

# Grievance Pool and Title IX Team Annual Training

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ARKANSAS TECH UNIVERSITY

AUGUST 17 AND 18, 2020

# Roadmap

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- Policy Overview
- Confidentiality, Resources, and Remedies
- Investigations Overview
- Institutional Procedures Overview
  - Terminology
  - Force, Incapacity, Consent
  - Disparate Treatment and Impact
  - Weighing Evidence
  - Relevance
  - Preparing for the Hearing
- Rights of Parties
- Sanctions
  - Rendering a Finding
  - Generating a Rationale
  - Appeals
- Questioning, Due Process, Objectivity
  - Implicit Bias
  - Fairness, Equity, and Due Process
  - Questioning
  - Impartiality and Objectivity

# Training Outcomes

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**As a result of attending this training, participants will be able to:**

- List types of harassment and discrimination prohibited by the Equal Opportunity, Harassment (Sexual Misconduct), and Nondiscrimination Policy and Procedures
- Recognize and understand the importance of the definitions of prohibited behaviors in the Policy
- Explain the three critical questions in harassment (sexual misconduct) complaints: force, incapacity, consent
- Understand how credibility relates to evidence
- Articulate the preponderance standard when weighing evidence

# Welcome and Policy Overview

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AMY PENNINGTON

ASSOCIATE VICE PRESIDENT/DEAN OF STUDENTS AND TITLE IX  
COORDINATOR



# Title IX Defined

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Title IX of the Education Amendments of 1972 prohibits discrimination based on sex in education programs and activities that receive federal financial assistance.

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving federal financial assistance.”

20 U.S.C. § 1681 & 34 C.F.R. Part 106 (1972)

# Types of Discrimination Under Title IX

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- Harassment (Sexual Misconduct);
- Failure to provide equal opportunity in athletics;
- Discrimination in a school's science, technology, engineering, and math (STEM) courses and programs;
- and discrimination based on pregnancy.

# Harassment (Sexual Misconduct) Includes...

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- Sexual Harassment
  - Quid Pro Quo
  - Hostile Environment
- Unwelcome conduct, determined by a reasonable person, to be so severe, and pervasive, and, objectively offensive, that it effectively denies a person equal access to ATU's educational program or activity.
- The "Big Four" (VAWA Sect. 304)
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

\*Sexual Exploitation

# Government Oversight of Title IX

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- The Office for Civil Rights (OCR) under the U.S. Department of Education is responsible for establishing the compliance standards to be applied in investigations and enforcement of Title IX regarding harassment (sexual misconduct).
- OCR standard indicates that upon receipt of **notice**, the Recipient (ATU) must take immediate and appropriate steps to investigate what occurred and take prompt and effective action to end the harassment, remedy the effects, and prevent the recurrence.

Office for Civil Rights (OCR):  
U.S. Department of Education  
400 Maryland Avenue, SW Washington, D.C. 20202-1100  
Customer Service Hotline #: (800) 421-3481  
Facsimile: (202) 453-6012  
DD#: (877) 521-2172  
Email: [OCR@ed.gov](mailto:OCR@ed.gov)  
Web: <http://www.ed.gov/ocr>

Little Rock Area Office  
820 Louisiana Street, Suite 200  
Little Rock, AR 72201  
Phone: 1-800-669-4000  
Facsimile: 501-324-5991  
TDD#: 1-800-669-6820

For complaints involving employees:  
Equal Employment Opportunity Commission (EEOC)  
1-800-669-4000 or <https://www.eeoc.gov/>



# Policy on Nondiscrimination

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ATU adheres to all federal and state civil rights laws and regulations prohibiting discrimination in public institutions of higher education.

ATU does not discriminate against any employee, applicant for employment, student, or applicant for admission on the basis of:

Color, sex, sexual orientation, gender identity, race, age, national origin, religion, veteran status, genetic information, disability, or any other protected category under applicable local, state, or federal law, including protections for those opposing discrimination or participating in any grievance process on campus or with the Equal Employment Opportunity Commission.

Policy covers nondiscrimination in both **employment** and access to **educational** opportunities.

# Policy on Disability Discrimination and Accommodation

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- ATU is committed to full compliance with the Americans With Disabilities Act of 1990 (ADA), as amended, and Section 504 of the Rehabilitation Act of 1973, which prohibit discrimination against qualified persons with disabilities, as well as other federal and state laws and regulations pertaining to individuals with disabilities.
- The ADA also protects individuals who have a record of a substantially limiting impairment or who are regarded as disabled by ATU, regardless of whether they currently have a disability. A substantial impairment is one that significantly limits or restricts a major life activity such as hearing, seeing, speaking, breathing, performing manual tasks, walking, or caring for oneself.

# Notice of Harassment and Discrimination

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## Notice to ATU: Actual Knowledge

### *“Responsible Employees”*

- Employees at ATU who are required to report actual or suspected discrimination or harassment to the Title IX Coordinator immediately.
- Responsible Employees include: President, Chancellor, Vice Presidents, Chief Officers, Associate Vice Presidents, Assistant Vice Presidents, Academic Deans, Academic Department Heads and Program Chairs, Dean of Students, Associate Deans, Assistant Deans, Area Coordinators, Athletic Director, Head Coaches, Assistant Coaches, Faculty Advisors for Student Groups, Employees in the Department of Public Safety, Resident Directors, Resident Assistants.

