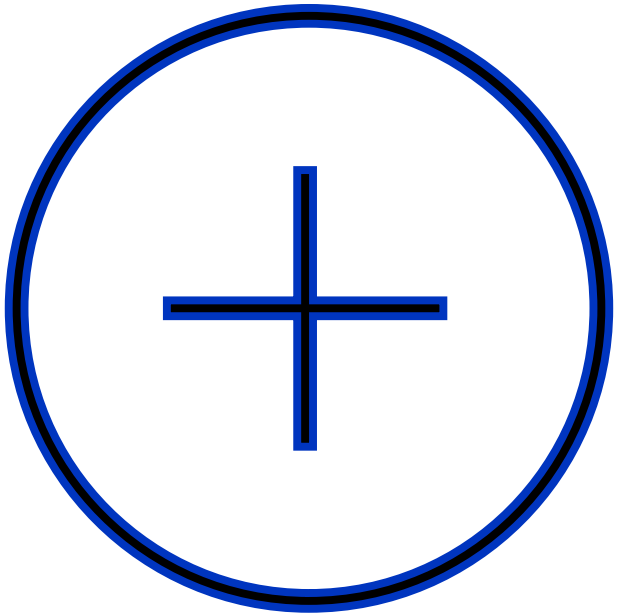
Role of Institutional Policy & Procedure



- Designate parameters for protections, responsible officials, and steps to follow
- May extend protections beyond those required by law

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Discretionary Process Considerations

- Scope
- Definitions
- Reporting options
- Retaliation
- Confidentiality
- Notice requirements (timing, content)
- Alternative resolution options
- Special procedures for complaints against senior administrators
- *Investigation procedures:*
  - Interviews with parties, witnesses
  - Review of evidence
  - Opportunities to be heard
  - Advisors/attorneys
- Discipline, sanctions, remedial measures
- Timelines for completion and extensions

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How do we address retaliation complaints?

- *Consider:*
  - Policy and procedure language as to procedural path
  - *Specifics of retaliation allegations:*
    - Who is Respondent?
    - Retaliation for what?
    - Allegation of (knowingly) false complaint?
    - Credibility implications (*e.g.*, do allegations suggest motive to lie)?

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Example

A K-12 debate team member reports the captain of the team for plagiarism. The captain later files a complaint alleging the team member harassed the captain for missing a tournament to celebrate a religious holiday. The team member claims the captain filed a false harassment complaint in retaliation for the plagiarism report.

The school's policy prohibiting religious discrimination/harassment states that retaliation for exercising rights under the policy will be handled under the same procedures as those provided for complaints of religious discrimination/ harassment. The school separately prohibits false reports and retaliation for submitting good-faith reports of nondiscriminatory misconduct.

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Due Process/Fundamental Fairness Considerations

- *Those accused of violations receive:*
  - Notice of the allegations against them, and
  - An opportunity to be heard
- *Applicability:*
  - *Public institutions:* U.S. (and state) constitutions
  - *Public and private:* Similar protections applicable often provided in case law, statute/regulation, and/or policies

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Policy and Procedure Flexibilities

- Consider any need to deviate from statements throughout grievance process
- Ensure appropriate exercise of discretion
- Document reasoning
- As process unfolds, consider need to communicate

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Resolution Team (Common Members)

- Civil rights coordinator (titles vary)
- Persons responsible for initial assessment, resources, supportive measures
- Investigator
- Informal resolution facilitators
- Decision maker
- Appeal officer
- Legal counsel
- Law enforcement
- Other officials as appropriate

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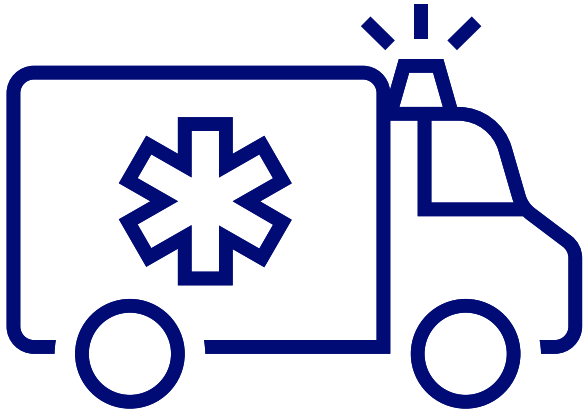
Note re Civil Rights First Responders



- *Those who receive first clue(s) of potential concern:*
  - *E.g.*, supervisors, resident assistants, student organization leaders, advisors
- Roles sometimes include initial review and intervention
- Training and coordination support integrity of investigations
- Investigators should consult for information

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Initial Assessment

- *Process by which concern is directed to appropriate office/process*
  - Often, not role of investigator
- *Consider whether available information calls for formal investigatory response:*
  - Presence of complainant (could be pursued by institution) and/or (depending on issue and relevant law/guidance) reason to believe violation occurred
  - Substance of allegations as compared to policy/standard requirements

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Initial Assessment Considerations

- Basic facts
- Immediate safety
- Privacy
- Rights & options
- Resources and/or supportive measures
- Clery (as applicable; reporting, warning)
- Preserving evidence
- Process options

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When/why do we "investigate" something?

- Reason to believe policy/standard **may** have been violated
- Evidence (both inculpatory and exculpatory) needed to determine fairly whether violation occurred
- Provide decisionmaker (may be the investigator) with information allowing a determination
- Particularly where some action may be necessary to address any violation found to have occurred

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How do we conceptualize an investigation?

- Identify complainant and subject(s) of the investigation
- Identify the specific types of misconduct implicated
- Identify relevant policy(ies)/procedure(s) at issue
- Identify the core alleged conduct at issue for which we need evidence

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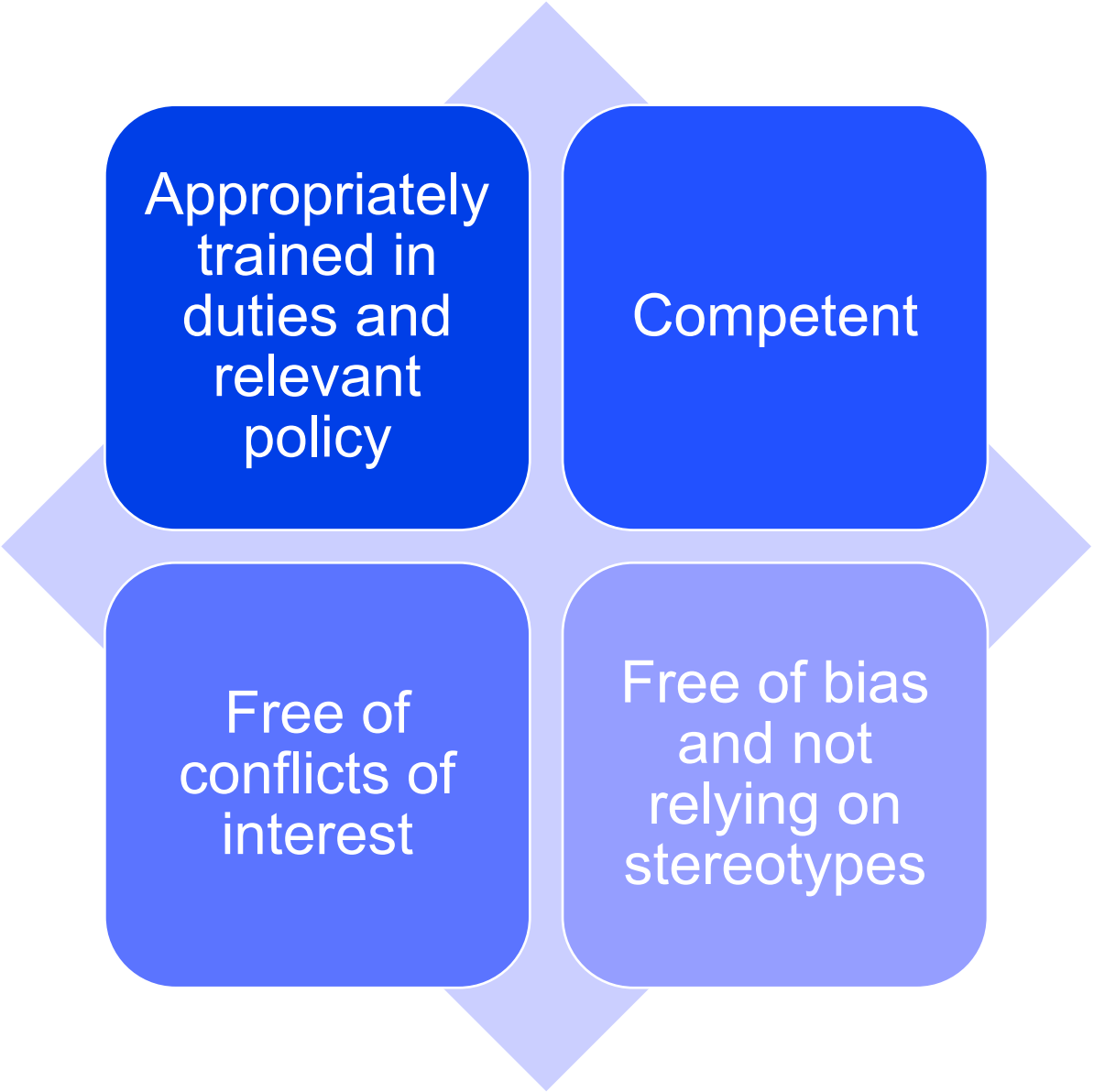
General Requirements for Civil Rights Investigators



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What is a conflict of interest?

- When an individual has a material connection to a dispute, or the parties involved, such that a reasonable person would question the individual's ability to be impartial
- May be based on prior or existing relationships, professional interest, financial interest, prior involvement, and/or nature of position

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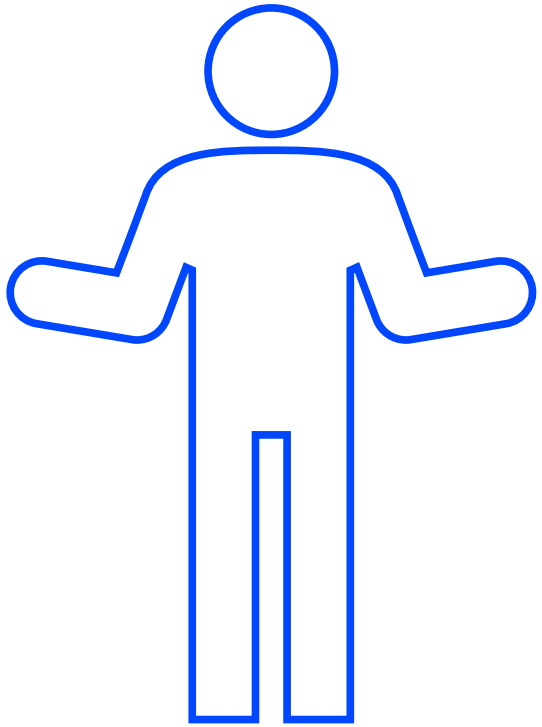
What is bias?

