

Sexual Misconduct Investigations – Procedural Elements

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Agenda

1. Title IX Intro
2. Initial Steps
3. Resolution Options
4. Ongoing Elements
5. Closing Steps
6. Transition to Adjudication Stage
7. Documentation & Record Keeping

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Introduction



Key Concepts & Framework



Distinctions...

Sexual Harassment

Employee
Quid Pro Quo

Severe
Pervasive
Obj. Offensive

Sexual Assault
Dating Violence
Domestic Violence
Stalking

VS.

Non-Sexual Harassment Ex. Other Inappropriate Sexual Conduct



Definition of “Sexual Harassment” under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

1. An **employee** of the institution conditioning the provision of an aid, benefit, or service of the institution on an individual’s participation in unwelcome sexual conduct (Quid Pro Quo);
2. Unwelcome conduct determined by a reasonable person to be **so severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the institution’s education program or activity; or
3. **“Sexual assault,” “dating violence,” “domestic violence,” or “stalking”** as defined under Clery/VAWA.



Source: Title IX Regulations (2020)

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#2 Element Examples

- **“Severe”**: Physically threatening or humiliating; effects of the alleged conduct to a reasonable person (using a “reasonable person” standard)
- **“Pervasive”**: Frequency, duration of the alleged conduct
- **“Objectively offensive”**: To a reasonable person (using a “reasonable person” standard)
- **“Reasonable person” standard**: An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.
- **“Effectively denies...equal access”**: Totality of the circumstances

For example, the degree of the alleged conduct’s interference with the CP or effects in an educational setting, type of alleged conduct, frequency and duration of the conduct, knowingly unwelcome in nature ⁶

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“Education program or activity” under Title IX

Includes locations, events, or circumstances over which the institution exercises **substantial control** over both the respondent and the context in which the alleged sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by the institution.

- **Example** of a “building owned or controlled by a student organization”: **Fraternity or sorority house** that is occupied by students of the organization, and the student organization is a recognized organization with the institution.



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Source: Title IX Regulations (2020)

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Definition of “Other Inappropriate Sexual Conduct”

Conduct on the basis of sex that does not meet the definition of “sexual harassment” (under the Model Policy), but is prohibited inappropriate or unprofessional sexual conduct.

Such conduct is:

1. **Verbal conduct** (including through electronic means), unwanted statements of a sexual nature intentionally stated to a person or group of people, that are objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.
2. **Physical conduct** that is objectively offensive to a reasonable person and also so **severe or pervasive** that it created a Hostile Environment.



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Source:
UT System Model Policy for Sexual Misconduct (2022)

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“Other Inappropriate Sexual Conduct” Cont.

Possible Examples (depending on facts):

- Unwelcome sexual advances (including explicit or implicit proposition(s) of sexual contact or activity);
- Requests for sexual favors (including overt or subtle pressure);
- Gratuitous comments about an individual’s sexual activities or speculation about an individual’s sexual experiences;
- Gratuitous comments, jokes, questions, anecdotes or remarks of a sexual nature about clothing or bodies;
- Persistent, unwanted sexual or romantic attention;
- Exposure to sexually suggestive visual displays such as photographs, graffiti, posters, calendars or other materials;
- Deliberate, repeated humiliation or intimidation;
- Sexual exploitation;
- Unwelcome intentional touching of a sexual nature;
- Deliberate physical interference with or restriction of movement; or
- Consensual sexual conduct that is unprofessional and inappropriate, and created a Hostile Environment.



Source:
UT System Model Policy for Sexual Misconduct (2022)

Key Pillars: Title IX Process

Impartiality

Respect

Fairness

Equity

For all of the participants in the process:

Complainants

Respondents

Witnesses

Third-party Reporters



Serving Impartially in Your Role

- Must avoid **prejudgment** of the facts at issue
- Must avoid **conflicts of interest**
- Must avoid **bias**



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Source: Title IX Regulations (2020)

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Principles for Title IX Process



- Must maintain **complete neutrality & impartiality at all times** in investigating alleged conduct violations of institutional policies.
- Understanding bias & whether it exists: Need to take an “**objective, common sense approach to evaluating whether a person serving in a role is biased.**” (*Title IX Preamble (2020)*)...



