ATIXA Guidance: Investigations with Pattern Elements
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ATIXA has developed this document to provide guidance on pattern evidence in sexual misconduct investigations and resolutions. The frequency and complexity of member queries, OCR guidance, and resolution agreements – as well as recent court decisions that have considered pattern evidence – suggest a need for clearer guidance for the field.

At the outset, Title IX administrators should recognize that an investigation may be classified into one (or more) of three frameworks: incident, pattern, and/or climate. As outlined in the July 17, 2018, ATIXA Position Statement on Consideration of Pattern Evidence in Campus Sexual Misconduct Investigations, “[w]hen one behavior by one individual is being investigated, we are investigating an incident. When more than one similar behavior by one individual is being investigated, we are investigating a possible pattern. And, when an entity, institution, department, and/or the actions of multiple individuals are being investigated, we are usually investigating the potential for a hostile climate or culture.”

This “Pattern Elements” guidance document focuses not on considering pattern evidence, but on how to conduct resolution processes while addressing potential patterns of misconduct. As with all civil rights investigations, pattern-based investigations must be prompt, thorough, and impartial and designed to stop, prevent, and remedy the effects of discriminatory conduct. While investigations involving pattern evidence retain the standard elements of a preliminary inquiry (small “i”), formal investigation (big “I”), finding, and resolution, some adaptation and modification may be required.

Several scenarios are illustrative:
- A single individual may report multiple incidents of misconduct by the same responding party.
- One or more individuals may each report a similar but separate incident of misconduct by the same responding party.
- One or more individuals may each report multiple (as opposed to just one per reporting party) separate incidents of misconduct by the same responding party, creating a potential “pattern of patterns.”
- One or more individuals may report multiple similar incidents of misconduct by an organization or group, which may also constitute a pattern.

There is no singular approach that best addresses each possible scenario. Accordingly, this guidance document provides the foundational ideas, principles, and tools to equip Title IX professionals to effectively resolve pattern evidence situations as they arise.

How does evidence of a pattern affect an investigation?

The proposed regulations released by OCR in November 2018 require institutions to conduct an investigation if there is evidence of pattern behavior. Accordingly, there is an enhanced need to consider how pattern-based evidence should be addressed in a sexual misconduct investigation.

Multiple good-faith allegations regarding the same responding party can affect an investigation in four possible ways: 1) as corroborative evidence lending credibility to other allegations of similar conduct, 2) as persuasive evidence increasing
the likelihood that the responding party is responsible for a policy violation, 3) as evidence indicating a need for enhanced interim measures, and/or 4) as part of an accumulation of evidence necessitating heightened sanctions and/or remedial measures. Title IX administrators should be careful not to let non-specific allegations or rumors influence findings or sanctions, because accusations in and of themselves are not enough to establish a violation of policy. Where there’s smoke, there is not necessarily enough evidence of fire. To help sort through the smoke, Title IX practitioners should keep all four of the pattern-based impacts in mind when considering the evidentiary value and appropriate function of the evidence and whether it supports a determination that a pattern of misconduct exists. Each is addressed in turn in this section.

1) Corroborative evidence lends credibility to other allegations of similar conduct

Multiple allegations of similar conduct, by either a single individual or multiple individuals, may add credibility or value to related testimony and other evidence. For example, during a preliminary inquiry (small “i”), multiple allegations could provide enough evidence of a severe, persistent, or pervasive environment that the inquiry should shift to a formal investigation (big “I”). Multiple allegations of substantially similar conduct across different incidents, particularly when by multiple reporting parties, may also strengthen the credibility of the evidence provided. Conversely, the absence of multiple reports might, depending on the circumstances and reported misconduct, render the underlying allegation insufficient to continue to the next stage of the resolution process.