# Notice of Harassment and Discrimination

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## Notice to ATU: Actual Knowledge

*“Officials with Authority” (OWAs)*

- “Officials with the authority to institute corrective measures on the recipient’s behalf”
- Charges ATU with actual notice and triggers our response obligation

Intersection of roles:

- Responsible Employees
- OWAs
- Campus Security Authorities (Clery)
- Mandatory Reporters

# Jurisdiction

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## **Harassment (Sexual Misconduct) Occurring in a School's "Education Program or Activity" and "in the United States"**

- Title IX mandatory dismissal
- Process A and Process B
- Student Code of Conduct
  - Off-Campus Conduct
  - Violence Risk Assessment through Care Team

# Confidentiality, Resources, & Remedies

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STACY GALBO

DEPUTY TITLE IX COORDINATOR FOR EDUCATIONAL OUTREACH AND  
TRAINING/INVESTIGATOR

# Confidentiality

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- Consider reporting responsibilities (Responsible Employee, OWAs, CSAs)
  - Most employees are not confidential, but we keep information as private as possible
  - Once a report is made, information is only shared on a need-to-know basis
  - Privacy of investigative materials
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- What happens if a Complainant does not want to move forward?
  - What happens if a Complainant or other reporting party is anonymous or requests anonymity?
  - Pattern, Predation, Threat, Violence, or Weapon

# When Should You Report?

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- An individual notifies you
- You witness the behavior
- The behavior is widespread, openly visible, or well-known to students, faculty, and staff
- What could an individual disclosure look like?
- Descriptive vs. labels
- Third party
- Unrelated (or related) policy violation
- “They didn’t disclose, but...”



# Disclosures 101

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- Be open, honest, receptive, and empathetic
- Be a good listener
- Be transparent; Explain your reporting requirements
- Provide **all** information to the Title IX Coordinator or on the online form
- Provide information on campus resources such as medical services and/or counseling;  
Remember: you are not a source of privilege or confidentiality
- No employee may discourage an individual from reporting
- Reluctant Complainants

# The Role of a Caring Professional

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## **A CARING PROFESSIONAL DOES:**

Listen compassionately.

Answer questions about the process.

Help students identify concerns (safety or otherwise).

Connect students with resources and problem solve to address those concerns.

Practice self care and ask for help.

## **A CARING PROFESSIONAL DOES NOT:**

Offer legal advice.\*

Provide therapy.\*

Make decisions and choices for the student.

Tell the student how they should feel about what has happened or what is happening.

Expect to know all the answers.

# Confidential Resources

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## ATU Health and Wellness Center

### Counseling Services

**Confidential Resource.** Professional, licensed counselors who provide mental-health counseling to members of the school community (and including those who act in that role under the supervision of a licensed counselor) are generally not required to report any information about an incident to the Title IX Coordinator without a party's permission.

- Kristy Davis, [kdavis51@atu.edu](mailto:kdavis51@atu.edu); (479) 968-0329
- Craig Witcher, [cwitcher@atu.edu](mailto:cwitcher@atu.edu); (479) 968-0329
- Janis Taylor, [jtaylor78@atu.edu](mailto:jtaylor78@atu.edu); (479) 968-0329
- Josh Root, [jroot4@atu.edu](mailto:jroot4@atu.edu); (479) 968-0329
- Leann Watson, [lwatson12@atu.edu](mailto:lwatson12@atu.edu); (479) 968-0329

# Confidential Resources

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## ATU Health and Wellness Center

### Health Services

**Confidential Resource.** The medical professionals who work in the on-campus health center can generally talk to an individual without revealing any personally identifying information about an incident to the University. An individual can seek assistance and support from these professionals without triggering a university investigation that could reveal the party's identity or that the individual has disclosed the incident.

- Robin Koontz, APRN, [rkoontz@atu.edu](mailto:rkoontz@atu.edu); (479) 968-0329
- Kyle Wewers, APRN, [kwewers2@atu.edu](mailto:kwewers2@atu.edu); (479) 968-0329
- Heather Stout, RN, [hstout1@atu.edu](mailto:hstout1@atu.edu); (479) 968-0329
- Cori Poore, RN, [cpoore1@atu.edu](mailto:cpoore1@atu.edu); (479) 968-0329

# Other On-Campus Resources

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- Department of Public Safety

*Russellville:* 716 N. El Paso Avenue and available by phone at 479-968-0222 or dialing 911 (24/7).

*Ozark:* 1700 Helberg Lane, Collegiate Center, Room 100C and available by phone at 479-508-3359 or by dialing 911. (Monday through Friday, 8 a.m. to 5 p.m.)

*Off Campus Assistance:* Law enforcement assistance is available off campus through the Russellville and Ozark Police Departments 24 hours a day, 7 days a week by calling 911.

- Care Team: ATU's Behavioral Intervention Team (<https://www.atu.edu/careteam/>)
- Disability Services: (479) 968-0302, TTY: (479) 964-3290, email at [disabilities@atu.edu](mailto:disabilities@atu.edu), or stop by the office located in the Doc Bryan Student Services Building, Suite 141. An online application for services can be found at [www.atu.edu/disabilities/](http://www.atu.edu/disabilities/)
- Human Resources: (479) 968-0396, Brown Hall, Suite 434

# Off-Campus Resources

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## **Victim Assistance Outreach Program**

The 5th Judicial District Prosecuting Attorney's Office's Victim Assistance Outreach Program provides assistance with:

Orders of Protection

Contacting Law Enforcement Agencies

VINE (Victim Identification and Notification Everyday)

Arkansas Crime Victims Reparations Program (assists with financial compensation, counseling, lost wages, and funeral expenses)

Information on the criminal court process

The Arkansas Victim Assistance Coordinator for Pope County, Fatima Gomez, can be reached at 479-968-8600, and the Coordinator for Johnson and Franklin County, Melissa Vandever, can be reached at 479-705-0579.

ATU Counseling Services can also refer students, faculty, and staff to off-campus mental health professionals.

## • **Ozark Rape Crisis Center**

- 24-hour crisis intervention
- Advocacy services
- Hospital accompaniment
- 800-818-1189

## • **Sexual Assault Crisis Response of Central Arkansas (Conway)**

- 866-358-2265

## • **River Valley Shelter (Domestic Violence—Russellville)**

- 24-hour crisis intervention
- Case management
- Emergency shelter
- 479-968-3110

## • **St. Mary's Regional Medical Center (Russellville)**

- 479-968-6211
- Evidence collection/medical care

## • **Mercy Hospital (Ozark)**

- 479-667-4138
- Evidence collection/medical care

# Supportive Measures

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Non-disciplinary, non-punitive individualized services available for both parties as appropriate and reasonably available.