- A prejudice, predisposition, or inclination in favor of or against a thing, group, or person
- Team members must be free of bias against complainants or respondents generally, or a specific complainant or respondent



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Alternative Resolution & Appeals (lightning round)

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Alternative Resolution Options (Generally Policy Dependent)

Potential methods

- Mediation
- Facilitated discussions
- Restorative justice
- Attorneys for parties negotiate

Potential terms

- Apology
- Restrictions on contact, participation, or presence
- Training or education
- Withdrawal or resignation
- Negotiated discipline or sanctions
- Climate assessment

Best practices

- Consider requirements of policies and procedures
- Share information about process with parties in advance
- Describe what will happen if alternative resolution fails
- Use trained facilitators
- Document, document, document

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Appeals

Common sample grounds

- A procedural irregularity affected the outcome
- New evidence, not reasonably available at the time of determination, that could/would have affected outcome
- Conflict/bias by officials involved in investigation/determination that could/would have affected outcome

Best practices

- Policy should identify any available appeal process
- Appeal officer who is not otherwise involved in the investigation
- Written submissions and decision

Investigation considerations

- Available appeal(s) and grounds (potential arguments and information relevant to deciding appeal)
- Appeal official(s) (audience)

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Questions/Discussion

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Investigation

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Review and Know Institutional Policy

SCOPE

PROHIBITED CONDUCT DEFINITIONS

PROCEDURAL STEPS AND OTHER RIGHTS OF THE PARTIES
(NEXT SLIDE)

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Policy-Dependent Rights of Parties

- Notice elements (including supplemental notices)
- Support (advisors/attorneys)
- Access to evidence
- What kind of report/decision(s) received
- Opportunities to respond to allegations, evidence, determinations
- Process free of bias and conflicts of interest

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What is the purpose of an investigation?

- For the institution
- To collect relevant inculpatory and exculpatory evidence
- Sufficient to permit an impartial decision maker to determine
- Whether or not the reported policy violation occurred

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Investigation Planning

- ***Assignment of investigator***
  - Who?
  - Free from conflict of interest
  - How many?
- ***Develop Investigation Plan***
  - Scope/Applicable Policy
  - Witnesses, documents/evidence, etc.
  - Maintain working timeline

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Effective investigators…

Create	Document	Act	Keep	Treat
Create an investigation plan	*Document* all steps taken throughout investigation	*Act* promptly (eye on timeframes)	*Keep* parties informed	*Treat* each investigation as if work will be scrutinized by an outside third party (OCR, court, opposing counsel, etc.)

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Creating an Investigation Plan

- Formulate comprehensive investigative plan at the onset and adjust accordingly as investigation proceeds
- Who to interview and in what order
- Evidence to gather/scope
- Pull all relevant policies/procedures
- Notices (appropriate detail; **amend as necessary**)
- Interim measures
- Timeline
- Periodic updates to parties
- Document any delays

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Agree or Disagree?

Investigator: **"I always interview the complainant first, then all witnesses, and then the Respondent."**

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Benefits of Investigation Plan

- Ensures investigations are conducted consistently
- Ensures steps are not missed
- Allows for possibility of revisions/additions
  - Remember amended notices
  - Address and refer cross-complaints

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Interviews

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How do we collect evidence in an investigation?

Interviews of parties and witnesses

Collection of non-testimonial evidence

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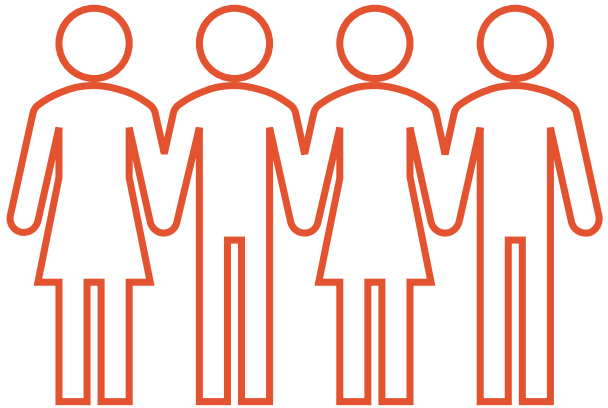
Who do we interview in an investigation?

- Parties
- Fact witnesses
- <u>Maybe</u> character witnesses
- <u>Maybe</u> experts



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What's the difference between a fact witness and a character witness?

- A **fact witness** has personal knowledge about specific facts that are relevant to determining whether or not a given act of misconduct occurred.
- A **character witness** does not possess knowledge of specific, relevant facts but instead speaks to a person's general character traits or their general disposition.

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Example

Hardeep accuses Jamie of discrimination on the basis of ethnicity. Hardeep claims that Jamie repeatedly made disparaging remarks about Hardeep's religious and ethnic attire, including his turban. One of Hardeep's friends, Campbell, was present when Jamie made one of these remarks to Hardeep and heard Jamie make a derogatory comment.

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Example

Gloria has known Jamie since high school. Gloria can testify to their belief that Jamie is a “caring person” who would “never” intentionally discriminate against anyone.

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“Elements” of the policy

- The policy language defines the behavioral standard (*i.e.*, the rule)
- Identify the elements of the policy
- *Example:* Anti-retaliation policy
  - What are the elements?
  - In other words, what facts must be proven to establish a violation?

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Example

Student organization alleges it was suspended by the Dean of Students in retaliation for complaining about race discrimination in the institution's allocation of funding. The institution's nondiscrimination policy defines retaliation as:

- **"Adverse action taken against an individual in response to, motivated by or in connection with an individual's complaint of discrimination or discriminatory harassment, participation in an investigation of such complaint and/or opposition to discrimination or discriminatory harassment in the educational or workplace setting."**

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What are some general principles about interviewing?

Timing	Conduct interviews as soon as reasonably possible to maximize the most accurate memories
Setting	Choose a private and quiet setting
Role	Maintain and explain your role as a neutral fact-gatherer; not a prosecutor; not a defense attorney
Prepare	Anticipate questions that you will be asked and have responses ready

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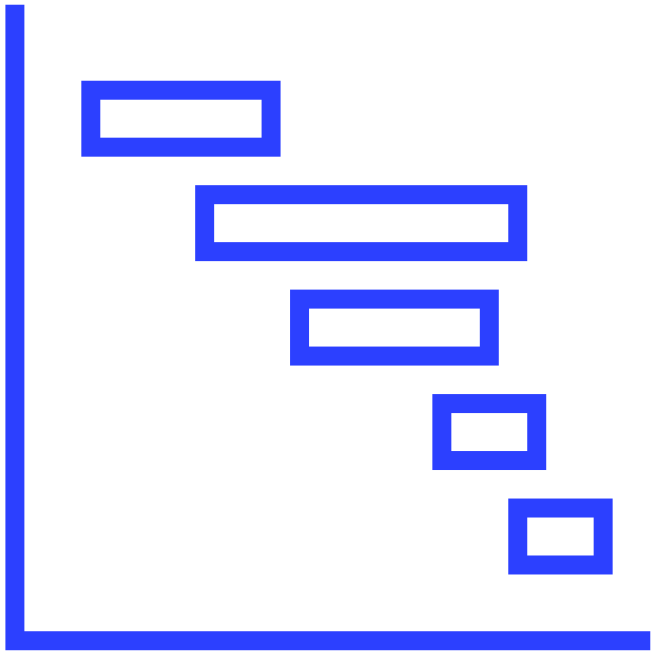
Essential groundwork

- Plan your sequence
- Prepare your “must ask” questions
- Bring materials
- Take inventory of previous communications
- Know who’s coming
- Anticipate questions from the party



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How do you structure an interview?

- Rapport building/information providing phase
- Substantive testimony collection
- Closure/information providing phase

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Beginning – Demeanor & Tone

- Establish rapport
- Acknowledge that the process can be difficult
- Explain your role
- Talk about your experience conducting investigations
- Where possible, offer choices
- Listen vs. Interview vs. Interrogate
- Confirm applicable policy and notice of allegations
- Questions welcome
- Breaks as needed

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What are common unknowns to the subject of an interview?

- Who is the interviewer?
- What is the interviewer investigating?
- Am I the one in trouble?
- What is the interviewer going to ask me about?
- What is the interviewer going to do with the information I provide?
- When will I learn what happens next?
- Is this confidential?

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Things helpful to say in every interview . . .

- “If I ask a question you don’t understand, please tell me.”
- “If I ask a question and you don’t know the answer, it’s okay to say you don’t know.”
- “If you think I’ve misunderstood anything you say today, please tell me.”
- “I want to get as much information as possible, so please be detailed in what you share. And if I don’t ask about something you think is important, please tell me.”
- “To do my job, I need accurate information. So, I always remind every witness that it’s important to tell the truth.”

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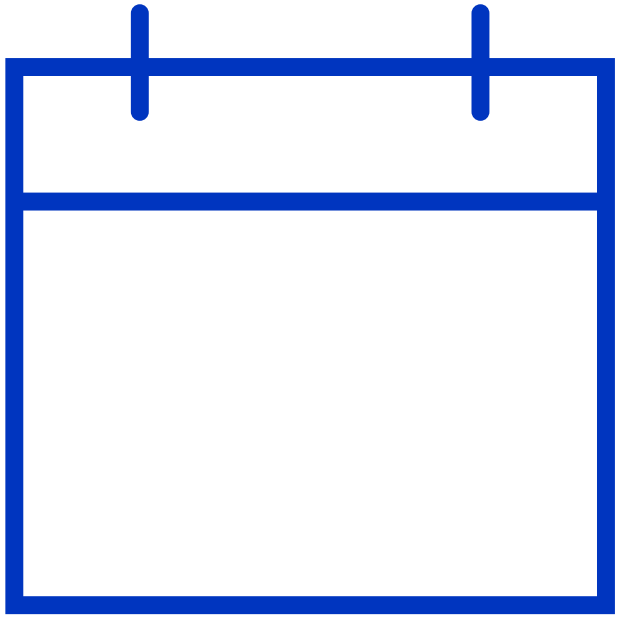
Practical considerations for interviewing

- Focus on elements of alleged violation and disputed facts
- Consider appropriate ways to guide off-track witnesses



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Questioning tips

Use policy language when discussing allegations

Neutral language

- Avoid labels/ judgments

One question at a time

Rephrasing

Open-ended vs. leading questions

Utilize silence

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When Asking Questions . . .