2) Persuasive evidence increases the likelihood that the responding party is responsible for a policy violation

Multiple prior allegations of similar conduct by multiple reporting parties may inform a finding in the current investigation. For example, if a responding party was previously found responsible for a policy violation, and a subsequent allegation describes substantially similar conduct by the same responding party, the nature of the prior allegation may be used in the current investigation. This is more than just giving a credibility boost to the current allegation – it can be evidence supporting the substance of the current allegation. To provide substantive weight in a subsequent investigation, there must be a finding of violation in a prior, substantially similar allegation. That said, investigators should carefully examine the evidence of the present allegation without being overly or unduly influenced by previous allegations and/or findings.

Organizational misconduct – such as by a team, department, or student organization – is often the subject of pattern-based misconduct investigations. As with investigations of individuals, prior allegations and findings can inform current allegations. This is particularly true when examining the “severe, pervasive or persistent” policy threshold, which typically requires multiple incidents or a discriminatory pattern. In such cases, previous allegations can be used to inform either credibility, a finding, or both. Indeed, a policy or practice affecting just one individual may not be sufficient to show discrimination by the group, but an aggregate of multiple incidents or collusion by members acting in concert may meet the threshold of severe, persistent, or pervasive conduct. Additionally, failure to investigate and establish responsibility for multiple incidents will most often result in a failure to establish a violation for discriminatory conduct in the final analysis.

3) Evidence indicates a need for enhanced interim measures

Multiple allegations of multiple incidents involving the same individual(s) or group may require heightened interim measures while the investigation is pending. Depending on the underlying conduct, multiple credible allegations pertaining to multiple incidents – particularly by multiple reporting parties – may more credibly demonstrate a risk of harm through a pattern of behavior than would a single incident. This in turn can lead to more significant interim measures to ensure the harassment or discrimination stops and recurrence is prevented to the extent possible until the investigation is complete. As the investigation progresses, however, it is important to re-evaluate the need for restrictive measures in light of the evidence gathered. Note that doing so may either result in relaxing interim measures if the pattern-based allegations do not represent the level of risk initially considered, or in enhancing measures as more pattern-based evidence is gathered.
4) Accumulation of evidence necessitates heightened sanctions and/or remedial measures

When imposing sanctions on a responding party, multiple credible allegations of substantially similar conduct may present cause to enhance the severity of the sanctions. Indeed, when an investigation results in finding a policy violation, additional credible allegations of substantially similar conduct – pattern behavior – can justify sanctions that reasonably anticipate future harm if such behavior continues. For a responding party, this may increase the likelihood or duration of separation from the academic program. For programs or organizations, this may enhance the level of intervention and monitoring, the length of probation, etc. Additionally, credible allegations which did not result in finding a policy violation may still influence a tailored set of (non-punitve) remedial measures to address specific repeated circumstances.

How do I modify my investigation when there’s a possible pattern?

In practice, Title IX professionals should structure investigations to assess multiple allegations when appropriate. When a single individual presents multiple reports of misconduct by the same responding party, the separate allegations may lend initial credibility to one another. However, each report must be thoroughly investigated, and the corroborative value of each allegation will increase or decrease depending on the investigator’s ability to substantiate each allegation respectively. The final investigation report will consider this corroborative value, both as it pertains to the likelihood of responsibility for the individual incidents as well as for a determination of a behavioral pattern. Therefore, the process becomes an investigation of not just one incident, but two or more, which can add complexity, time, depth, and breadth to the investigation.

When multiple individuals present separate reports of misconduct by the same responding party, an institution can either investigate each allegation through separate investigations, or through a single investigation. Whichever approach is used, each allegation must be assessed independently before a determination and/or sanctions can be based on a pattern of behavior. This is critical because the number of allegations could sway investigators at the findings phase, which would be improper, unless those incidents reflect a pattern – which provides corroborating information. Similarities between the alleged behavior can boost the credibility of the similar allegations, however, only substantially similar conduct should be relied upon to make such a decision. Whichever approach is used – a merged investigation or separate investigations, the investigation(s) should follow the process described in the preceding paragraph. Also, it is important to recognize that a finding of policy violation for one allegation does not automatically mean a person violated policy in each alleged incident; each allegation must be taken on its own merits and a decision made on the evidence. Merging investigations will be more likely the more obvious the evidence is supporting a pattern from the inception of the preliminary inquiry or formal investigation. The less obvious the pattern from the outset, the more logical it will be to keep the investigations separate. Key factors influencing the decision to merge investigations include the similarity of the allegations, the number of overlapping witnesses, and whether each reporting party (where there is more than one) will be a witness for the other. The more likely each of these is, the more efficient and logical it will be to merge the investigations, which may also result in a more trauma-informed approach that minimizes gratuitous recounting of the incident.