**Actions may include, but are not limited to:**

- Referral to counseling, medical, and/or other healthcare services
- Referral to community-based service providers
- Visa and immigration assistance
- Student financial aid counseling
- Safety planning
- Providing campus safety escorts
- Providing transportation accommodations
- Implementing contact limitations (no contact directives) between the parties
- Education to the institutional community or community subgroup(s)
- Altering campus housing assignment(s)
- Altering work arrangements for employees or student-employees

# Supportive Measures

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- Academic support, extensions of deadlines, or other course/program-related adjustments
- Campus ban letters
- Timely warnings
- Class schedule modifications, withdrawals, or leaves of absence
- Increased security and monitoring of certain areas of the campus
- Any other actions deemed appropriate by the Title IX Coordinator or the AA/EEO Officer

Privacy when providing supportive measures

Accommodations

Contact limitations

- Violations of no contact directives will be referred to appropriate student or employee conduct processes for enforcement.
- Enforcement of non-University orders



# Investigations Overview

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WILLIAM TITSWORTH

ASSISTANT DEAN FOR STUDENT CONDUCT AND LEAD INVESTIGATOR

# 10 Steps of the Investigative Process

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1. Notice/Complaint Received
2. Initial Assessment
3. Investigation Basis and Appointment of Investigators
4. Notice of Investigation and Allegations
5. Develop Strategic Investigation Plan
  - Witness list
  - Evidence list
  - Investigation timeframe
  - Order of party/witness interviews

# 10 Steps of the Investigative Process

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6. Conduct Investigation (thorough, reliable, and impartial)
  - Interview witnesses
  - Gather relevant evidence
7. Complete Investigative Report (Draft)
8. Investigative Report Provided to Parties/Advisors & Ten (10) Day Review/Comment Period
9. Incorporation of Relevant Elements/Evidence/Revisions into Finalized Investigative Report and Presented to Title IX Coordinator for Review and Feedback
10. Final Investigative Report Provided to Parties/Advisors for Review (Minimum of Ten (10) Business Days Before Hearing Date)

# Institutional Procedure Overview

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WILL COOPER

ASSOCIATE DEAN FOR STUDENT CONDUCT/HEARING BOARD CHAIR



You do not have a side.  
You represent the  
process.

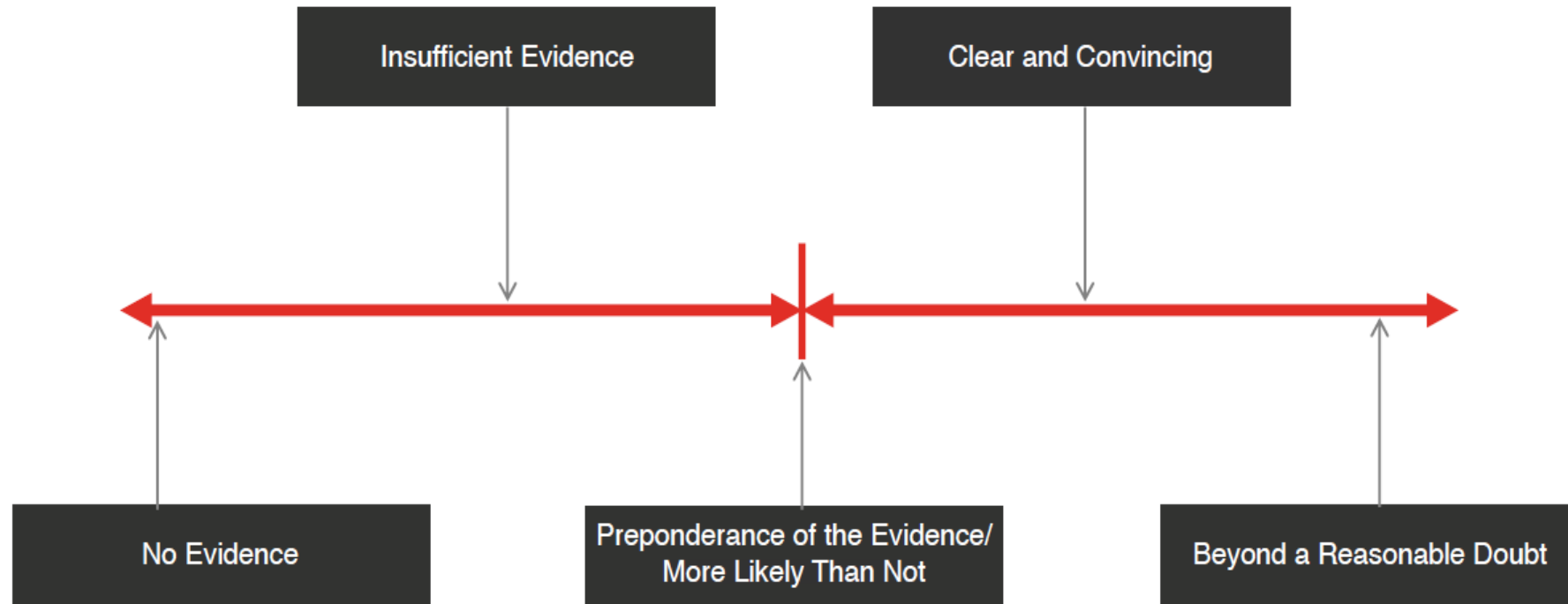
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# Presumption of Innocence

The respondent is presumed not responsible. Any finding of responsibility comes at the conclusion of the process.

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# EVIDENTIARY STANDARDS



# Terminology

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## Sexual Harassment:

Acts of sexual harassment may be committed by any person upon any other person, regardless of the sex, sexual orientation, and/or gender identity of those involved.

Sexual harassment, as an umbrella category, includes the offenses of sexual harassment, sexual assault, domestic violence, dating violence, and stalking.