Non-verbal communication	Convey care, concern, and interest to both sides and to witnesses Make eye-contact
Verbal communication	Avoid questions that imply the alleged conduct occurred or did not occur Avoid questions that blame or judge the complainant Avoid questions that blame or presume violation by respondent

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How do we ask questions in the substantive phase?

- Open-ended and non-suggestive invitations
- Use “facilitator” words to keep the narrative flowing
- Use cued-invitations to expand particular topics
- Delay use of specific questions until necessary
- Avoid leading questions

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What are “invitation” questions?

“Can you please tell me what happened that night?”

“Can you walk me through what happened?”

“In your own words, can you tell me what occurred?”

“Can you describe what you saw that day?”

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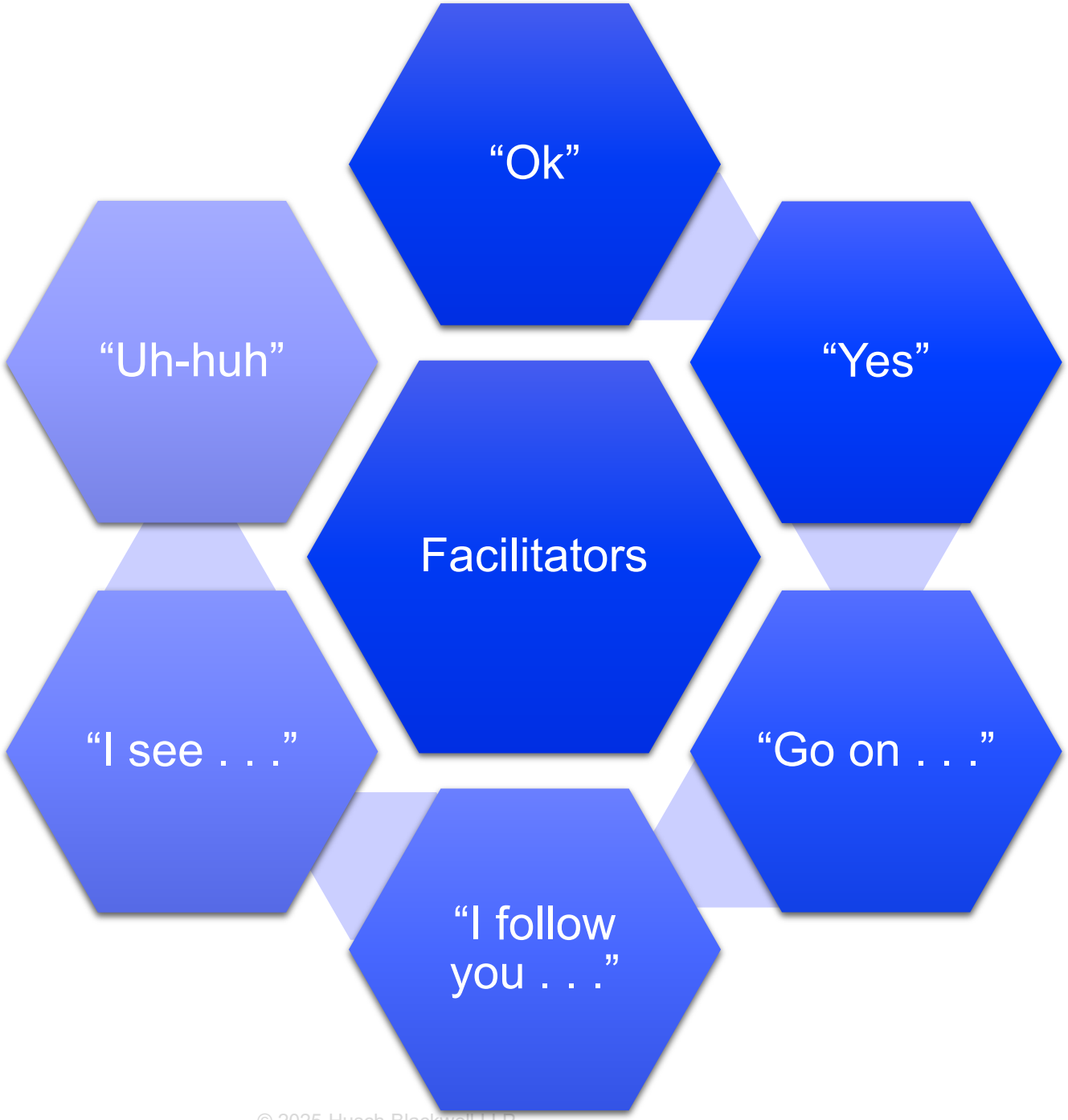
What are "facilitators"?



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What are “cued” invitations?

“You mentioned that . . . . Can you tell me more?”

“You said that . . . . Can you elaborate?”

“You said they ‘made fun of’ you. Can you tell me more about how they made fun of you?”

“If I understood you right, you said that after . . . . Can you tell me what happened in between?”

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What about leading questions?

- Leading questions imply the anticipated answer through the question itself
- Pose a significant risk of influencing the testimony and compromising impartiality (perceived or actual)
- Should generally be avoided by institutional actors

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Examples

You must have felt shocked and disgusted when they did that, right?

And because you have been harassed before, it must have been especially hurtful when it happened again?

So, you feel that you had permission to post the information because you had seen someone else do it too?

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Interviewing minors

- Adhere to state laws and district/school policies
- Conduct the interview in a safe, private space
- Straightforward and age-appropriate questioning
- Begin the interview with rapport building
- Documentation is critical

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May an investigation collect and rely on privileged information?

- Generally, only if a party waives the privilege
- *An institution generally should **not** attempt to pierce a subject's:*
  - Attorney-client privilege
  - Confidential health communications
  - Confidential counseling communications, etc.

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Example (1 of 2)

During the initial investigation interview, the complainant discloses that they went to the counseling center the very next morning after the alleged incident. The investigator asks: “What did you tell the counselor? It’s important for me to know this, as it could corroborate your account.”

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Example (2 of 2)

During the initial investigation interview, the complainant discloses that they went to the counseling center the very next morning. The investigator says: “Your conversations with the counselor are confidential, and you have the right to keep them confidential. I’m not going to ask about them, but you do have the right to waive confidentiality if you think there is something important that you want me to know.” The complainant asks, “Well, do you think I should waive confidentiality?” The interviewer responds, “I can’t answer that for you, but I do think that’s something you could discuss with your counselor.”

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What are other potential landmines for interviewers?

- Disproportionate questioning of one party over the other
- Being overly solicitous to one party
- Asking questions that create the appearance the investigator is a prosecutor or defense attorney
- Asking questions predicated on stereotypes or bias
- Revealing the likely outcome through questions
- Not addressing credibility issues through interviews

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Example

At the outset of the complainant's interview, the investigator says: "I just want to thank you for being here today. I know it takes a lot of courage and that this is likely very difficult for you. I have some questions that I need to ask, but if any of them make you uncomfortable, just let me know. I want you to be as comfortable as possible."

Before questioning the respondent, the investigator says simply: "I have a few questions for you. If anything I ask doesn't make sense, I'll expect you to let me know."

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Example

While questioning the respondent in a race discrimination case, the investigator says:

“You received training on the nondiscrimination policy, right?”

“And you remember from training that certain comments may constitute race discrimination, right?”

“And so you knew, when you made that comment to the complainant, that you would be discriminating against them on the basis of their race, right?”

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Difficult Issues in Questioning

- Remember to ask the difficult questions
- And questions that bear on credibility
- Although it may be difficult to ask certain questions, remember you are providing the parties and opportunity to share information supporting or refuting the allegations

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Example Questions for Parade Hypothetical

- Did you attend the parade?
- What did you observe about the parade and the involvement of the student organization? What could you see/hear?
- Did the student participants have signs? What did the signs say?
- Were any components of the organization's float concerning to you?
- Did the student participants make comments or engage in behaviors that you perceived to be targeting individuals of certain protected categories?
- How did the student organizations float impact you?

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Sample questions to assess credibility

"You previously said that you did not remember who Complainant was. However, you later mentioned that you remembered Complainant because Complainant always wore a "pinko" shirt. Can you please explain why you initially said you did not remember Complainant?"

"In your complaint, you stated that this incident occurred on September 3. During our initial interview, you mentioned this incident took place over the course of several weeks in November. Can you please specify what the date was?"

"When we initially spoke, you indicated that Respondent was aware of your veteran status because you discussed it in class on November 11 while sitting next to Respondent, who spoke of anti-military sentiments on that day. Respondent denies knowing your veteran status and attendance records indicate Respondent was not in class on November 11. Can you tell me more about your recollection?"

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How should interviews be recorded?

According to policy/procedure (consider consistent application or reasons for deviation)

A common practice is to take contemporaneous notes and promptly convert the notes into a coherent interview summary/memorandum

Audio recording with or without subsequent transcription is becoming more common for serious cases with the potential for litigation

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Example: Interview Practice

Jordan, a Black student originally from Nigeria in the College's Engineering Honors Program, has received accommodations for extended time on exams due to a documented learning disability. He is also the only international student in his advanced robotics seminar. During a group project, Dr. Reynolds, the course instructor, frequently singles out Jordan for criticism, often interrupting him and dismissing his ideas in front of the class. On one occasion, Dr. Reynolds comments, "Maybe engineering just isn't the right field for everyone, especially if you didn't grow up here," after Jordan presents his project proposal, while praising similar ideas from his classmates. *(continued on next slide)*

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Example: Interview Practice *(cont.)*

Despite consistently earning top grades and being nominated by his peers to lead the seminar's capstone team, Dr. Reynolds assigns the leadership role to another student, a white student born in the U.S., who has lower grades and less project experience. When Jordan asks for feedback, Dr. Reynolds tells him, "I just think someone who understands our way of doing things will be able to handle the pressure better."

