



Association of
Title IX Administrators

Applying Policy in Investigations and Determinations

An ATIXA Best Practices Workshop

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

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Workshop Introduction



The primary focus of this workshop is to help participants use policy elements to guide their investigations and decision-making.



Practitioners will learn how to deconstruct policy language into essential elements to inform question development and evidentiary analysis.



Our goal is to provide participants with tools to focus their investigation and decision-making efforts on the essential elements of the applicable policies to avoid deficiencies or overreach.

Parsing and Deconstructing Policies

Technique: Models of Proof

- Investigators and Decision-Makers (DMs) navigate policies with lengthy and complicated provisions
- Models of Proof help dissect policy
 - Determine each essential element
 - Structure analyses by each element
 - Ensure analysis is consistent with the entirety of each policy

Example

Quid Pro Quo:

- ☐ an employee of the Recipient
- ☐ Conditions the provision of
 - ☐ an aid, or
 - ☐ benefit, or
 - ☐ service of the Recipient,
- ☐ on an individual's participation in unwelcome sexual conduct

Stalking Definition

Identify the elements of the policy provision:

Stalking, defined as:

- A Respondent engaging in a course of conduct, on the basis of sex, directed at the Complainant that would cause a Reasonable Person to fear for the person's safety or the safety of others, or suffer substantial emotional distress



Element Identification

Identify the elements:

Stalking, defined as:

- Respondent engaging in a course of conduct
- on the basis of sex
- directed at the Complainant
- that would cause a reasonable person to
- fear for the person's safety or
- the safety of others or
- suffer substantial emotional distress



Conceptually Related Elements

Show how the elements relate to each other:

Stalking, defined as:

- A Respondent engaging in a course of conduct, on the basis of sex
- directed at the Complainant
- that would cause a reasonable person to
 - to fear for the person's safety or
 - the safety of others or
 - suffer substantial emotional distress

This type of analysis helps identify any prerequisite or qualifying elements



Interpreting Policies

- Some Title IX policies have components with common meaning
 - E.g., a “course of conduct” inherently requires two or more acts
- Other definitions are more nuanced
 - Relationships between words
 - Intersections with other policies
 - Subjective vs. objective analysis
- Sources outside the policy itself can also influence policy analysis



Policy Deconstruction Strategies

Common Meaning

Is there a commonly accepted use for a term or phrase?

Defined Meaning/Jargon

Is the term defined by policy or is it a legal term of art?

Punctuation

Are there commas, periods, semi-colons, or other punctuation?

Connecting Conjunctions

Does the policy use “or,” “and,” or other conjunctions?

Timing Words

Does the policy use words like “during” or “while”?

Visual Deconstruction

Is there a visual depiction that would be helpful?

Multiple Deconstructions

Is there more than one way to deconstruct a policy?

Common Meaning

- Dating violence is defined as:
 - “a social relationship of a romantic or intimate nature...”
- Incapacitation includes being:
 - “Disoriented, helpless, asleep, or unconscious...”
- Check for a “definitions” policy section
 - Apparent common meanings may have specific definitions within the policy
 - “Retaliation”
 - “Student”