# Terminology Continued

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Sexual Harassment, at ATU, is defined as follows:

Conduct on the basis of sex/gender or that is sexual satisfies one or more of the following:

1. Quid pro quo:

- a. an employee of ATU,
- b. conditions the provision of an employment or educational benefit, aid, or service of ATU,
- c. on an individual's participation in unwelcome sexual conduct.

# Terminology Continued

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## 2. Sexual Harassment:

- a. unwelcome conduct,
- b. determined by a reasonable person,
- c. to be so severe, and
- d. pervasive, and,
- e. objectively offensive,
- f. that it effectively denies a person equal access to ATU's education program or activity.

# Terminology Continued

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## 3. Sexual Assault, defined as:

### a. Sex offenses, Forcible:

- Any sexual act directed against another person,
- without the consent of the complainant,
- including instances in which the complainant is incapable of giving consent.

### b. Forcible Rape:

- Penetration,
- no matter how slight,
- of the vagina or anus with any body part or object, or
- oral penetration by a sex organ of another person,
- without the consent of the Complainant.

# Terminology Continued

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c. Forcible Sodomy:

- Oral or anal sexual intercourse with another person,
- forcibly,
- and/or against that person's will (non-consensually), or
- not forcibly or against the person's will in instances in which the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# Terminology Continued

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d. Sexual Assault with and Object:

- the use of an object or instrument to penetrate,
- however slightly,
- the genital or anal opening of the body of another person,
- forcibly,
- and/or against that person's will (non-consensually),
- or not forcibly or against the person's will in instances in which the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# Terminology Continued

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e. Forcible Fondling:

- the touching of the private body parts of another person (buttocks, groin, breasts),
- for the purpose of sexual gratification,
- forcibly,
- and/or against that person's will (non-consensually),
- or not forcibly or against the person's will in instances in which the complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

# Terminology Continued

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## f. Sex Offenses, Non-forcible:

- Incest:
  - 1) Non-forcible sexual intercourse,
  - 2) between persons who are related to each other,
  - 3) within the degrees wherein marriage is prohibited by Arkansas law.
- Statutory Rape:
  - 1) Non-forcible sexual intercourse,
  - 2) with a person who is under the statutory age of consent of 14.

# Terminology Continued

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## 4) Dating Violence, defined as:

- a. Violence,
- b. On the basis of sex,
- c. Committed by a person,
- d. Who is in or has been in a social relationship of a romantic or intimate nature with the complainant.
  - i. The existence of such a relationship shall be determined based on the complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—
  - ii. Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
  - iii. Dating violence does not include acts covered under the definition of domestic violence.



# Terminology Continued

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## 5) Domestic violence, defined as:

- a. violence,
- b. on the basis of sex,
- c. committed by a current or former spouse or intimate partner of the complainant,
- d. by a person with whom the complainant shares a child in common, or
- e. by a person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner, or
- f. by a person similarly situated to a spouse of the complainant under the domestic or family violence laws of arkansas, or
- g. by any other person against an adult or youth complainant who is protected from that person's acts under the domestic or family violence laws of arkansas.

To categorize an incident as domestic violence, the relationship between the respondent and the complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.

# Terminology Continued

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## 6) Stalking, defined as:

- a. engaging in a course of conduct,
- b. on the basis of sex,
- c. directed at a specific person, that
  - i. would cause a reasonable person to fear for the person's safety, or
  - ii. the safety of others; or
  - iii. suffer substantial emotional distress.

### **For the purposes of this definition —**

1. Course of conduct means two or more acts, including, but not limited to, acts in which the respondent directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
2. Reasonable person means a reasonable person under similar circumstances and with similar identities to the complainant.
3. Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.

# Terminology Continued

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## **Sex discrimination:**

an umbrella term encompassing multiple types of actions involving the unfavorable treatment of an individual or a group of identifiable individuals based on gender.

## **Sexual Violence:**

a severe form of hostile environment sexual harassment that represents conduct involving physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's incapacity. An individual's incapacity may arise from use of drugs or alcohol or individual conditions including intellectual or other disability.

# Criminal v. Title IX Investigations

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- A complainant has the ability to pursue either a Title IX complaint through ATU or a criminal complaint through the appropriate law enforcement agency, or both.
- A criminal investigation is conducted by police or law enforcement with subpoena power, while Title IX investigations are conducted by university employees.
- A standard of evidence known as “beyond a reasonable doubt” is applied to criminal cases, while “preponderance of the evidence” applies to Title IX cases.
- The two cases may run parallel.
- Sanctions, such as expulsion or suspension, apply to Title IX, while criminal penalties can include prison and sex offender registration.

## Force, Incapacity, and Consent: Three Questions

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1. Was force used by the alleged student to obtain sexual access?
2. Did the alleged student know, or should have known that the alleged victim was incapacitated (alcohol, other drugs, asleep, etc.)?
3. What clear words or actions by the complainant gave the accused student permission for the specific sexual activity that took place?

# Force

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Was force used by the alleged student to obtain sexual access?

There are four types of force to consider:

- Physical violence -- hitting, restraint, pushing, kicking, etc.
- Threats -- anything that gets the other person to do something they wouldn't ordinarily have done absent the threat
- Intimidation -- an implied threat that menaces and/or causes reasonable fear
- Coercion – the application of an unreasonable amount of pressure for sexual access.
  - Consider the following:
    1. Frequency
    2. Intensity
    3. Isolation
    4. Duration

Because consent must be voluntary (an act of free will), consent cannot be obtained through any type of force.

# Force Continued

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If force, in any of the four forms was used, stop here. You are done.

The policy has been violated. Consent and incapacity are irrelevant at this point.

Sanction appropriately to:

- Bring an end to the discrimination
- Prevent its future recurrence
- Remedy the effects on the victim

# Incapacity

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Did the alleged student know, or should s/he have known that the alleged victim was incapacitated (alcohol, other drugs, asleep, etc.)?

Address this question second, because it can be ruled out quickly and efficiently if alcohol, drugs or other incapacity are not in issue. If not, move on to the 3<sup>rd</sup> and final question about consent.