Additionally, during a midterm exam, Dr. Reynolds refuses to allow Jordan to use his laptop and have extended time on an exam, and tells him, "You should be able to do this like everyone else." As a result, Jordan is unable to finish the exam.

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Example Questions for Complainant
(Subjectively and objectively offensive)

- **Tell me more about what Respondent said about your contribution to the group project?**
- **What did Respondent say about your future success in the program?**
- **What was your reaction to Respondent's comments?**
- **How did you feel after hearing these comments?**
- **How did Respondent's comments impact you?**

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Example Questions for Complainant
(Severe and pervasive)

- **Have there been any other interactions with Respondent that you found troubling?**
- **In as much detail as you can recall, tell me the specific language used by Respondent.**
- **Did Respondent make these statements during one conversation, or over the course of multiple conversations?**
- **Why do you think you were not selected by Respondent to lead the capstone team?**

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Example Questions for Complainant
(Limits or denies participation)

- **What impact did not receiving the special position appointment have on you?**
- **Did you have any additional classes with Respondent after Respondent made those comments? If so, did you continue to attend those classes?**
- **Has this impacted your experience in the Engineering Honors Program? In what way?**

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Non-Testimonial Evidence

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What is non-testimonial evidence?

- Video
- Photos
- Documents
- Emails
- Text messages
- Law enforcement records
- Social media posts
- Relevant objects (journals, drugs, devices)
- Information on comparators

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What are the sources of non-testimonial evidence?

- Parties
- Witnesses
- Institutional personnel and offices
- Online
- Third-party entities

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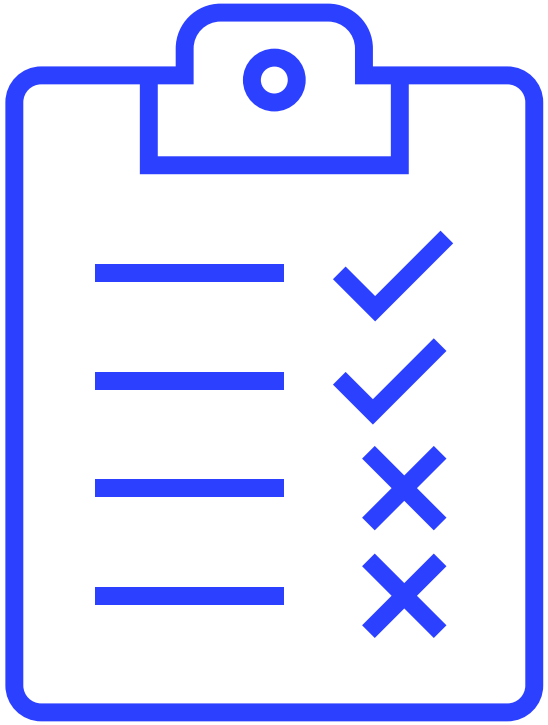
How do we document non-testimonial evidence?



- *Track:*
  - Where or from who did we get it?
  - When did we get it?
  - What form did we get it?

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Gathering Evidence on Comparators

- Type of non-testimonial evidence that may be used to determine if it is more likely than not that discrimination has occurred
- *Examples:*
  - Salaries
  - Promotions
  - Termination data
  - Team rosters
- Will likely require collaboration with other institutional departments and personnel
  - Only share as much information as is needed – be mindful of confidentiality

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Investigation Interview Scenario

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Scenario: Mock Interview

Jordan, a Black student originally from Nigeria in the College's Engineering Honors Program, has received accommodations for extended time on exams due to a documented learning disability. He is also the only international student in his advanced robotics seminar. Jordan reports that, during a group project, Dr. Reynolds, the course instructor, frequently singles out Jordan for criticism, often interrupting him and dismissing his ideas in front of the class. On one occasion, Dr. Reynolds comments, "Maybe engineering just isn't the right field for everyone, especially if you didn't grow up here," after Jordan presents his project proposal, while praising similar ideas from his classmates. *(continued on next slide)*

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Scenario: Mock Interview *(cont.)*

Jordan reports that, despite consistently earning top grades and being nominated by his peers to lead the seminar's capstone team, Dr. Reynolds assigns the capstone leadership role to another student, a white student born in the U.S., who has lower grades and less project experience. When Jordan asks for feedback, Dr. Reynolds tells him, "I just think someone who understands our way of doing things will be able to handle the pressure better."

Jordan also reports that, during a midterm exam, Dr. Reynolds refuses to allow Jordan to use his laptop and have extended time for the exam, and tells him, "You should be able to do this like everyone else." As a result, Jordan is unable to finish the exam.

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Breakout - Interview Preparation Questions

How will you prepare for your interview with Respondent?

What will you do to build rapport as the interviewer?

As the interviewer, how will you build out your outline?

As the interviewer, what documents will you review to prepare for the interview?

Are there any individuals you will want to talk to before Respondent?

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Questions/ Discussion

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Decision Making: Assessing the Evidence

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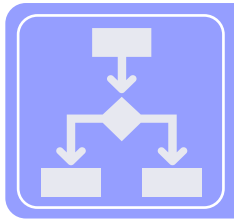
How do(es) decision maker(s) decide a case?

After investigation, decision maker(s) must deliberate and consider all the admissible testimony and admissible non-testimonial evidence

Evaluate evidence for relevance, weight and credibility

Resolve disputed material issues of fact under the standard of evidence adopted by the institution



Using the facts as found, apply the policy's definitions to those facts to determine whether a policy violation occurred

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“Standard of Evidence”

Measure by which a policy violation is determined

(As to each element of a violation, what needs to be shown?)

Set by policy (sometimes law, regulation, guidance)

E.g., Preponderance of the evidence (more likely than not)

Clear and convincing evidence

Beyond a reasonable doubt

Preponderance of the evidence most common

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How do we know when the investigation has "sufficient" evidence?

- Has the respondent admitted to the misconduct?
- Is it clear the material facts are undisputed?
- Is there definitive non-testimonial evidence?
  - If none of these apply, have reasonably available avenues of inquiry been exhausted considering the likely consequences of an adverse finding?

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Example

A university professor has views related to the conduct of a particular country. The university has received no complaints from students, employees, or others involved in university programs/activities about the professor, nor has it identified evidence that the professor is creating a hostile environment for students from that country. It has received numerous email "complaints" from outsiders alleging the professor is creating a hostile environment for students from the country based on national origin in relation to views expressed by the professor in the classroom. When the university follows up with these individuals, they do not respond.

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What is relevance of evidence?

- *Evidence is relevant if:*
  - It has a tendency to make **a fact** more or less probable than it would be without the evidence; and
  - The **fact is of consequence** in determining the action
- Relevance must be determined considering the form of violation alleged
- May be directly related but not relevant to deciding alleged policy violation
- *Evidence may be relevant but not considered: E.g.,* sexual history, privileged/protected information

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Example

Student accused anti-war Political Science Professor of discriminating against Student last term with a failing grade due to Student's status as a veteran of the War in Afghanistan after Student defended military action in class.

- **Witness says, "Student was arrested for domestic abuse this term."**
- **Professor explains that Student earned poor grades on assignments before Professor learned of Student's veteran status and on the multiple-choice final, such that Student "earned" the F.**

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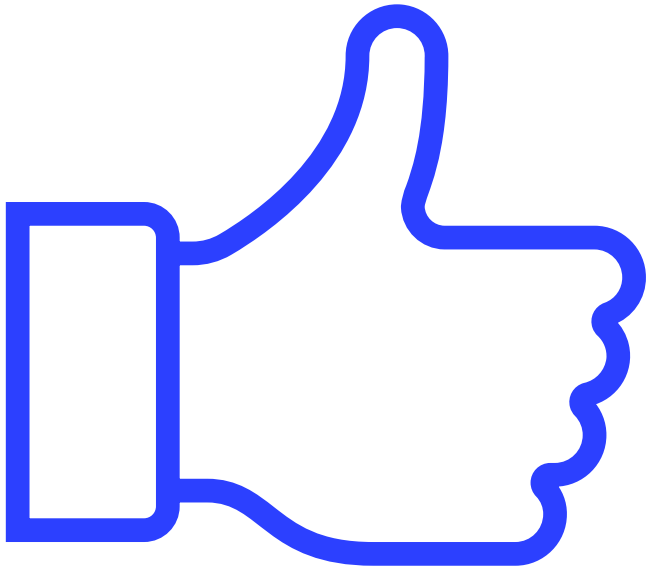
What is credibility of evidence?

- The extent to which something is believable, trustworthy, or convincing
- *Critical where:*
  - **Material** facts are disputed
  - Witnesses/evidence inconsistent on **material** facts
- Not necessarily binary/absolute



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How do we assess credibility?

- Plausibility—Believable?
- Corroboration—Other evidence?
- Consistency
- Demeanor
- Motive to falsify
- Contemporaneous
- First-hand knowledge
- Influence of others
- Bias (overt/unconscious)
- Behavior after the report

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Example

Emilio alleges an advisor of the politics club at California Public University infringed on Emilio's speech rights. Witness Rachel saw Emilio leaving the club meeting room and observed that Emilio was crying and appeared distraught. Rachel reported that Emilio left the room at approximately 11:25 a.m. Emilio recalls sending a text message to another friend right after leaving the room, telling the friend the club's professor advisor just "threatened to kick me off the club council if I didn't vote for _____ and stop challenging the advisor's bananas ideology in meetings."

Credibility considerations:

- **Did Rachel talk to Emilio about this investigation before the interview? (Bias, motive to falsify, or—even unconscious—influence)**
- **Is there evidence of the text message between Emilio and the friend? If so, when was it sent? (Consistency, corroboration)**
- **Is there any surveillance evidence showing Emilio crying outside the club room? (Consistency, corroboration)**

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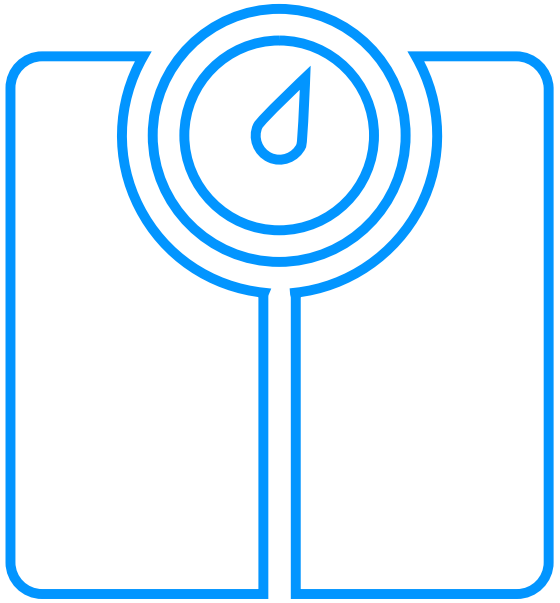
What is weight of evidence?