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Avoiding Bias

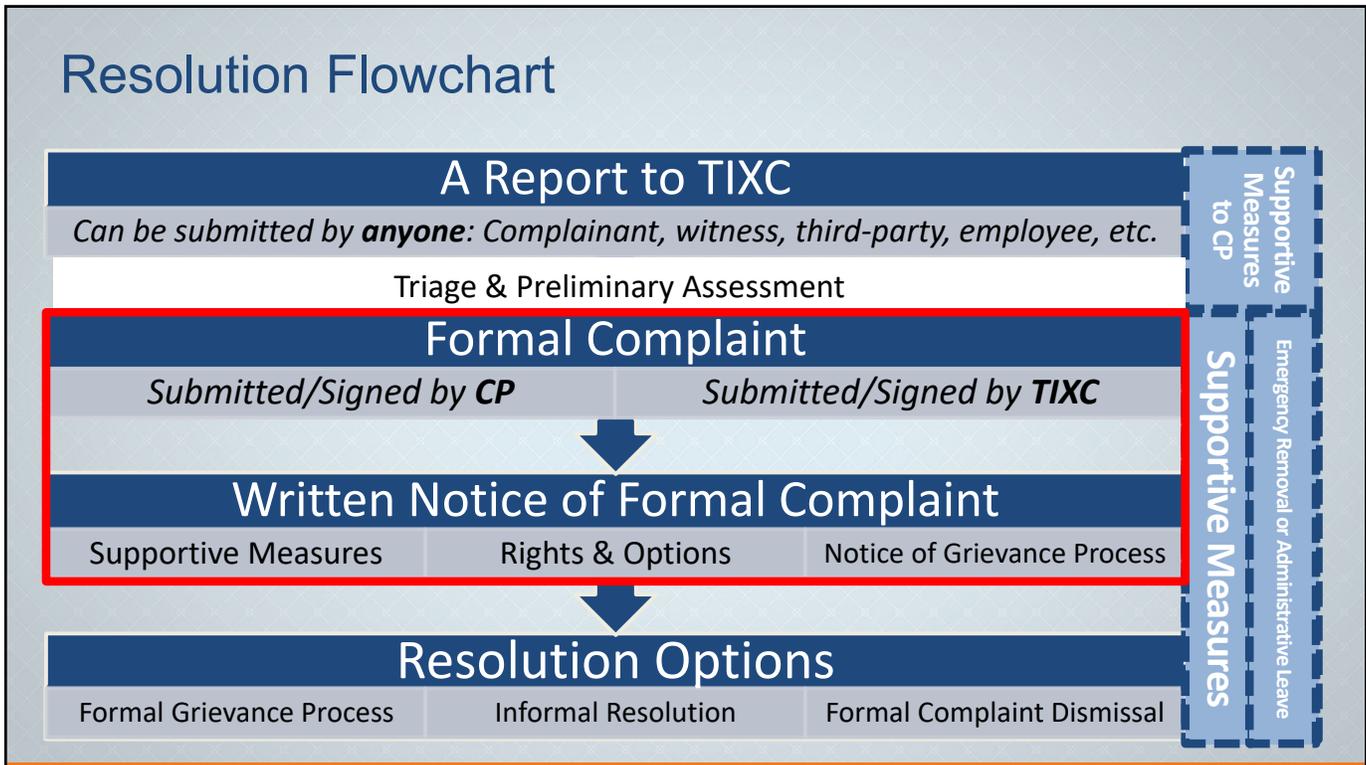
- Must **not** treat a party differently:
 - On the basis of the person's **sex**;
 - On **stereotypes** about how men or women behave with respect to sexual violence; and/or
 - On the basis of the person's **protected characteristics**.



Initial Steps of an Investigation



Resolution Flowchart



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Written Notice of Formal Complaint

Upon receipt of a formal complaint, promptly send written notice to CP & RP:

- Notice of the grievance process under the policy;
- Notice of the allegations that potentially constitute prohibited conduct under the policy, sufficient details about the alleged conduct: Date(s), time(s), and location(s);
- A statement that the potential policy violations are being investigated;

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Written Notice (Continued)

- A statement that the RP is presumed not responsible for the alleged conduct and that the determination regarding responsibility will be made at the conclusion of the grievance process;
- Both parties may have an advisor of choice, who may be, but is not required to be, an attorney, and may inspect and review all evidence;
- A statement that the parties may review evidence gathered as part of the any investigation;

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Written Notice (Continued)

- A provision of the policy that knowingly making false statements or knowingly submitting false information during the grievance process is prohibited and subject to disciplinary action;
- Any other relevant information for the written notice; and
- A statement that retaliation is prohibited under the policy. (recommended)

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Other resources to include with the written notice:

1. **Supportive measures** available for both parties
2. **Campus & local** resources or services
3. **Rights & options** of both parties
4. A copy of the **grievance process & policy**
5. Title IX Coordinator & Investigator(s) **contact information**



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Party's Rights

A **Complainant** and **Respondent** have the following rights during a grievance process:

Information and Support

- To be informed of and have access to counseling, medical, academic, and other applicable **support services**, including **confidential resources**.
- To be informed of the importance of a victim going to a **hospital for treatment** and the **preservation of evidence**, if applicable, as soon as practicable after an alleged incident.
- To be informed of a **notice of formal complaint** to the University, whether filed by a CP or the TIXC.
- To receive information and ask questions about the **formal and informal processes**.

Equal Opportunity and Representation

- To receive a **prompt, fair, equitable, and impartial grievance process**
- To be given **equal chance** to participate in a grievance process, including the opportunity to identify witnesses and other relevant evidence and to **choose not** to actively participate in the grievance process, if desired.
- To have an **advisor of choice** present during all meetings and grievance proceedings.
- To have an **advisor provided** for a party at a **hearing** under the Title IX/SH grievance process, if an advisor of choice is not present.
- To have access and equal opportunity to **inspect and review any evidence obtained** as part of the investigation, and to receive a copy of the completed investigation report.
- To be **equally informed** of any **determinations** regarding responsibility, dismissals of formal complaints, and/or a party's filing of an appeal.
- To **appeal** a determination regarding responsibility and/or dismissals of formal complaints.
- To file a report with **local and/or campus law enforcement** authorities.



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Complainant's Rights

(related to the Grievance Process)

- To **report** an incident and/or **file a formal complaint** with the University.
- To **request** in writing that the University **not investigate** a reported incident and be **informed** of the **University's decision** whether or not to investigate.
- To **request** in writing a **dismissal** of a formal complaint (e.g. withdraws the formal complaint or any allegations therein).