If incapacity could be involved, there is a two-step analysis:



# Incapacity Continued

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First, was the alleged victim incapacitated at the time of sex?

- Could s/he make rational, reasonable decisions?
- Could s/he appreciate the situation and address it consciously such that any consent was informed
- knowing who, what, when, where, why and how

Second, did the alleged student know of the incapacity (fact)?

Or, should the alleged student have known from all the circumstances (reasonable person)?

# Incapacity Continued

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What was the form of incapacity?

- Alcohol or Other Drugs
- Not impaired, not under the influence, not drunk, but incapacitated
- Administered voluntarily or without victim's knowledge
- Rape drugs
- Mental/cognitive impairment
- Injury
- Sleep

# Incapacity Continued

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Incapacitation is a determination that will be made after the incident in light of all the facts available

Assessing incapacitation is very fact dependent

Blackouts are frequent issues

- Blackout = incapacitation
- Blackout = no working (form of short term) memory, thus unable to understand who, what, when, where, why or how
- Partial blackout must be assessed as well

What if the accused student was drunk too?

# Incapacity Continued

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If the alleged victim was not incapacitated, move on to the 3<sup>rd</sup> question.

If the alleged victim was incapacitated, but:

- The accused student did not know it = policy not violated.
- The accused student should not have known it = policy not violated. Move on to 3<sup>rd</sup> question.

If the alleged victim was incapacitated, and:

- The accused student knew it = policy violation. Sanction.
- The accused student should have known it = policy violation. You are done. Sanction accordingly.

# Consent

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Question 3 is the Consent question: What clear words or actions by the complainant gave the accused student permission for the specific sexual activity that took place?

# Consent Continued

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- Informed (knowing)
- Voluntary (freely given)
- Active (not passive)
- Clear words or actions
- Indicating permission to engage in mutually agreed upon (sexual) activity

# Consent Continued

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At the heart of the idea of consent is the idea that every person, man or woman, has a right to personal sovereignty (autonomy); a right not to be acted upon by someone else in a sexual manner unless he or she gives clear permission to do so.

# Consent Continued

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With this idea comes the understanding that consent can be broad or narrow, and can be limited, such as in cases where someone is willing to engage in some forms of sexual activity, but not in others.



# Consent Continued

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- Consent may be given verbally or nonverbally, but it must be communicated clearly in whatever form
- Silence and/or passivity is not consent
- Must be a verbal or non-verbal “Yes”

# Warning Signs of Non-Consent

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- Consent is in doubt when a party to a sexual interaction is making assumptions about what their partner does or does not want.
- Absence of clear signals means no consent, not try it and see if s/he likes it or objects.

# Conceptualizing Consent

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Consent means two (or more) people deciding together to do the same thing, at the same time, in the same way, with one another.

# Consent in Regard to Force, Resistance

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The idea of pure, autonomous consent completely rules out any requirement to show the use of force, or any type of resistance.

Yet, the use of force or the showing of resistance would demonstrate non-consent.

# Who Must Consent?

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All parties to a sexual interaction

Consent requires that the person initiating the sexual activity get permission to do so, and that permission does not exist in the absence of resistance.

Passively allowing someone to touch you in a sexual manner is not consent.

# Consent is NOT Always Valid

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There are circumstances where even when consent is given, it is not valid.

Consent would be invalid when:

- forced, threatened, intimidated, coerced,
- when given by a mentally or physically incapacitated person,
- or when given by a minor.

# More on Consent...

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To be valid, consent must be given prior to or contemporaneously with the sexual activity.

Consent can be withdrawn at any time, as long as that withdrawal is clearly communicated by the person withdrawing it.

You can place any conditions you want on your willingness to consent.

# More on Consent...

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Making someone touch you is as inappropriate as touching someone else, where no consent is given.

If someone won't touch you, and you have to physically manipulate them to get them to touch you sexually, you automatically have a consent problem.

Unless they freely give consent, you can't take it.



# Question 3

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What clear words or actions by the complainant gave the accused student permission for the specific sexual activity that took place?

If the accused student can answer this question with evidence of sufficient words or actions, you are done. There is no policy violation.

# Disparate Treatment and Impact

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**Disparate impact** refers to policies, practices, rules, or other systems that appear to be neutral, but result in a disproportionate impact on protected groups.

**Disparate treatment** refers to policies, practices, rules, or other systems that are intentionally discriminatory.

# Analyzing Unwelcomed

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Unwelcomed is subjective and determined by the Complainant (except when the complainant is below the age of consent). Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the perspective of a reasonable person in the same or similar circumstances (“in the shoes of the complainant”), including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

# Analyzing Hostile Environment

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A hostile environment is one that unreasonably interferes with, limits, or effectively denies an individual's educational or employment access, benefits, or opportunities. This discriminatory effect results from harassing verbal, written, graphic, or physical conduct that is severe or pervasive ***and*** objectively offensive.

# Weighing Evidence Impartially

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Credibility- the process of weighing the accuracy and reliability of evidence.

To assess credibility, evaluate the following:

1. Source- where is the information coming from?
2. Content- could the witness hear what they say they heard?
3. Plausibility- does the information even make sense to a reasonable person?

When all three are strong, credibility is strong.

Think of credibility on a 100% scale:

- i. if it dips below 50% the witness or evidence doesn't weight the scale.
- ii. if the witness or evidence is more credible than not it does weight the scale for determining a preponderance.

# Weighing Evidence Continued

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Credibility weighted on neutrality, impartiality, and objectivity:

1. The more loyal a witness is based on relationship to one party, the more biased their evidence could be.
2. Neutral witnesses may be more objective than partisan witnesses.

Credibility is best established through corroboration, which is provided through sufficient independent evidence:

1. Corroboration is more than another witness who agrees with the first.
2. You need evidentiary support for what the witness contends.
3. What is observed in person is most valuable, what you heard from the responding party about the incident after the fact is less so, and what you learned from the responding party's best friend about the incident is even less so.