- Not all evidence has equal value
- Some evidence may be more reliable and probative (tending to prove a proposition) than other evidence
- Weight may vary depending on a range of factors, including credibility



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How do we assess weight?

- Unrefuted
- Objectively proven
- Corroborated
- Level of detail
- Expertise
- Direct vs. circumstantial
- Personal observation vs. general knowledge or hearsay
- Credibility

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Direct vs. Circumstantial

Direct — Actual evidence of a fact, circumstance, or occurrence proves a fact in question without presumption or inference

- ***E.g.,*** testimony of a witness who actually observed and perceived event in question (see, hear, touch)

Circumstantial (indirect) — Information which, based on logic or reason, is so closely associated with the fact to be provided that proof may be inferred

- ***E.g.***, a receipt suggesting a party was not where they claimed to be at a material, particular time

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Circumstantial

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Direct

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What is hearsay?

- *Hearsay* — Statement (written or oral) offered by someone other than the speaker, to prove fact in question
  - Longstanding evidentiary principle that hearsay has less weight than personal knowledge
  - Some hearsay is more reliable than other hearsay*, e.g.,*:
    - Statement contemporaneous with the event in question
    - Excitable statement uttered in the moment being perceived

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Example

A campus security officer testifies at a hearing about what a witness said to the security officer in relation to a discrimination-related security incident.

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Practical Points

- **Strict, court-like rules of evidence rarely apply in institutional investigation and hearing processes.**
- **In most cases, if evidence gathered in an investigation is ultimately irrelevant, privileged, or otherwise inappropriate for consideration in decision-making, it can generally be disregarded (and its treatment clarified in a file, report, or written decision).**

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Example: Weight

Witness testified they heard complainant call respondent by a discriminatory epithet outside a residence hall as witness was arriving. Witness reported clearly seeing the parties' faces and remarked to a friend about a Greek pledge pin the complainant was wearing on the complainant's ROTC uniform and how respondent had a nose ring. Witness testified they know the time was exactly 11:05 pm because witness remembers catching an Uber right as witness arrived at the residence hall, and witness's Uber app indicates the ride started at 11:05 pm.

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Other Evidentiary Considerations

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How do we assess "I don't remember"?

True loss of memory may occur due to, e.g.:

- Trauma
- Passage of time
- Lack of attention

Balance

- Memory loss alone does not equate to a lack of credibility
  - Recollection/testimony need not be linear
- Possible to remember some information and not other information
- Inexplicable memory loss as to adverse details, while memory of helpful details, may indicate a lack of credibility
- May go to weight

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Tricky Evidence

- Consult policies, procedures, and appropriate officials as needed

Medical, psychological, and other protected records	*Refusal to answer/testify*	*"New" evidence*
• Protected information generally not considered absent consent of protected party • Legal/regulatory restrictions may apply	• Generally, not in and of itself evidence • Negative inference **may/not** be permissible • Consider other available evidence	• May impact weight/credibility • May require additional investigation • Consider reason it is "new"

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Also Tricky – AI-Generated or Potentially Altered Evidence

Consider

- Unnatural lighting or shadows, blurry areas, inconsistent skin tone/texture/movement
- Inconsistencies
- Contrary evidence or inconsistency with other evidence
- Detection technology
- History of evidence (*e.g.*, metadata, circulated before investigation)
- Any relevant procedures (*e.g.*, for AI-detection, separate disciplinary procedures)

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Determination

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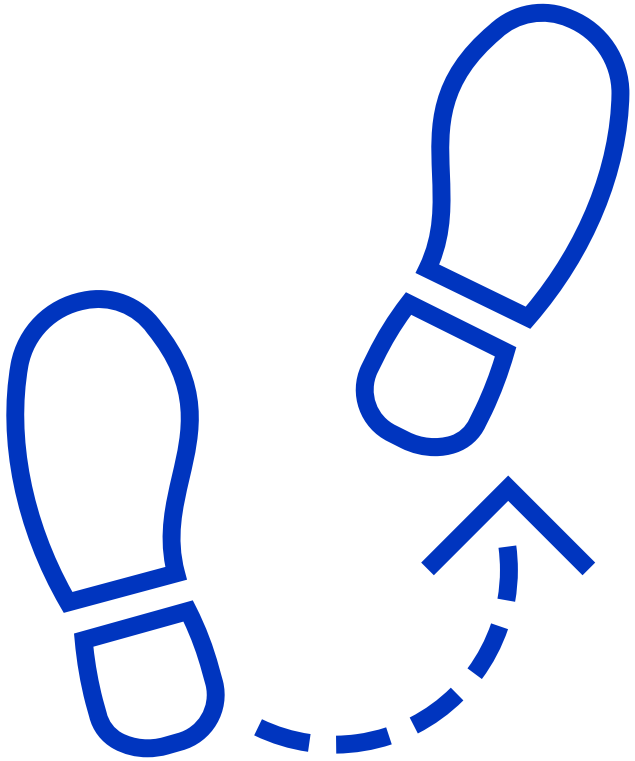
Determination

- Decision as to whether/not evidence demonstrates prohibited misconduct occurred under standard of evidence
- Moves matter to next procedural step
- Record of following process
- Documents fair process
- Provides parties and subsequent decision-makers (if applicable) with information



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Determination Scenario

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Scenario

- *Complainant:* Jesse international student and teaching assistant from Mexico
- *Respondent:* Dr. Lee, tenured Chemistry professor
- *Allegations:* Intimidating behavior and unprofessional conduct. Dr. Lee shouted at her during a lab meeting, belittled her research in front of students, and threatened to block her grant application based on her race/national origin
- Jesse reports the incident to her academic advisor, who, in turn, reports the incident to the Director of HR in accordance with the University's processes. The Director of HR determines an investigation is warranted given the allegations.
  - The Director of HR is responsible for assigning an investigator to the case and ensuring procedural requirements are met but is not to have any involvement in the fact-finding or decision-making. If the investigation results in a finding of policy violations, the respondent's supervisor is responsible for determining and issuing sanctions.

(continued on next slide)

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Scenario *(cont.)*

- *The Investigator interviews:* Complainant, Respondent, and two witnesses: Ms. Chen (a lab technician) and Mr. Smith (a graduate student)
- Dr. Lee proposes two additional student witnesses, but the investigator declines to interview them and does not explain the reasoning for not doing so in the investigation report
- During Ms. Chen's interview, she states: "I heard Dr. Lee raise his voice, but he apologized immediately and said he was under stress. He later offered to help with Jesse's grant application." In the summary of evidence shared with both parties, Ms. Chen's statement is summarized as: "Ms. Chen heard Dr. Lee raise his voice at Jesse." The original, full statement is not included.
- The investigator finds Dr. Lee violated University policy.
- Prior to sending the report to the parties, the Director of HR reviews the draft report and suggests changes to the findings section, including softening language about Dr. Lee's apology and subsequent offer to help.
- After the investigation, the Director of HR meets with Dr. Lee's Department Chair to discuss sanctions. *She references two prior cases and states:* "Given the pattern we're seeing, I think a written warning is too light; suspension is more appropriate."
- The Department Chair expresses concern about consistency and asks the Director of HR to draft the sanction letter, which the Director does, and sends it to Dr. Lee without copying the Department Chair.

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Breakout – Discussion Questions

Should the investigator have explained why the two students were not interviewed? If so, how?

What is problematic about the way Ms. Chen's statement was summarized and provided to the parties?

What should the investigator have done differently regarding evidence sharing and documentation?

What issues arise from the Director of HR's level of involvement in both the investigation and the sanctioning process?

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Questions/ Discussion

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Report Structure and Content

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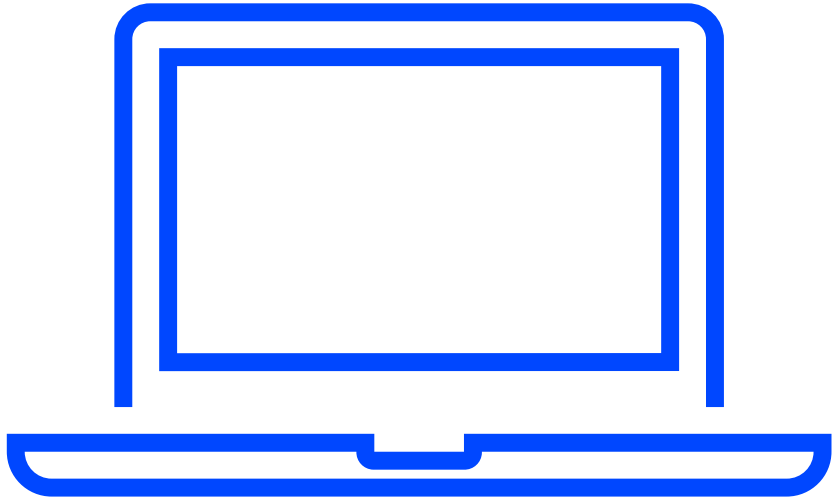
What is the purpose of an investigative report ?



- Outline/summarize the allegations of potential misconduct
- Describe a timeline of the investigation
- Fairly summarize relevant evidence
- Potentially include analysis and determination

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Who is our audience?