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Resolution Options

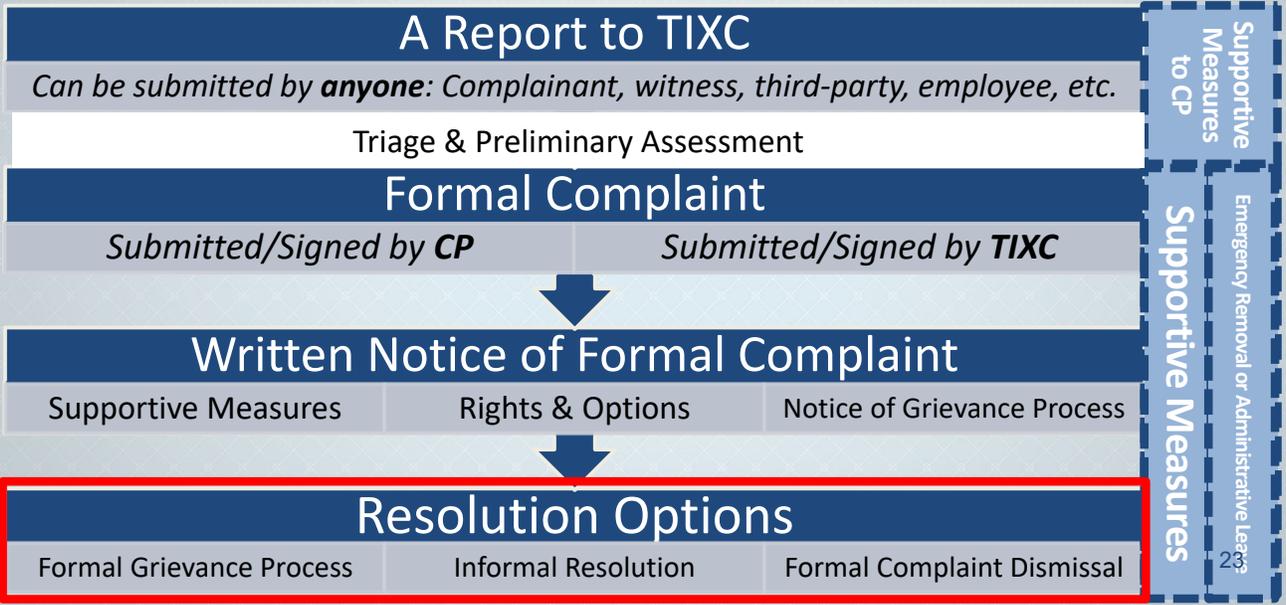


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Resolution Flowchart



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Formal Grievance Process Flowchart (Zoomed-In) Sexual Misconduct Cases



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Conducting an Investigation: Ongoing Elements



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Investigative Framework

- Establish **facts & timeline(s)**.
- Understand each party's **perception & experiences** of the alleged incident(s).
- Elicit **details & descriptions** of the alleged incident(s) from the parties & witnesses.
- Address **disputed facts or conflicting evidence** (if any) & seek responses from the parties (if applicable).
- Gather **sufficient information available** for a determination of facts, importance, & relevance to the formal complaint.



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Investigator Considerations

- One or two investigators?
- Roles of each investigator?
 - Facilitator
 - Notetaker
- Interview notetaking or recording?

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Investigation Plan: The Foundation

Basis for the investigation?

- Alleged **incident** of prohibited conduct
- Alleged **pattern** of prohibited conduct
- Alleged **climate issue(s)** in an area or department



Note: It is the institution's decision on how an investigation may be handled.

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Look at the
Provision(s)
at Issue:

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for his or her safety or the safety of others or suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker 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.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
- **Substantial emotional distress** means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.



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Look at the
Provision(s)
at Issue:

Engaging in a (1) course of conduct
(2) directed at a specific person that would
(3) cause a reasonable person to fear for
his or her safety or the safety of others or
suffer substantial emotional distress.

For the purposes of this definition:

- **Course of conduct** means two or more acts, including, but not limited to, acts in which the stalker 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.
- **Reasonable person** means a reasonable person under similar circumstances and with similar identities to the victim.
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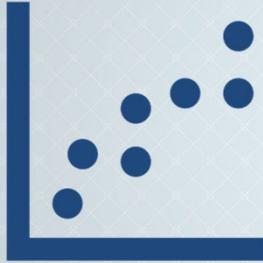


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Basis: Pattern Investigations



- **Multiple incidents** of similar type of alleged conduct or circumstances with same RP?
- **Multiple complainants** regarding same or multiple incidents of similar type of alleged conduct or circumstances with same RP?
- **Multiple respondents** regarding same incident or situation?
- **Student organization** allegations?

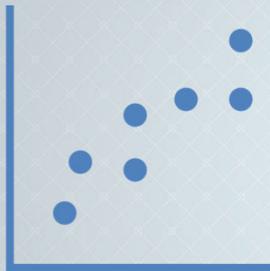
Note: It is the institution's decision on how a pattern-based investigation may be handled.



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Considerations: Allegation Patterns



- **Reports vs. Formal Complaints?**
 - **Report history** for same RP regarding similar conduct allegations? **Applicability** (if any) to the current investigation?
- **Consolidate pattern allegations** into one investigation?
- May be **larger-scale** in scope.
- **Multiple incidents?** May lend credibility to witness testimony regarding allegations of similar conduct with same RP?
- **Multiple complainants?** Information/privacy waivers, participation?

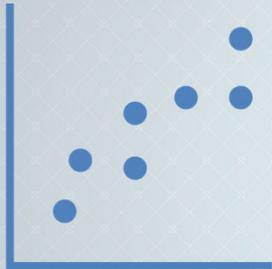
Note: It is the institution's decision on how a pattern-based investigation may be handled.