# Weighing Evidence Continued

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Abductive Reasoning:

Credibility can also be assessed by triangulation-

1. Use two or more data points to extrapolate or infer that a third data point is more likely than other possibilities.
2. Triangulation is simply being faced with two plausible explanations (b & c) and deciding which is the more plausible (likely) based on the fact that you know a & d to be true. based on what you know about a & d, b is more likely than c.

# Weighing Evidence Continued

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- Avoid micro-expression analysis and gestics unless you are an expert.
- Major inconsistencies would likely detract from credibility.
- If established, continuation of harassing behavior after the responding party was informed it was unwelcomed would be corroborating.
- Documents such as diaries, calendar entries, journals, notes, or letters describing the incident(s) can add to credibility, but can also be manufactured after-the-fact. The adage, “trust, but verify,” applies.
- Telling another person about the harassment may add to credibility, but if the accounts provided to others vary meaningfully, that can also undermine credibility



# Weighing Evidence Continued

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- Motivation to lie, exaggerate, or distort information should be assessed when there are differences in what was reported or questions about veracity or accuracy.
- Questions to consider in assessing credibility:
  1. How might a reasonable person react to the incident(s)?
  2. What was the effect of the behavior on the reporting party?

# Weighing Evidence Continued

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A preponderance can be established simply because you believe one party and not the other, based on assessment of credibility of the party and the evidence provided.

# Weighing Evidence Continued

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- Explanations of why the harassment occurred do not add to credibility.
- People who have sexually harassed others often acknowledge their behavior but explain and defend it in ways that do not justify their actions and should not add to their credibility.
- To the contrary, such excuses should be seen as admissions of having engaged in sexually harassing behaviors.
- For example:
  - “I didn’t know it was against the rules.”
  - “I was just joking around.”
  - “I was just flirting with her.”
  - “She was leading me on!”

# Weighing Evidence Continued

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The following do not add or detract from credibility of the responding party because they are irrelevant:

- Character witnesses. (“He is such a good kid; I know he would never do that.”)
- Popularity with staff and other students. (“Everybody likes him; I just don’t believe he would do that.”)
- No history of past problems. (“She’s never been in trouble before.”)
- Academic performance. (“But he’s a really good student. His professors really like him.”)

# Weighing Evidence Continued

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The following do not add or detract from credibility of the Complainant:

- Clothing. (“Just look at what she was wearing.”) Clothing does not cause sexual harassment, nor does it give anyone permission to touch or make sexual remarks.
- Appearance. (“She is so pretty no wonder he did it,” or “she is so unattractive! I don’t believe anyone would do that to her.”)
- Flirting behavior. (“He’s always flirting with the boys, what did he expect?”)
- Males being victims. (“He should have realized she meant it as a compliment.”)
- Sexual orientation of victim (“listen, he came out of the closet and told everyone. He should have expected that people would act like this.”)
- Finally, politics, including athletics participation, concern about the team, concern about “getting a good student in trouble,” whether someone is a last semester senior, etc., cannot impact decisions about whether a policy has been violated.

# Relevance

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- Evidence that is relevant helps to prove or disprove whether or not a policy violation occurred or speaks to the credibility of the complainant, respondent, or witness.
- Investigators have already done some preliminary assessment of relevance based on what is included in the investigative report.
- Ultimately, relevance at the hearing will be determined by the decision-makers.
- Relevant evidence must be evaluated impartially.

# Relevance Continued

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- Character evidence is of little to no value.
- Impact statements may be useful during sanctioning, but are of little evidentiary value during the hearing.
- Complainant's prior sexual behavior is irrelevant with limited exceptions.

# Preparing for the Hearing

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- The Hearing Panel will most likely meet prior to the scheduled hearing.
- The Panel will review the investigative report.
- The Panel will compile relevant questions for the parties and any witnesses.
- The Panel will discuss anticipated relevance issues.
- The Advisors will be asked to pause after questions and before the question is answered, the decision-makers will make a relevancy determination.



# Hearing Technology

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- Webex Meetings will be used when a virtual option is needed.
- Each hearing will be recorded, and there will be one verbatim record.
- Any technology needed to review evidence will be provided, i.e. videos, photos, card swipes, etc.

# Advisor's Role

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- The parties may each have an Advisor of their choice present with them for all meetings, interviews, and hearing within the resolution process.
- Advisors should help parties prepare for each meeting and are expected to advise ethically, with integrity, and in good faith.
  - This is different than providing legal advice
- No guarantee to equal Advisory rights (ATU not required to provide an attorney).
- Advisor will conduct indirect questioning during the hearing.
- ATU will appoint an Advisor for indirect questioning if either party does not have one at the hearing.

# Advisor's Role Continued

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- Advisors do not make a presentation for or represent the parties.
- The party will ask and respond to questions on their own behalf during the investigation phase.
- Advisors only speak for parties during indirect questioning in a hearing.
- Advisors must not overstep their Policy-defined role.
- Advisors are expected to maintain the privacy of any record shared with them.
- Parties may elect to change Advisors during the process.

# Rights of Parties

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# Rights of Parties

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- Both parties have same rights to have others present and to present evidence during proceeding and participate in hearings and/or appeals.
- Both parties are entitled to have an advisor of their choice present for all investigative and disciplinary proceedings.

# Rights of Parties Continued

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- Both parties will be simultaneously informed in writing of the outcome of any disciplinary proceeding under the policy.
- Both parties are entitled to the same options and opportunities for appeal.
- Both parties will be notified of changes in results that occur prior to when results become final, and will be notified when final.

# Protection Against Retaliation

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ATU policy protects against retaliation for the following:

1. Reporting an incident,
2. participating in the grievance process,
3. assisting in providing information relevant to an investigation,
4. and/or acting in good faith to oppose conduct that constitutes a violation of the ATU policy.

ATU is prepared to take appropriate steps to protect individuals who fear that they may be subjected to retaliation.