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Practical Point

- **Not all matters, or policies/procedures, require an exhaustive, detailed report. Consider institutional practice, policy/procedure, and resources; and consult other officials as needed to determine optimal approach.**

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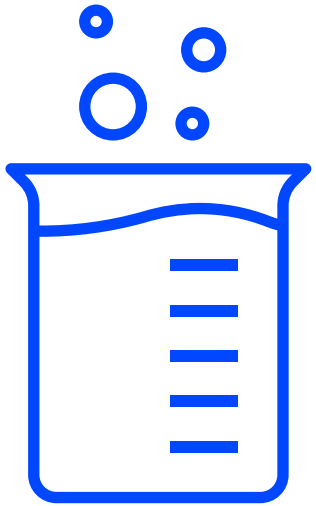
Critical Elements



- Preliminary case information
- History of the case
- Allegations/potential violations
- Applicable policies/procedures
- Evidence gathered/considered
- Standard of proof
- *(If applicable)* Evidence/Facts: Factual findings, credibility/weight assessments
- *(If applicable)* Decision maker:
  - Analysis and conclusion regarding responsibility
  - Sanctions
- Next steps (*e.g.*, hearing, procedures/grounds for appeal)

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Example

Ishu Student alleges that Angel Supervisor, Ishu's work-study supervisor who is also a student, engaged in race-based harassment in the form of "jokes" in the office and private Snapchat stories shared with work-study colleagues. In response, Angel:

- **(a) disputes the allegation that the alleged jokes and stories were related to race and**
- **(b) offers that, in any case, they were not sufficiently serious to significantly interfere with a reasonable person's ability to participate in or benefit from institution's programs or activities, or their terms or conditions of employment.**

This report summarizes the investigation of this matter and all relevant evidence, as specified in the University's Race-Based Harassment Policy.

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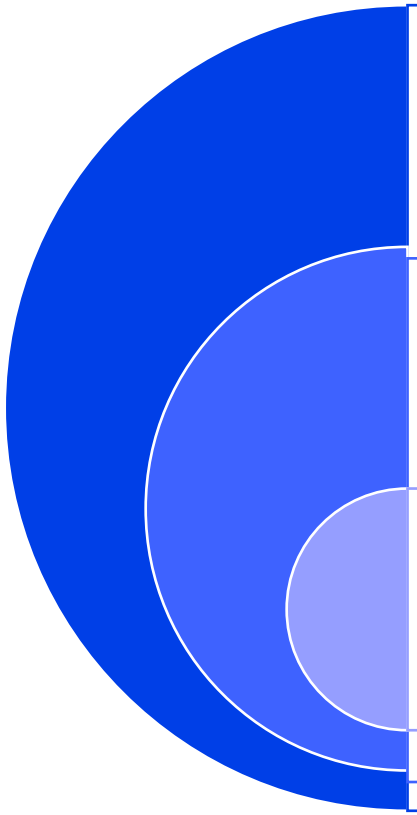
Summarizing Allegations



Goal: identify and articulate what part of complainant's story, if true, is a violation of the institution's policy

Focus on who, what, where, when, how

Match with notice

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Practical Point

The alleged misconduct identified in the investigation report should align with the that identified in the initial written notice (and any supplemental notices) provided to the party(ies) pursuant to procedural notice requirements.

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Applicable Policies & Procedures

Reference all applicable policies and procedures, including specific language which is pertinent to the allegation

- *E.g.,* include relevant definitions

Attach full copy of current policy and procedures to report

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Example – Applicable Policy Discussion

Ishu's complaint implicates potential harassment based on race, as defined by the Racial Harassment and Harassment policies. Key definitions are below, and the full policies are attached as Appendix X.

Harassment

"A form of discrimination that occurs when unwelcome verbal, physical, visual, electronic, or other conduct, based on an individual's or group's protected status, is sufficiently serious to significantly interfere with their ability to participate in or benefit from the institution's programs or activities or with their terms or conditions of employment."

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History of the case

How did the institution respond to the report?

- *E.g.*, rights and options provided, notices provided

When, how, and where were parties and witnesses interviewed?

Provide status

- *E.g.*, parties given access to evidence, opportunity to comment, others consulted, key timeline dates

Explain any apparently unreasonable delays

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Example

10/3/2024: Complaint filed by Complainant
10/7/2024: Initial written notice provided to parties
10/10/2024: Interview of Complainant
10/11/2024: First attempt to schedule Respondent interview
10/14/2024: Second attempt to schedule Respondent interview
10/16/2024: Third attempt to schedule Respondent interview
10/17/2024: Interview of Respondent
10/31/2024: Interview Witnesses A, B, and C
11/15/2024: Evidence file provided to parties and advisors
11/25/2024: Responses to evidence file received from both parties

**** May note dates/source of evidence collection here, or in other format (e.g., Appendix table of contents or footers)***

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Report Template Excerpt

Relevant Policy Provisions

[INSERT REFERENCE TO OR QUOTE OF KEY RELEVANT POLICY PROVISIONS (*e.g.*, definition of harassment, retaliation, etc.]; ATTACH COPY OF RELEVANT POLICY.]

Procedural Steps

[INSERT A DESCRIPTION OF THE PROCEDURAL STEPS TAKEN UPON RECEIPT OF THE FORMAL COMPLAINT, THROUGH ISSUANCE OF THE WRITTEN DECISION, INCLUDING NOTIFICATION TO THE PARTIES, INTERVIEWS WITH THE PARTIES AND WITNESSES, METHODS USED TO GATHER NON-TESTIMONIAL EVIDENCE.]

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Evidence Gathered/Considered

Facts that matter	***Goals***	***How to do this?***
• Consider elements of alleged policy violation • Which facts are relevant to each element? • Which are disputed and undisputed?	• *Investigators:* identifying disputed /undisputed material facts • *Decision makers:* reaching resolution of disputed material facts	• Show your work • Explain as needed (*e.g.*, if emphasized by a party) irrelevant information not considered • *Decision makers*: Explain your credibility assessments

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How do we summarize party and witness statements and evidence?

Consider whether witness-by-witness, chronology, topic, or other format best aligns with policy, procedure, and clarity considerations

Summarize statements and evidence related to *material* facts

If a transcript of the interview or a full memorandum of interview is included, summary can be relatively brief

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Describing Statements and Quotations

- *Consider point of view:*
  - "I" vs. "the investigator"
  - *Clarify outside perspective/objectivity:* "Complainant was scared" vs. "Complainant reported feeling scared"
- *Quotations:*
  - Can convey speaker's unique perspective
  - Use care to indicate who is speaking
  - Consider context:
    - *Witness Stacy described the relationship as follows: "…"*
    - *When asked about X, Respondent said, "…"*

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Agree or Disagree?

Investigator: **"Summaries of factual information should always be divided by interview so that it is clear who provided what information."**

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Approaches to Evidence

Excerpt into report

Include as appendix/exhibit

- Cross-reference key portions

Other compilations as indicated by particular matter

Include all evidence vs. all directly related evidence vs. only relevant evidence

- Consider policy/procedure/practice
- Consider audience that will receive evidence
- Maintain complete file regardless

Redaction

- May be appropriate for sensitive, irrelevant information
- For relevant information, consider redaction with key, anonymous identifiers
- Maintain unredacted copies

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Example

Ishu provided dozens of screenshots of stories that Angel sent to the group during office hours and text correspondence between Ishu and others commenting on Angel's conduct. Those screenshots are included as Exhibits 1-53.

Of note, Ishu reported sending one of the screenshots (Exhibit 20) to a friend shortly before noon on October 15, in which Ishu wrote, in pertinent part: "You won't believe what Angel said to me today. Rude. F** [*spelled out*] straight up called me a '**********' *[spelled out*]. CALL ME." The friend also showed the Investigator the same text message on the friend's phone, but declined to share a screenshot; the Investigator did observe the friend open it directly from what appeared to be the messages app on the friend's iPhone.**

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What are some key tips?

- Avoid sanitizing parties' and witnesses' language; use quotes if needed
  - Avoid euphemisms that create ambiguity
- If credibility observations are included, explain the basis for them
- *Avoid speculation* – if something is unknown/undeterminable, state as much (if material, consider further investigation)
- *Use objective, formal writing:*
  - Complete sentences with sound grammar and correct spelling
  - Avoid contractions
  - Consistent tense
  - Professional font with professional margins
  - Consistent use of headings to guide reader
- Use a standard form and format where possible

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Practical Point

Have another person consider/proofread the investigation report before it is finalized. (In most cases/preferably, not someone who is otherwise involved.)

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Example

Ishu described that Angel made racist remarks in-person and online.

vs.

Ishu stated that, on four occasions, Angel made racist remarks. Per Ishu, these included:

- **On October 15, Angel said [*statement*] in front of [*people present*]. Ishu reported that, immediately thereafter, Ishu sent a friend the text message provided at Exhibit 20.**
- **….**

Ishu also reported that Angel's Snapchat videos included several instances of race-based harassment on occasions. Ishu reported the following as to specific exhibits, describing each as a screenshot of a video posted to a work-study private Snapchat video group that included all work-study students in the Office:

- **Exhibit 23: An October 1 video in which Angel "ranted" about a mistake made by Ishu and another student worker.**
- **Exhibit 35: A November 3 video in which Angel commented that "student workers are nuts!"**
- **Exhibit 41: A November 4 video in which Angel said, "I don't wanna offend anybody but y'all are crackers."**

Ishu reported there were "many, many" other posts of which Ishu does not have screenclips. Ishu stated these included one in which Angel commented on Ishu's skin tone; Ishu did not recall the specific comment but said Angel stated something to the effect of "I just love that color of skin" in a sarcastic tone. Ishu did not recall other specific statements, but said there were others.

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Example

Ishu said that Ishu and other students could not stand going to work.

vs.

Ishu reported that Ishu and another student, who is also [*race*], missed work due to Angel's comments. Ishu's roommate recalled that Ishu frequently commented on Angel's racism, and how Ishu just wanted to do the job without having to deal with it. Ishu said the work-study job provided money Ishu used to buy groceries and pay bills. Ishu provided a copy of an appointment confirmation with the counseling center (Exhibit 45), which Ishu said was made to address anxiety and sleeplessness over having to choose between earning money and "putting up with" Angel in the Office.

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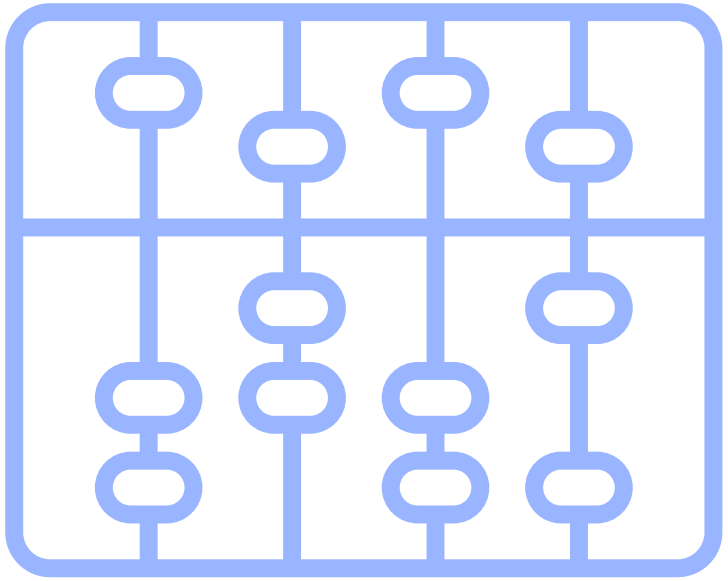
Assessment of credibility



- *Describe your reasoning:* Line up *facts* relevant to credibility
- Consider relevant factors (*e.g.*, plausibility, motive to falsify, etc.)