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Considerations: Allegation Patterns (Cont.)



- Balance focus on the **individual** and **pattern elements** of consolidated investigations:
 - Based on the **scope of the investigation**, consider **each allegation** on **its own merits**, with the relevant evidence gathered for each allegation
 - Same grievance process applied
- Document the **justification** for consolidating the investigation, if applicable. Examples might include, but are not limited to:
 - Multiple allegations? Similarity of allegations? How so?
 - Overlapping witnesses?
- **Student-based allegation patterns**: Emergency removal threshold met? (Individualized safety & risk analysis)

Note: It is the institution's decision on how a pattern-based investigation may be handled.



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Basis: Climate Investigations



- Generalized concerns about the **climate, environment, or policies** in a program or department.
- No specific incidents or allegations with a program or department.
- **Reputational** concerns or **exit interview** statements regarding a program or department.

Note: It is the institution's decision on how a climate-based investigation may be handled.



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Considerations: Climate Allegations

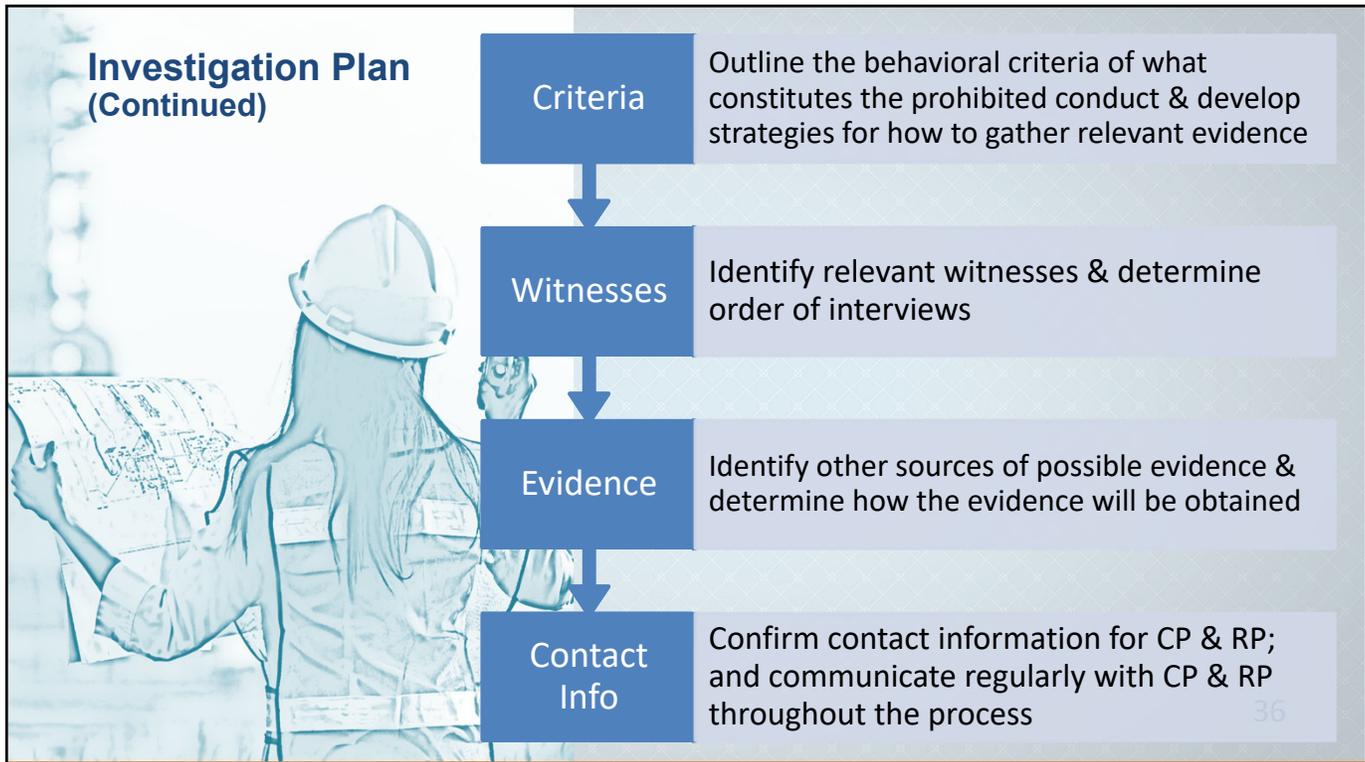


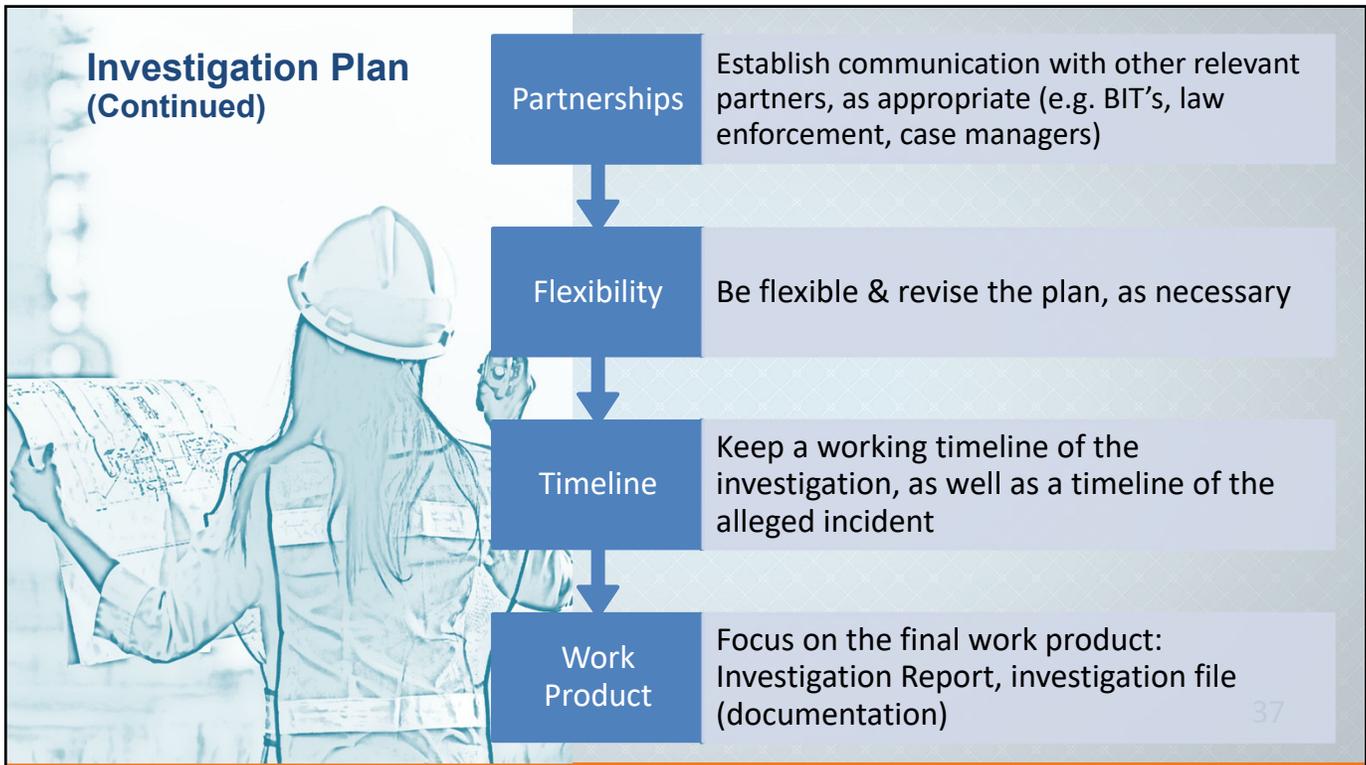
- May be **larger-scale** and more **open** in scope.
- Without specific RP's for a formal written notice, provide **notice** to the **program director** or **department chair**.
- Invite program or department affiliates as **witness interviews**, general prompts
- As evidence is collected & reviewed, triage & determine if the **basis or scope** needs to be **updated**.