Defined Meaning or Jargon

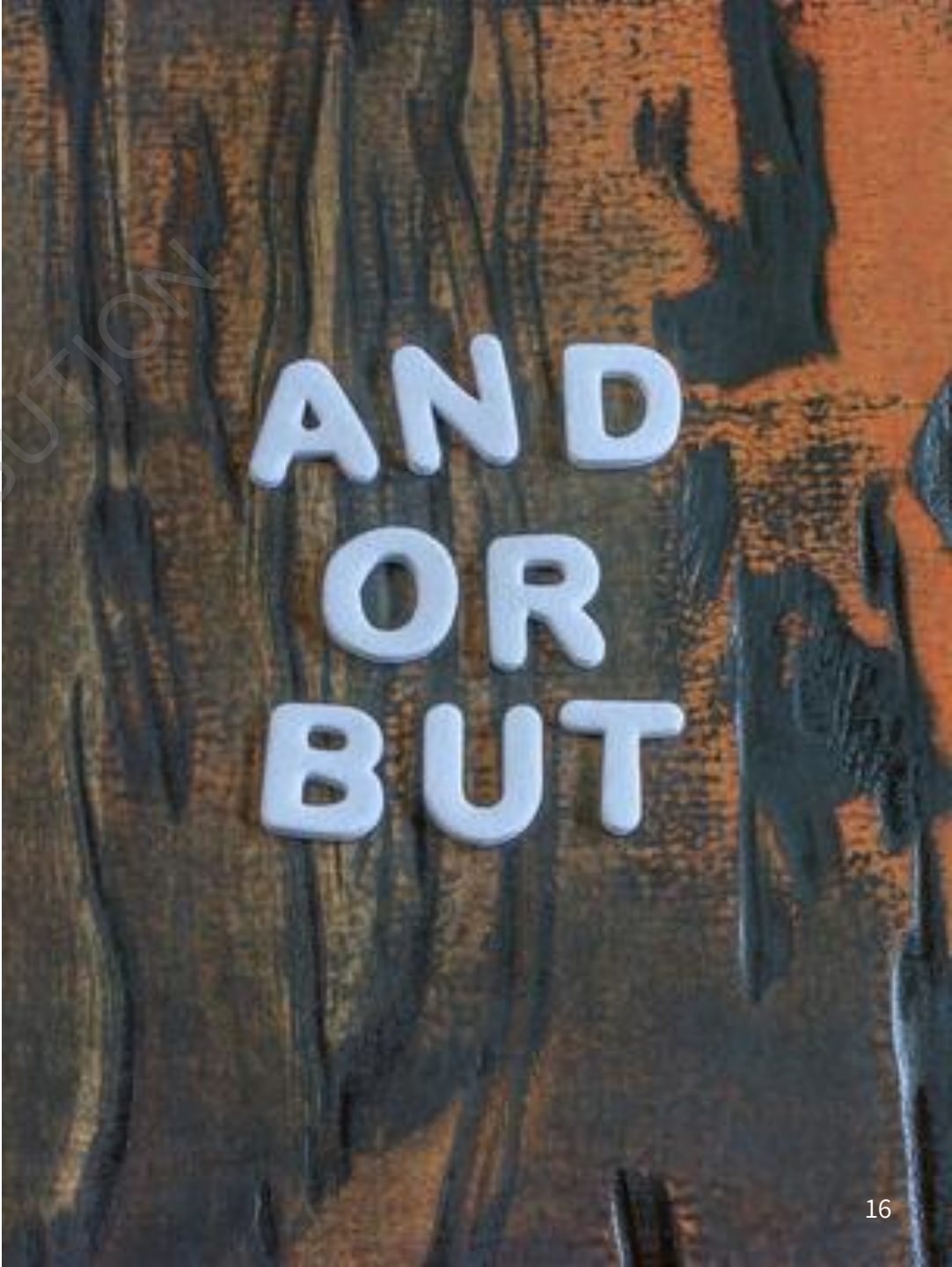
- Again, check policy for a “definitions” section
- Dictionaries, legal dictionaries, or other legal sources may be required
 - “*Quid pro quo*”
 - “Reasonable person”
 - “Known or should have known”
 - “Pervasive”
 - “Substantial emotional distress”
- Ask legal counsel or Title IX Coordinator

Punctuation

- Natural break points between ideas
- Distinguishes clauses or elements
- Example: **Fondling**
 - “The intentional touching of the clothed or unclothed genitals, buttocks, groin, breasts, or other body parts of the Complainant by the Respondent, without the consent of the Complainant, for the purpose of sexual degradation, sexual gratification, or sexual humiliation.”

Connecting Conjunctions

- Connectors that expand or limit
 - “And”
 - “Or”
 - “Including but not limited to...”
- Example: Sexual Harassment Hostile Environment
 - “Unwelcome conduct...to be so severe, **and** pervasive, **and** objectively offensive,...”
- Example: Domestic Violence:
 - “...is a current **or** former spouse **or** intimate partner of the Complainant...”



AND
OR
BUT

Other Strategies

- Timing Words
 - Consent:
 - “consent may be ratified...at some point **during** the interaction...”
 - “A person cannot consent **while** asleep or unconscious...”
- Visual Deconstruction
 - Models of proof, flowcharts, rubrics
- Multiple Deconstructions
 - Compare and contrast which deconstructions make the most sense



Multi-Charge Complaints

- When complaints result in multiple charges, models of proof and other deconstruction techniques provide structure and organization
 - Multi-charge complaints may involve policies with overlapping and/or concurrent elements
- Models of proof and other organizational techniques ensure:
 - The investigation and decision-making is comprehensive
 - No element is accidentally missed
- Similar considerations in grievance processes with counter-complaints, retaliation allegations, or collateral misconduct

Activity: Applying Strategies

Applying Strategies

Use the definition below to identify:

- The policy elements
- Any conceptually related policy elements
- Any deconstruction techniques that may be useful

Hostile Environment Harassment

- Unwelcome conduct, determined by a Reasonable Person, to be so severe, and pervasive, and objectively offensive, that it effectively denies a Complainant equal access to the Recipient's program or activity.

Hostile Environment Harassment

Individual Elements

- Unwelcome conduct
- determined by a Reasonable Person
- to be so severe, pervasive, and objectively offensive
- that it effectively denies a Complainant equal access to the Recipient's program or activity

Conceptually Related Elements

- Unwelcome conduct
- Determined by a Reasonable Person
 - To be so severe, pervasive, and objectively offensive
 - that it effectively denies a Complainant equal access to the Recipient's program or activity

Retaliation Definition

Use the definition below to identify:

- The policy elements
- Any conceptually related policy elements
- Any deconstruction techniques that may be useful

Retaliation

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

Retaliation Model of Proof

Individual Elements

- Intimidation, threats, coercion, harassment or discrimination against any individual
- By the Recipient or any member of the Recipient's community
- For the purpose of interfering with any right or privilege secured by law or Policy
- Or because the individual has made a report or complaint...