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Example

During the interview, Angel appeared highly credible.

vs.

Angel was consistent throughout discussions with the Investigator as to the descriptions of the videos and verbal statements that Angel made. Angel provided copies of what Angel reports are all videos Angel posted to Snapchat in October and November (Exhibits 51-60). Angel did not recall when each was posted (stating that Angel could not see the history). While denying that the videos were intended to reference race, Angel conceded that "someone" might misinterpret them as referring to race, though Angel believes that is a stretch.

Angel denied using the racial epithets described by Ishu in the text message at Exhibit 50, or making other comments in the office that referred to race inappropriately. As detailed above, one witness in the Office recalled hearing Angel make statements similar to those reported by Ishu about skin color, but did not recall racial epithets such as those alleged by Ishu.

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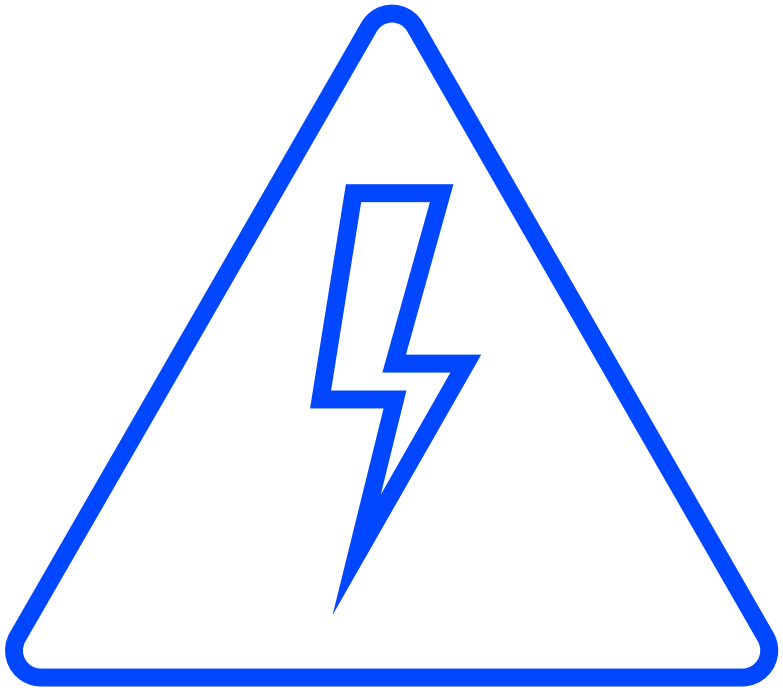
What are some other landmines to avoid?

- Injecting stereotypes or bias
- Including external facts not derived from the investigation
- Including ethical or moral judgments
- Including prohibited or improper content



Example

In this investigator's experience, it is common for persons who have been close friends for a long time to bend the truth and/or lie to cover up for their friends. Therefore, the investigator generally deems the testimony of Ishu's friends to be less credible than other witnesses who are not Ishu's friends.

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Example

According to information the investigator independently located on the website www.healthfacts.com a person who already suffers from generalized anxiety disorder may experience exacerbated injury from comments about their protected status. Therefore, the investigator concludes it is likely that Respondent's conduct had a particularly injurious effect on Complainant who presented as anxious.

vs.

Complainant reported a history of trauma. Complainant offered a written statement from a licensed healthcare provider stating that Complainant has generalized anxiety disorder which was exacerbated after the encounter with Respondent.

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How should you address the parties' criticisms of the investigation?

Incorporate new or salient points as necessary

If a party demanded more interviews or collection of other evidence, and you elected not to pursue, explain why

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Example

Ishu complained that the length of this investigation was longer than the target noted in the policy, and that this report should have issued sooner. The Investigator notes that Ishu submitted the complaint during the study days before finals, after Angel had gone abroad for several weeks and key witnesses were gone from campus during break. Given the gravity of the allegations, the Investigator determined it was important to conduct in-person interviews, if possible, to best assess credibility. This necessarily delayed the investigation into the next calendar year.

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Example

Together, Respondents to the allegation that they engaged in disruptive conduct by protesting on January 6 identified 18 witnesses, including some faculty members. These witnesses would purportedly testify variously that, for example, Respondents are generally animated in expressing themselves but never "yell"; that they respect the operations and rules of the College; and that they never intend to harm anyone. However, because there was no indication any of these 18 witnesses had personal or direct knowledge of the events on January 6, the Investigator determined that these witnesses would not have relevant information.

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“Missing” Information

- *Explain why certain information not included:*
  - Not available
  - Unable to identify
  - Asked but not answered
  - Party/witness declined to participate/submit
  - Legally protected
- *Describe attempts and reasoning to document thorough investigation*

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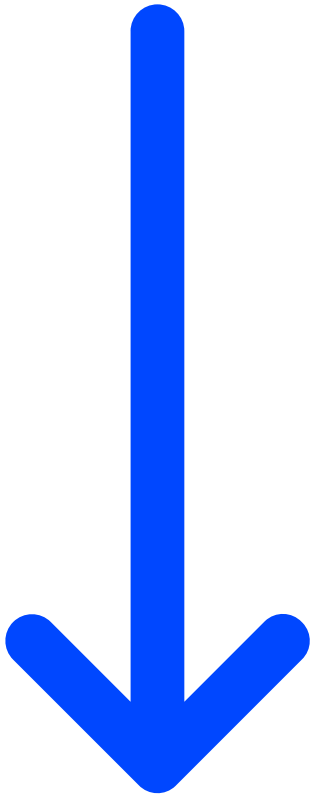
How should we structure of the analysis section?

- Will vary
- *Consider following (C)IRAC form:*
  - (Conclusion, briefly)
  - Issue (restate question that must be answered)
  - Rule (policy/procedure elements)
  - Analysis (resolving factual disputes under the standard of evidence to the rule and application of those facts to the rule)
  - Conclusion (simple, definitive statement as to whether the policy standard was violated)



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Example

Considering the evidence summarized above, the Decision Maker must determine whether a preponderance of the evidence supports a finding that Angel engaged in prohibited racial harassment of Ishu via verbal statements and Snapchat videos.

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Example

Thus, the Decision Maker finds that a preponderance of the evidence indicates that:

- **Respondent Student, an athletics employee, posted from the University's athletics social media account—immediately after the announcement of the verdict in which another institution was found responsible for religious discrimination against a student athlete—that "Some people need to stop blaming their faith for poor performance";**
- **Respondent demanded that newly recruited student athletes spray paint [religious epithet] on Complainant's door;**
- **Respondent intentionally violated team rules in practice, injuring Complainant; and**
- **Complainant immediately thereafter took a leave from the team.**

As such, the Decision Maker finds it is more likely than not that Respondent engaged in religious harassment by [*insert language mimicking definition of prohibited religious hostile environment harassment from relevant policy(ies)*]. Therefore, Decision Maker concludes that Respondent violated [*policy(ies)*] by engaging in religious discrimination against Complainant.

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Report Template Excerpt

Findings of Fact

[IDENTIFY UNDISPUTED MATERIAL FACTS, DISPUTED MATERIAL FACTS AND PARTIES' POSITIONS ON THEM, FINDINGS OF FACT, AND THE BASIS FOR THOSE FINDINGS. INCLUDE CHRONOLOGY OF EVENTS (*e.g.*, in bulleted format); DISCUSS FINDINGS AS THEY RELATE TO EACH ALLEGATION.]

Determination

[AS APPROPRIATE UNDER POLICY, "In light of the findings described in Section _____, I have determined, by a preponderance of the evidence, that [INSERT NAME] [violated/did not violate] the [COLLEGE/UNIVERSITY]'s [POLICY"]. [PROVIDE DETERMINATION AND DISCUSSION OF RATIONALE FOR EACH ALLEGED POLICY VIOLATION].

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Questions/ Discussion

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Report-Writing Scenario

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Scenario: Hypothetical Complaint

Jordan, a Black student originally from Nigeria in the College's Engineering Honors Program, has received accommodations for extended time on exams due to a documented learning disability. He is also the only international student in his advanced robotics seminar. Jordan reports that, during a group project, Dr. Reynolds, the course instructor, frequently singles out Jordan for criticism, often interrupting him and dismissing his ideas in front of the class. On one occasion, Dr. Reynolds comments, "Maybe engineering just isn't the right field for everyone, especially if you didn't grow up here," after Jordan presents his project proposal, while praising similar ideas from his classmates.

Jordan reports that, despite consistently earning top grades and being nominated by his peers to lead the seminar's capstone team, Dr. Reynolds assigns the capstone leadership role to another student, a white student born in the U.S., who has lower grades and less project experience. When Jordan asks for feedback, Dr. Reynolds tells him, "I just think someone who understands our way of doing things will be able to handle the pressure better."

Jordan also reports that, during a midterm exam, Dr. Reynolds refuses to allow Jordan to use his laptop and have extended time for the exam, and tells him, "You should be able to do this like everyone else." As a result, Jordan is unable to finish the exam.

Jordan recalls confiding in his classmate, Priya, who says, "Honestly, you're probably just being too sensitive. Dr. Reynolds is tough on everyone, but maybe he just doesn't think international students are prepared for this kind of work." Jordan has also overheard other students making comments about him being a "diversity pick" for the program and questioning whether international students should be in the honors program at all.

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Issues

Failure to implement approved religious and disability accommodations

Race and national discrimination

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Complainant's Statements

- ***Complainant's Statements***
  - I liked Dr. Reynold's class a lot until they refused to give me extended time on my exam. I did OK on prior quizzes, but knew that this material for the October 6th exam was tough and I would need the extra time to focus.
  - The accommodations office approved my accommodation, and I'm pretty sure they told Dr. Reynolds that I needed the extended time. But I never got it.
  - No, I never talked to Dr. Reynolds about my accommodation until we met in Dr. Reynold's office.
  - We talked about it in Dr. Reynold's office, I think it was in October. But I don't really remember what I said because I was pretty upset about my grade.