Note: It is the institution's decision on how a climate-based investigation may be handled.



Investigation Plan (Continued)





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Interview Notice

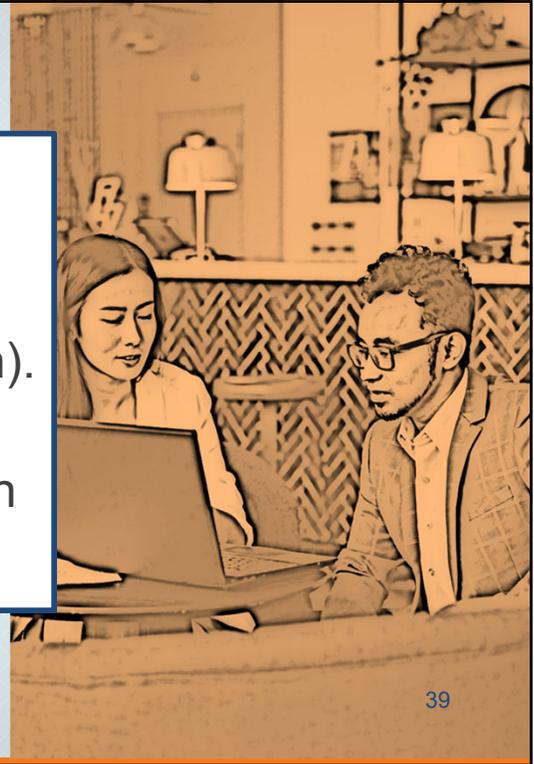
- Date, time, & location of the interview meeting
- Names of the invited or expected meeting participant(s)
- Purpose of the meeting or investigative interview
- Opportunity to present any information, evidence, and/or witnesses relevant to the formal complaint.
- An advisor of choice may attend, though not required.

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Advisor Considerations

- Is an advisor of choice involved?
- Access to the related evidence & the finalized investigation report (closing steps of the investigation).
- Consider providing an advisor, if an advisor of choice has not been involved.



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Evidence Collection

- Available body of facts or information:
 1. Tangible objects (real items)
 2. Demonstrative (modeling)
 3. Documentary (written materials)
 4. Testimonial (statements)

...that indicates whether a claim, belief, or proposition may be true or valid.



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Closing Steps of the Investigation

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Evidence Pyramid

Relevant evidence

Evidence included in the Investigation Report

Evidence directly related to the allegations

Evidence provided to the parties & advisors for inspection & response

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Medical Records Evidence



Cannot access, consider, disclose, or use a party's **medical or mental health records** as evidence unless the party provides voluntary, written consent to the institution for the grievance process.