Conceptually Related Elements

- Intimidation, threats, coercion, harassment, or discrimination against any individual
- By the Recipient or any member of the Recipient's community
- For the purpose of interfering with any right or privilege secured by law or Policy
 - Or because the individual has made a report or complaint...

Deconstruction as a Technique

Deconstruction as a Technique

- Promotes thoroughness
- Structures and organizes evidence

Investigators

- Map questions to policy elements while planning interviews
- Gather evidence related to each policy element during investigation
- **Goal:** Enable DM to determine whether evidence shows all necessary elements are met for each alleged policy violation

Decision-Makers (DM)

- Map questions to disputed policy elements while preparing/planning questions
- Connect relevant evidence to each element during deliberation phase to reach a determination
- **Goal:** Determine whether sufficient relevant, credible evidence supports a finding for each policy element

Investigation Example – Stalking

Policy Element	Question/Prompt
■ A Respondent engaging in a course of conduct	Inv: Describe your interactions with Respondent. Complainant: After I rejected Respondent’s romantic overtures, Respondent starting following me. Follow up: Describe what happened with the rejection.
■ A Respondent engaging in a course of conduct	Inv: How often did Respondent follow you home? Complainant: Twice. Follow up Q: From where?
■ A Respondent engaging in a course of conduct	Inv: How much time lapsed between incidents? Complainant: Maybe a month or so. Follow up Q: If you know, what was the date of each?

Investigation Example – Stalking

Policy Element	Question/Prompt
▪ Would cause a reasonable person to fear for their safety	Inv: What was Respondent’s demeanor when showing up at your work? Complainant: Respondent would just stare at me. Follow up Q: Who else observed this behavior?
▪ Would cause a reasonable person to fear for their safety	Inv: What did you observe Respondent doing after they followed you home? Complainant: Respondent paced back and forth down my apartment’s street, occasionally looking into cars in the parking lot. One time, I swear I saw Respondent look into some apartment windows. Follow up Q: How long would Respondent spend outside your apartment on these occasions?

Decision-Making Example – Stalking

Policy Element	Question/Prompt
▪ A Respondent engaging in a course of conduct	Evidence from Complainant Statement: Respondent came to the coffee shop where I work part-time, twice, but did not order. Respondent also followed me home from school. Respondent sends me hundreds of texts each day. Other Related Evidence: Security footage from coffeeshop, text messages, testimony from Complainant's friend about walking home with Complainant.
▪ A Respondent engaging in a course of conduct	Evidence from Complainant Statement: Respondent followed me home twice, that I know of for sure. Other Related Evidence: Security footage of family's apartment complex unavailable.

Decision-Making Example – Stalking

Policy Element	Question/Prompt
▪ Would cause a reasonable person to fear for their safety	Evidence from Complainant Statement: Respondent visited the coffeeshop twice in two weeks. The other stuff was about two weeks after that. The texts have been constant. Other Related Evidence: Security footage, text messages.
▪ Would cause a reasonable person to fear for their safety	Evidence from Complainant Statement: Respondent would pace back and forth on my street and stand outside my building. I would see Respondent walking through the parking lot looking into cars and I am pretty sure I saw Respondent looking in apartment windows. Other Related Evidence: Security footage of family's apartment complex unavailable.

Finding Efficiencies

- Adopting deconstruction techniques streamlines the Resolution Process
 - Clarifies role and reduces redundancies between roles
- Investigators
 - Organize evidence and roadmap analysis for DMs
 - Assemble a structured investigation report, organized by each element
- DMs
 - Identify gaps in evidence or disputed facts for each element
 - Approach decision-making analysis in an organized and comprehensive way
 - Mimic and adapt outcome letter with investigation report structure



Activity: Applying Policy to Investigations and Decision-Making

Activity Instructions

We will now split into groups to complete this activity as either the Investigator or Decision-maker

Investigators

- **Materials:** Resident Advisor report, Formal Complaint, Notice of Investigation and Allegation(s) (NOIA)
- Looking at the investigation prospectively, what is the scope of the investigation?
 - Who will have relevant information?
 - What will I ask those individuals?
- Use policies to design questions to ask the Complainant at the first interview

Decision-Makers

- **Materials:** Entire file
- **Task:** Map relevant evidence in file to policy elements outlined in the NOIA
 - Group information together based on policy elements
 - Ex: “What information do I have that speaks to incapacitation?”

ATIXA's Consent Construct

1. **FORCE:** Was force used by the Respondent to obtain sexual or intimate access?
2. **INCAPACITY:** Was the Complainant incapacitated?
 - a. If so, did the Respondent know, or
 - b. Should the Respondent have known that the Complainant was incapacitated?

Note: The intoxication of the Respondent can not be used as a reason they did not know of the Complainant's incapacity

3. **CONSENT:** What clear Complainant words or actions gave the Respondent permission for each specific sexual or intimate act that took place as it took place?



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Questions?

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