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Respondent's Statements

- ***Dr. Reynold's Statements***
  - Yes, I recall this incident because the student was very upset about it.
  - I wasn't even aware he had an accommodation.
  - I only become aware of a student's accommodation if they hand me a letter notifying me about it. He never gave me one, I am sure of that.
  - Students have to schedule their own exams with extended time with the testing center and I have no part in that. If he didn't schedule it, that's on him.
  - Jordan came to my office to talk about his grade on October 14th. I remember it clearly because it was my anniversary and it was unusual to have a student yelling at me like that.
  - This conversation was the first time I'd ever heard that he had an accommodation. He'd been doing great in class, so I had no idea.

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Draft Report –Allegations Re: Dr. Reynolds

Complainant, a student, had an accommodation for class. Complainant claims that Respondent did not provide his accommodation during a test. Complainant alleged disability discrimination based on the Respondent's failure to accommodate.

Complainant said that Respondent was aware that Complainant needed his accommodation. Respondent denies any knowledge of Complainant's accommodation and claims that it was the Complainant's responsibility to coordinate his accommodation. Complainant and Respondent agree that they spoke about the test accommodation in Respondent's office, but Complainant does not recall what was said. Respondent stated that Complainant was angry during the conversation.

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Discussion

- **How can we make this evidence section better?**

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Improved Version – Allegations Re: Dr. Reynolds

Jordan stated the accommodations office approved his request for extended time and that he believed Dr. Reynolds was notified of this accommodation. However, Jordan did not receive the extended time on the exam and did not recall directly discussing the accommodation with Dr. Reynolds prior to the exam. Jordan remembered meeting with Dr. Reynolds in the professor's office sometime in October to discuss his grade, but, due to being upset about the situation, did not recall the details of that conversation.

Dr. Reynolds, on the other hand, stated that she was not aware of Jordan's accommodation prior to the October 14th meeting in her office, which she remembered clearly because it coincided with her anniversary and because Jordan was visibly upset. Dr. Reynolds asserted that she only becomes aware of a student's accommodation if the student provides a letter from the accommodations office, which she stated Jordan never did. Dr. Reynolds further explained that students are responsible for scheduling their own exams with extended time through the testing center, and that she does not play a role in that process. According to Dr. Reynolds, the October 14th meeting was the first time she learned that Jordan had an accommodation, and she had not previously been aware due to Jordan's strong performance in class.

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Summarizing Interview Statements

- Be specific
- Attempt to be clear about what was reported vs. what happened
- Use quotations to convey context
- Consider cross-referencing transcripts or more detailed summaries

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Example

Ellie had three drinks, so did not remember much.

vs.

Ellie recalled that she had three drinks before seeing the parties, and is a "lightweight" with alcohol and was not paying attention, so she did not remember much about the incident.

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Complainant's Statements

- Jordan reported that during the group project phase of his advanced robotics seminar, he felt repeatedly singled out by Dr. Reynolds. According to Jordan, whenever he tried to contribute ideas during group discussions, Dr. Reynolds would cut him off or redirect the conversation to other students. Jordan recalled that, after he presented his project proposal on October 3rd, Dr. Reynolds said, "Maybe engineering just isn't the right field for everyone, especially if you didn't grow up here." Jordan interpreted this as a reference to his background as an international student from Nigeria. Jordan also noted that, immediately after making this comment, Dr. Reynolds complimented two of his classmates for their "innovative thinking," even though their suggestions were similar to his own.
- Jordan further stated that after class, several students approached him and expressed surprise at Dr. Reynolds's remarks, with one classmate saying, "I can't believe she said that to you." Jordan said he felt humiliated and discouraged from participating further in class discussions. He also recalled that, in a later group meeting, Dr. Reynolds asked him if he was "having trouble keeping up with the language or technical terms," despite Jordan's strong academic performance.

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Respondent's Statements

- Dr. Reynolds recalled the group project presentations differently. She stated that she provides constructive feedback to all students and does not intend to single anyone out. Regarding Jordan's presentation, Dr. Reynolds remembered saying, "Engineering is a challenging field, and it's important for everyone to keep working on their communication and technical skills." She denied making any reference to Jordan's background or international status, and specifically denied saying, "Especially if you didn't grow up here." Dr. Reynolds explained that she often encourages students to learn from one another's diverse experiences and ideas, and that her comments were meant to motivate Jordan and the group to refine their proposals.
- Dr. Reynolds acknowledged that she praised other students' ideas after Jordan's presentation, but stated that this was because their proposals addressed some of the technical issues she had raised earlier in the semester. She also recalled asking Jordan if he needed clarification on any technical terms, but said this is a standard question she asks all students, particularly when discussing complex robotics concepts.
- Dr. Reynolds stated that she was not made aware of any concerns from Jordan or other students following the class, and that her intention was always to foster a supportive and inclusive learning environment.

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Witness Accounts

- Several students who were present during the October 3rd project proposal presentation corroborated Jordan's account of the incident. Three students independently recalled Dr. Reynolds making a comment along the lines of, "Maybe engineering isn't for everyone, especially if you didn't grow up here." One student, Mark, stated, "I remember Dr. Reynolds saying something about how it can be harder for people who aren't from here to keep up, right after Jordan's presentation. It definitely sounded like she was talking about Jordan being from Nigeria."
- Another student, Priya, reported that she and two classmates discussed the comment immediately after class and agreed that it was inappropriate and directed as a criticism of Jordan's presentation linked to his status as an international student. Priya also recalled that Dr. Reynolds had, on at least two other occasions, questioned Jordan about whether he was "familiar with how things are done here" or if he "needed help understanding the American approach to engineering." ***(continued on next slide)***

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Witness Accounts *(cont.)*

- A third student, Alex, said, “I noticed Dr. Reynolds seemed to be a lot more critical of Jordan compared to the rest of us, and she made a couple of comments that made me uncomfortable, like asking Jordan if English was his first language during a technical discussion.”
- No students interviewed recalled Dr. Reynolds making similar remarks to other students regarding their backgrounds or language abilities.

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Draft Determination

It is more likely than not that Dr. Reynolds made a derogatory comment based on Jordan's national origin. Jordan reported that Dr. Reynolds singled him out during class and, following Jordan's project proposal on October 3rd, stated, "Maybe engineering just isn't the right field for everyone, especially if you didn't grow up here," which Jordan interpreted as a derogatory reference to his Nigerian background. Dr. Reynolds denied making any comments related to Jordan's national origin and maintained that her feedback was intended to be constructive and motivational. However, several student witnesses corroborated Jordan's account, recalling Dr. Reynolds making a similar comment about it being harder for people who "aren't from here" immediately after Jordan's presentation. Given the consistency and specificity of the witness accounts, the preponderance of the evidence supports a finding that Dr. Reynolds' statements were derogatory and based on Jordan's national origin.

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Discussion

Once we make this finding, what additional issues need to be analyzed in order to make a determination about whether the comments created a hostile environment based on national origin?

What additional facts are needed? What might be sources for these facts?

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Discussion

What about the adverse treatment allegation related to the capstone project?

What other facts are needed? What are sources for these facts?

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Example – Adverse Treatment Determination

During the investigation, it was revealed that the capstone leadership position was historically given to the student with the highest grades or the unanimous nomination of the group—both criteria that Jordan met. Peer evaluations submitted as part of the selection process indicated strong support for Jordan's leadership, citing his technical skills, collaborative approach, and experience managing team projects. In interviews, several students expressed confusion and disappointment at the decision, with one student offering, "We all expected Jordan to lead. He was the most qualified by far."

When asked to explain her decision, Dr. Reynolds was unable to provide any documentation or specific examples of why the selected student would be better suited for the position, other than vague references to "fit" and "understanding our way of doing things." Dr. Reynolds did not cite any formal criteria or performance concerns regarding Jordan, and Dr. Reynolds did not identify any issues with Jordan's prior work or leadership abilities. *(continued on next slide)*

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Example – Adverse Treatment Determination *(cont.)*

Emails provided by witnesses showed Dr. Reynolds had previously described Jordan as "very capable but sometimes struggles with the American approach to teamwork." The investigation did not produce any evidence of such struggles in peer or instructor feedback offered as part of the course, or in Jordan's grades, which included full points for teamwork as well as contributions to managing one team project.

It is undisputed that Jordan experienced adverse treatment in the form of being denied an academic opportunity. Considering the totality of the evidence, which included peer assessments and grades indicating he was the most qualified of the candidates under consideration, the lack of a non-discriminatory rationale from Dr. Reynolds, and Dr. Reynold's statements referencing Jordan's national origin, the investigator concludes it is more likely than not that Dr. Reynolds denied the capstone leadership position to Jordan due to his national origin. As such, the preponderance of the evidence indicates that Dr. Reynolds violated the Nondiscrimination Policy.

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Sample Notice of Outcome

This letter is to notify you of the outcome of the investigation of the complaint filed by [INSERT NAME] that [INSERT NAME] engaged in discrimination/harassment in violation of the College's [Policy].

[INSERT SUMMARY OF ALLEGATIONS AND INVESTIGATION]

[INSERT THE DETERMINATION OF WHETHER, BY A PREPONDERANCE OF THE EVIDENCE, A VIOLATION OF THE ANTI-HARASSMENT POLICY OCCURRED]

[INSERT SANCTIONS/REMEDIAL MEASURES IMPOSED – note: Sanctions/Remedial Measures that are put into place that affect one party but do not directly affect the other should be redacted from the letter going to the unaffected party.]

All parties are reminded that they must abide by the non-retaliation clause found in [Policy]. Retaliation is a separate violation of the [Policy] and, if a report of such is substantiated, will result in disciplinary consequences.

Under the [Policy], both the complainant and respondent have the right to appeal this determination. The appeal procedures are outlined in the [Policy], which is attached for your review. If you have any questions regarding these appeal procedures, please contact me.

Please contact me if you have any questions regarding the content of this letter.

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Questions/ Discussion

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Takeaways

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Concluding Questions

What have been some of your takeaways from this training?

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Big Picture

- Recognize applicable law, guidance, and policies, especially elements informing investigation (procedures, scope, definitions, information-gathering)
- Identify your role and collaborate with other officials and departments as appropriate
- Conduct appropriately prompt, fair, and thorough investigation
- Gather evidence (testimonial and non-testimonial)
- Document everything, including through clear, thorough reports that consider your audience(s)

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