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HIPAA vs. FERPA

The **medical or mental health record** is protected by **HIPAA**, and retained by the healthcare enterprise.

A copy of a medical or mental health record that is submitted to the investigation by the record holder (with voluntary, written consent) becomes protected under **FERPA** (students) and **privacy** provisions of the institution's policies. The documentation is eligible for **access to evidence** by both parties (and their advisors).



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Access to Evidence

Equal opportunity to both parties (& the advisors) to **inspect & review any evidence obtained** that is directly related to the allegations in the formal complaint.



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Access to Evidence: Why?

So that each party can **meaningfully respond** to the evidence prior to the conclusion of the investigation.



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Access to Evidence: When?

- Upon request from a CP, RP, or an Advisor?
- At the end of the investigation?



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Access to Evidence (Cont.)

Send each party (& the advisors*) the applicable evidence:

- In hard copy or electronic format
- At least 10 days to inspect, review, & respond to the evidence
- All responses to the evidence must be submitted in writing to the investigator(s)

** Advisor of choice; or the provided advisor by the institution (If applicable)*



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Access to Evidence (Cont.)

The investigators will consider all timely responses submitted by the parties **prior** to completing the investigation report.

Issues of Relevance

Review of Evidence

- Available body of facts or information:
 1. Tangible objects (real items)
 2. Demonstrative (modeling)
 3. Documentary (written materials)
 4. Testimonial (statements)

...that indicates whether a claim, belief, or proposition may be true or valid.



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Evidence Pyramid



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Relevant Evidence



Evidence is **relevant** if:

- The evidence has any 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.



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Relevant Evidence



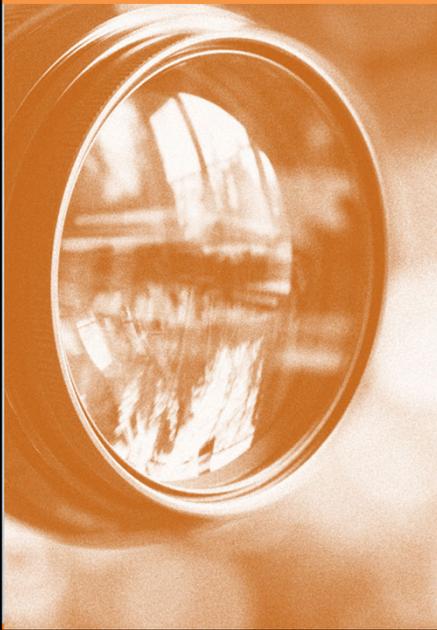
Another way to frame it:

- **Exculpatory evidence:** Evidence tending to excuse, justify, or absolve the person of the alleged conduct.
- **Inculpatory evidence:** Evidence that places responsibility on the person of the alleged conduct.

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“Reasonable Person” Standard



Use a “**reasonable person**” standard for weighing all of the evidence:

- An objective test to denote a hypothetical person who exercises average care, skill, and judgment in conduct under similar circumstances as a comparative standard.

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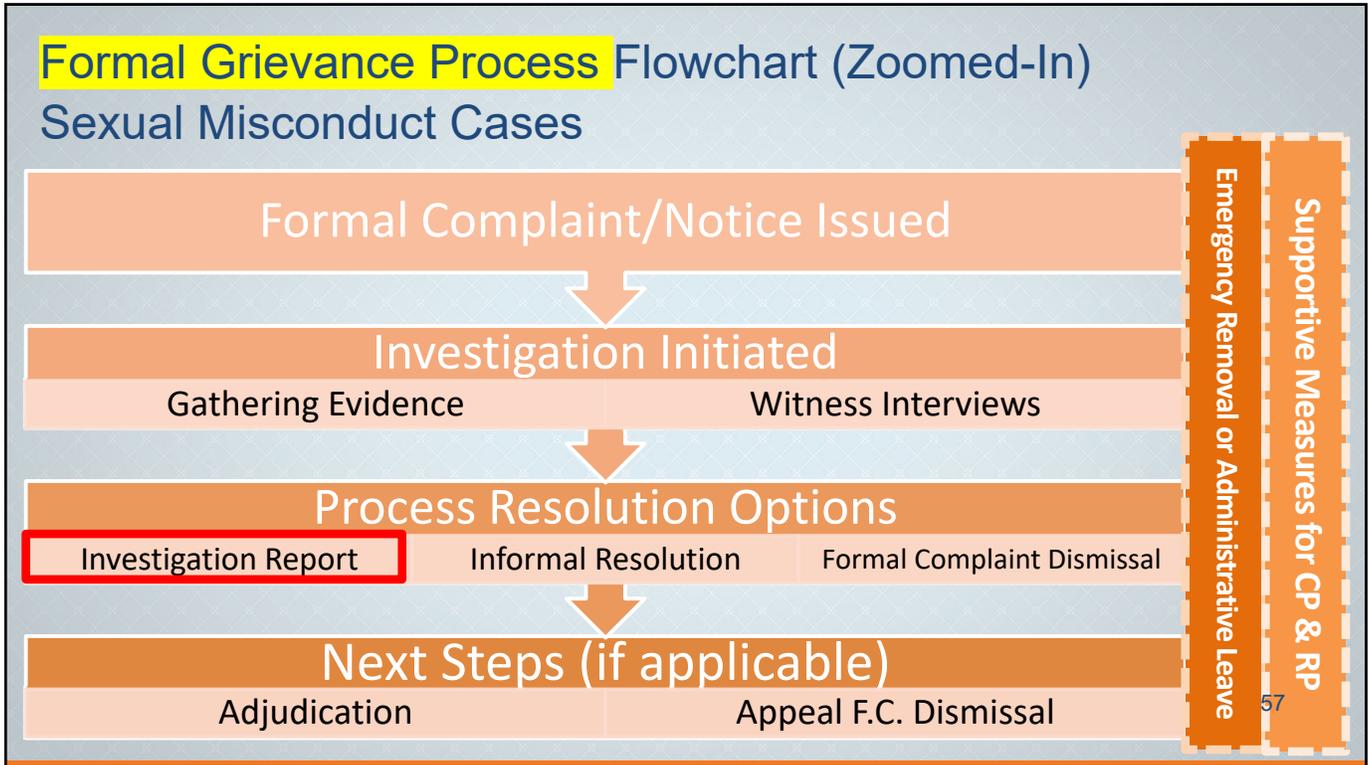
Investigation
Report