It is prohibited for any member of the ATU community to intimidate, threaten, coerce, harass, or discriminate against any individual for making a report or participating in the process.

# Sanctions

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# Rendering a Finding

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- Decisions must be based on the facts in the investigative report and presented at the hearing, not any outside evidence.
- The Panel must first determine whether or not the policy was violated. The sanction discussion will take place if they reach a finding of responsibility.
- Don't let the severity of the case change your standard of evidence.

# Sanctions

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Sanction appropriately to:

- Bring an end to the discrimination
- Prevent its future recurrence
- Remedy the effects on the victim

Sanctions for serious misconduct should be aimed at protecting the Complainant and the community.

# Sanctions

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- Progressive discipline when appropriate
- Warning
- Probation
- Loss of Privileges (ban from library)
- Educational Sanction (Judicial Educator Module, policy reviews, etc.)
- Discretionary Sanctions
- Monetary Fine
- Housing Suspension
- University Suspension
- Expulsion
- Termination of Employment

# Generating a Rationale

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Once the Panel has a finding and determined any appropriate sanctions, a written determination is composed.

The determination includes a rationale statement.

The written determination is be shared with both parties.

# Appeals

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- Any party may file a request for appeal, but it must be submitted in writing to the Title IX Coordinator within five (5) days of the delivery of the Notice of Outcome.
- Student appeals will be decided by the Vice President for Student Affairs. Employee appeals will be decided by the appropriate Vice President or Athletic Director.
- If the Respondent is a faculty member with tenure or with a special or probationary appointment, the procedures set forth in the Academic Termination Policies and Procedures section of the Faculty Handbook shall govern the Respondent's appeal.
- All parties will be kept informed of any appeals and be given an opportunity to respond.

# Appeals Continued

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Appeals are limited to the following grounds:

1. Procedural irregularity that affected the outcome of the matter;
2. New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
3. The Title IX Coordinator, investigator(s), or Decision-Makers had a conflict of interest or bias for or against complainants or respondents generally or the specific complainant or respondent that affected the outcome of the matter.

# Appeals Continued

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- Sanctions will be stayed during the appeal unless removed on an emergency basis after safety and risk analysis.
- Not intended to provide for a full re-hearing.

# Dishonesty During the Process

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- University community members are expected to participate in the process and be honest.
- Failure to do so may result in violation of the Acts of Dishonesty Policy for students and disciplinary measures for employees.



# Questioning Skills, Preponderance, Weighing Evidence, and Relevance

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THOMAS PENNINGTON

ASSOCIATE VICE PRESIDENT AND COUNSEL TO THE PRESIDENT



# Civil versus criminal matters

# Preponderance of evidence

**Preponderance of evidence:**  
**Evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not.**

**Black's Law Dictionary**

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# **Two main kinds of evidence that are presented:**

- 1. Demonstrative – evidence that is  
real to the senses.**
- 2. Testimonial – evidence is that is  
provided by individuals**

# **Two types of evidence that are presented:**

- 1. Direct evidence – evidence, which if believed by the fact finder, proves a fact without needing to draw inferences.**
- 2. Circumstantial evidence – evidence that requires the fact finder to make infer and draw conclusions.**

**Evidence presented  
should be relevant,  
competent and  
material to the case.**

**The next slides about  
the Federal Rules of  
Evidence are  
informational only.**



## **Evidence is relevant if:**

- (a) It has any tendency to make a fact more or less probable than it would be without the evidence; and**
- (b) The fact is of consequence in determining the action.**

**Rule 401 – Federal Rules of Evidence**

**Relevant evidence is admissible  
unless any of the following provides  
otherwise:**

- \* the United States Constitution;**
- \* a federal statute;**
- \* these rules; or**
- \* other rules prescribed by the Supreme Court.**

**Irrelevant evidence is not admissible.**

**Rule 402 – Federal Rules of Evidence**

**All relevant evidence is  
admissible unless a  
specific rule keeps it  
out.**

**The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.**

**Rule 403 – Federal Rules of Evidence**

# Questioning

# Direct examination

# Cross examination

# Implicit Bias

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WILLIAM TITSWORTH



# Implicit Bias

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Implicit bias (also called unconscious bias) refers to attitudes and beliefs that occur outside of our conscious awareness and control.

Implicit biases are unconscious attitudes and stereotypes that can manifest in the grievance process.

Explicit biases are biases we are aware of on a conscious level.

There are many different examples of implicit biases, ranging from categories of race, gender, and sexuality.

These biases often arise as a result of trying to find patterns and navigate the overwhelming stimuli in this very complicated world. Culture, media, and upbringing can also contribute to the development of such biases.

<https://www.simplypsychology.org/implicit-bias.html>

# Implicit Bias

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## Racial Stereotypes

- Automatic preference for one race over another without even being aware of this bias
- Holding an implicit stereotype that associates Black individuals as violent, and as a result, you may cross the street at night when you see a Black man walking in your direction, without even realizing why you are crossing the street
- The action taken here is an example of a microaggression. A microaggression is a subtle, automatic, and often nonverbal, that communicate hostile, derogatory, or negative prejudicial slights and insults toward any group
- A Latino student is complimented by a teacher for speaking perfect English, but he is actually a native English speaker. Here, the teacher assumed that simply because he is Latino that English would not be his first language.

<https://www.simplypsychology.org/implicit-bias.html>

# Implicit Bias

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## Gender Stereotypes

- Gender biases are the ways in which we judge men and women based on traditional feminine and masculine assigned traits.
- In the school setting, girls are more likely to be associated with language over math, whereas males are more likely to be associated with math over language (Steffens & Jelenec, 2011), revealing clear gender-related implicit biases that can ultimately go so far as to dictate future career paths.

## LGBTQ Stereotypes

- Asking a female friend if she has a boyfriend, assuming her sexuality and that heterosexuality is the norm or default.