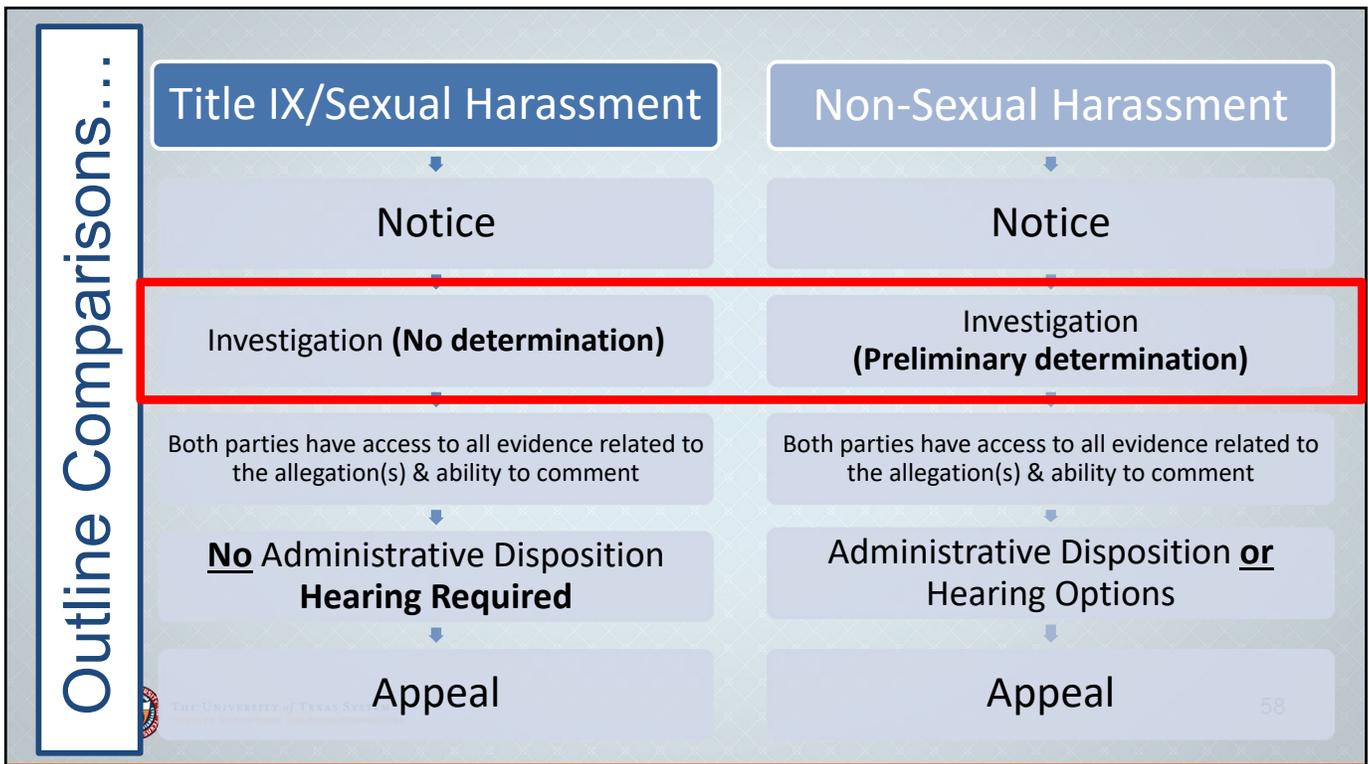
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Draft vs. Completed Investigation Report

FAQ's:

- When should the investigation report be released to the parties (and the party's advisors)?
- Can the institution provide a draft investigation report first?



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Completed Investigation Report: Sexual Harassment Cases

1. Outline each of the **allegations** that potentially constitutes prohibited conduct under the Policy (required by the Title IX regulations).
2. Provide a **timeline** (e.g. procedural steps) of the investigation. (recommended)
3. **Fairly summarize** relevant evidence, participate statements, and responses to questions (required by the Title IX regulations).
 - **Exculpatory**: Evidence tending to excuse, justify, or absolve the person of the alleged conduct.
 - **Inculpatory**: Evidence that places responsibility on the person of the alleged conduct.



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Additional Recommended Elements

- Overview (Summary) of the Investigation
- Institutional Jurisdiction
- Relevant Policies
- Investigators
- Witnesses
- Procedural Next Steps



What about these Elements?

- Credibility assessments?
- Evidence analysis & rationale?
- Preliminary determination regarding responsibility?



Access to the Completed Investigation Report

Send each party (& the advisors*) the completed investigation report:

- At least 10 days prior to the scheduled hearing
 - Why? Opportunity for the parties to inspect, review, & respond to the investigation report (at the hearing)
- A copy of the investigation report to the TIXC and hearing officer assigned.

* Advisor of choice; or the provided advisor by the institution (If applicable)



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Investigation Timeframe (Example)

The investigation of a formal complaint will be concluded within **90 days** of the filing of a formal complaint

Note: Circumstances may require a **temporary delay** in this timeframe & the institution may extend this timeframe for good cause.

- Provide **notice** to the parties for temporary delays or extensions



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Source:

UT System Model Policy for Sexual Misconduct

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Investigation Documentation Examples

- Documentation Checklists & Forms
- Intake & Initial Assessments
- Case Management Timelines & Decisions
- Contact & Communications
- **Notices, Letters, & Dismissals**
- **Evidence Collection**
- **Investigation Report**
- Data Systems for Electronic & Hard Copy Records



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Documentation & Record Keeping

The University (through the appropriate office) will retain all of the documentation included in the Grievance Process (outlined in the SM Policy) for 7 years, in accordance with state and federal records laws and University policy.

All documentation of records are private and confidential to the extent possible under law. Student records of the Grievance Process are disciplinary records under FERPA. Employee records of the Grievance Process are subject to the Freedom of Information Act (FOIA) and the Texas Public Information Act (TPIA), and included in the employee's official employment record.



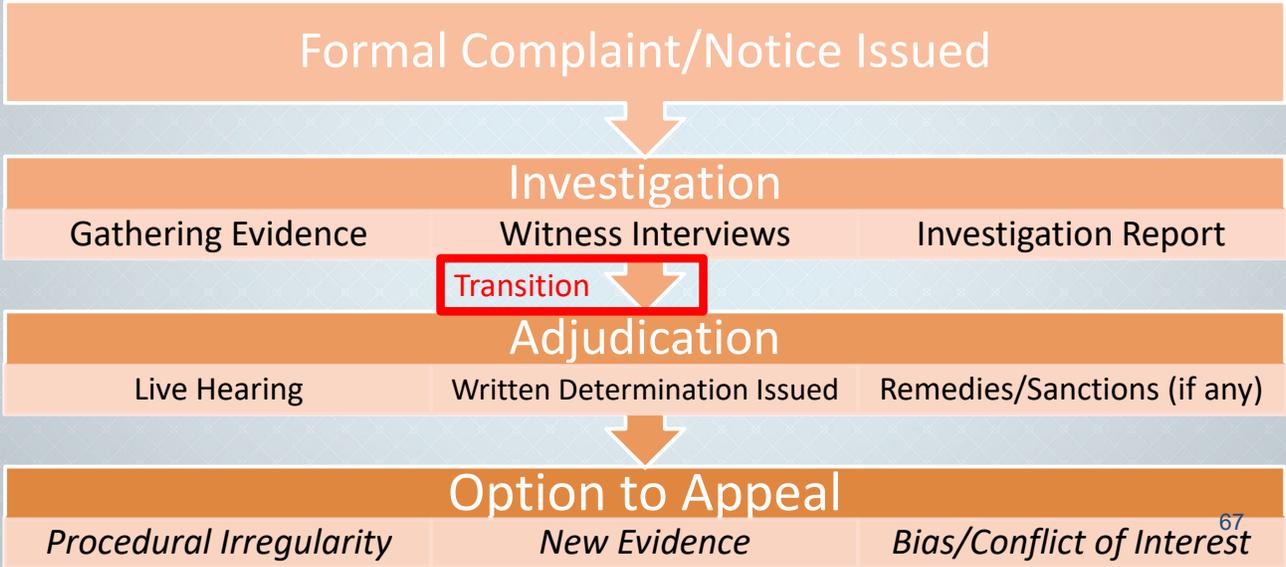
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Source:

UT System Model Policy for Sexual Misconduct

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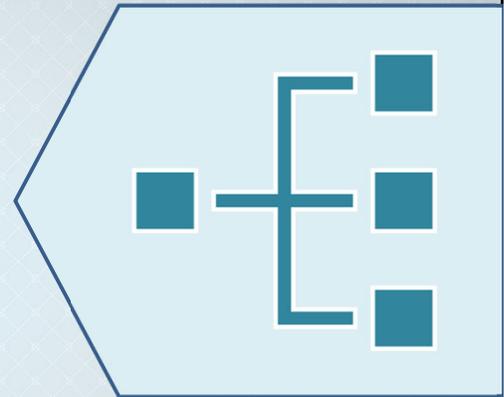
Formal Grievance Process Flowchart (Zoomed-In) Title IX/Sexual Harassment



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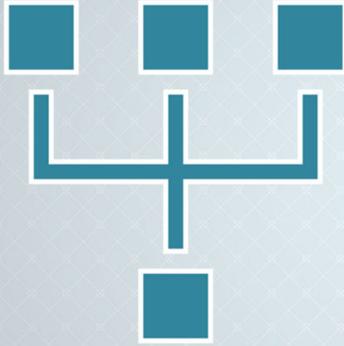
Transition to Adjudication

- Transition process to the adjudication office? Referral?
- An administrative coordinator for the adjudication intake, scheduling, organizing, & communicating the next steps (e.g. hearing) to all participants.



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Adjudication Intake



Referral Type (RP)	Adjudication Office (Examples)
Student	Student Conduct
Faculty	Provost
Staff	Human Resources

Q & A

Contact Information

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