<https://www.simplypsychology.org/implicit-bias.html>

# Implicit Bias

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## Ways to Reduce Implicit Bias

- Looking beyond your own point of view, so that you can consider how someone else may think or feel about something.
- Understanding what implicit biases are, how they can arise, how, and how to recognize them in yourself and others are all incredibly important in working towards overcoming such biases.
- Learning about other cultures or outgroups and what language and behaviors may come off as offensive are critical as well.

<https://www.simplypsychology.org/implicit-bias.html>

# Fairness, Equity, Due Process

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STACY GALB

A solid green horizontal bar spanning the width of the slide at the bottom.

# Fairness, Equity, and Due Process

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- “Fairness or justness in the way people are treated; justice according to natural law or right; specifically, freedom from bias or favoritism” ([www.merriam-webster.com](http://www.merriam-webster.com)).
- “Equity encompasses fairness, justice, and most precisely, fairness under the circumstances. Fairness under the circumstances is intended to make someone whole, in this context when sex or gender is the basis for some form of deprivation or discrimination” (2014 ATIXA Whitepaper, p.4).

# Fairness, Equity, and Due Process

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Due Process is the set of rights-based protections that accompany disciplinary action by a school, college or university.

**Dixon v. Alabama State Board of Education**-Landmark U.S. federal court decision in 1961 that held a public college could not expel without at least minimal due process.

- Alabama State College expelled six students for unspecified reasons and without a hearing.
- Students have due process protection under the Fourteenth Amendment
- Due Process: – Notice and hearing required prior to expulsion from a state college or university.

# Fairness, Equity, and Due Process

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## **Due Process Requirements in Procedure:**

- Detailed and specific Notice of Allegation and/or Investigation.
- Notice of Hearing.
- Right to present witnesses.
- Right to present evidence.
- Right to an advisor of their choice
- Opportunity to be heard and address the allegations and evidence.
- Right to appeal.
- Right to Cross-Examination
- Right to review all relevant evidence AND the investigation report prior to a decision.



# Fairness, Equity, and Due Process

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## **Due Process Requirements in Decision:**

- A decision must:
  - Be based on a fundamentally fair rule or policy.
  - Be made in good faith (i.e. without malice, ill-will)
  - Be unbiased
  - Have a rational relationship to (be substantially based upon, and a reasonable conclusion from) the evidence.
  - Not be arbitrary or capricious.
- Sanctions must be reasonable, constitutionally permissible, and should relate to the violations

# Questioning, Impartiality, and Objectivity

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# Questioning

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- Have a purpose for asking every question.
- Be sure to ask a question, not make a speech.
- Ask questions about the allegations and the evidence and the policy elements.
- Don't be accusing or argumentative.
- Don't make questions too long or confusing.
- Listen carefully and adapt follow-up questions

# Questioning

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- Focus on areas of conflicting evidence or gaps of information.
- Avoid evaluative responses to a person's answers.
  - E.g.: That's too bad, I'm glad you said that.
- Do not moralize.
- Do not blame the reporting party (often called "victim-blaming").
  - E.g.: Why didn't you hit him? Why didn't you leave? Why did you get so drunk?
  - Reporting parties' responses to trauma are quite varied.
- Seek to clarify terms and conditions that can have multiple meanings or a spectrum of meanings such as "hooked up," "drunk," "sex," "fooled around," and "had a few drinks."

# Questioning

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- Open-ended questions (tell us...who, what, how?)
- Close-ended questions (Did you, were you?) – Use infrequently, but when needed to drill down on a specific issue.
- Careful with Compound Questions – I have two questions, First..., Second...
- Multiple Choice Questions – Were you a), b), c)
- Avoid leading questions – (Isn't it the case that...?)

# Impartiality and Objectivity

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## Bias

- People do not shed their values, beliefs and life experiences at the hearing room door. Nor should we expect them to
- While bias is inevitable, it does not necessarily undermine the fairness or appropriateness of a hearing board's decision
- The key is recognizing the bias and ensuring it does not impact one's decision because bias that serves as the basis for the outcome of the hearing is improper
- Hearings must be based on evidence, not on personal beliefs about a complaint

## Prejudice

- To “pre-judge”
- “Prejudice” – Any preconceived opinion or feeling, either favorable or unfavorable (dictionary.com) § Often based on things we have previously read, our own experiences
- Prejudice – An unfair feeling of dislike for a person or group because of race, sex, religion, etc. – A feeling of like or dislike for someone or something especially when it is not reasonable or logical (merriam-webster.com)

# Impartiality and Objectivity

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## **“Bias” Defined**

- Tendency to believe that some people, ideas, etc. are better than others that usually results in treating some people unfairly.
- Strong interest in something or ability to do something.
- Inclination of temperament or outlook; especially a personal and sometimes unreasoned judgment (merriam-webster.com).
- “Biased” – To cause partiality or favoritism; influence, especially unfairly (dictionary.com).
- “Confirmation Bias”: The tendency to interpret new evidence as confirmation of one's existing beliefs or theories. (VERY common form of bias)

# Impartiality and Objectivity

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## **“Prejudice” Defined**

- Unfair feeling of dislike for a person or group because of race, sex, religion, etc.
- Feeling of like or dislike for someone or something especially when it is not reasonable or logical (merriam-webster.com).
- Any preconceived opinion or feeling, either favorable or unfavorable (dictionary.com).
- A prejudicial action is harmful to someone. In the investigation context, the “harm” is an unfair decision.



# Impartiality and Objectivity

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## Bias and Prejudice-Common Issues

- Role of Alcohol
- Own experiences...
- Student-Athletes
- Fraternity/Sorority Life
- Disabilities & Mental Illness
- International Students
- Sex/Gender
- Gender Identity
- Race
- Ethnicity
- Religion or Religious beliefs
- Academic Field of Study/Major
- Veteran Status
- Socioeconomic Status
- Politics
- Attitude
- Pre-disposition towards one party

# Impartiality and Objectivity

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- Simply knowing a student or an employee is typically not sufficient to create a conflict of interest if objectivity not compromised.
- Also, having disciplined a student or employee previously is often not enough to create a conflict of interest.

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