Sometimes one or more of the individuals does not want to be a reporting party but wishes to provide information regarding a separate but substantially similar incident in support of the original allegations. In practice, this makes very little difference to the way the investigation proceeds. Because OCR is taking the position that institutions will be obligated to investigate when multiple allegations are presented, an individual who wishes to provide information regarding a second potential violation but does not want to participate as an additional reporting party, will become at least a witness in the investigation. If the person serves only as a witness, the investigation report should note that while this witness’ testimony may not necessarily prove the original allegations, it may have corroborative value as it describes substantially similar conduct. Note that investigators will still provide the name of this individual and details of the additional allegations, and the responding party will have an opportunity to respond, rebut, and likely cross-examine. If sufficient evidence exists to support the additional allegation, then the allegation adds corroborative value to the original allegations and makes a policy violation more likely. If there is insufficient evidence to support the additional
allegation, or if the conduct is not substantially similar, this allegation should have no effect on the original allegation(s), although it may affect the second reporting party’s credibility. If sufficient evidence exists to render a finding on the witness’s allegations, it makes sense for investigators or decision-makers to do so, not because this is a chargeable additional offense that the responding party will face, but because it grounds the finding of pattern in something that is not just a good faith allegation, but a finding of additional violation of policy.

An investigation may also discover additional potential reporting parties. In these cases, the initial response should be to reach out to the potential reporting parties to assess the whether they wish to bring forward additional allegations. Beyond offering appropriate supportive measures, investigators should ascertain the willingness of the individual(s) to make a formal report. The individual(s) may decline to participate, may provide information as witness, or may join the investigation as an additional reporting party. The additional allegations should still be investigated thoroughly, either as another phase of the continuing investigation or as a separate investigation to be considered alongside the original investigation.

In the event of allegations pertaining to a program or organization, investigation of the program or organization may be conjoined with investigation of the individuals involved. However, findings should be made and rationales provided separately as to each individual and to the program or organization itself.

How do I avoid the appearance of conflicts-of-interest or bias in pattern-based cases?

Bias and conflict-of-interest are of particular concern when investigations involve pattern-based misconduct and/or prior misconduct. Conflicts-of-interest and bias are separate, related issues, though guarding against one does not necessarily guard against the other.

Conflicts-of-interest exist when individuals stand to gain something based on a certain outcome or conduct, or when there are dual roles or divided loyalties that compromise objectivity. For example, a hearing administrator who does not want to see a hearing outcome overturned also serves as the administrator briefing the appeals officer on the hearing outcome. Another example would be a hearing panel chair who makes a bad decision about admitting evidence during a hearing but fails to correct it because they don’t want to look incompetent and lose their position as chair in the future.

Bias may exist when an individual has a predisposition for or against something. For example, an investigator who previously investigated a responding party may be challenged in a subsequent investigation of the same responding party as “biased” because of their prior involvement, or when there are multiple allegations to be considered in succession, or if sanctions might take into account conduct sanctioned previously by the same administrator.

However, such challenges related to bias or conflict of interest tend to go too far. Not only can investigators and hearing administrators consider cases involving substantially similar allegations and/or repeat responding parties, some might argue they absolutely should. Sexual misconduct resolution processes are mandated by Title IX to be impartial. Just because an individual’s position might bring them into contact with the same responding party for similar allegations does not mean that individual is biased. Appropriately trained investigators and administrators must be trusted to maintain the integrity of that process, and to recuse themselves when they cannot be impartial. To remove or replace them in all but substantiated bias situations or in cases of clear conflict would compromise the process unnecessarily, but it is also wise to have a process that allows challenges on the basis of bias or conflict to be raised by the parties.

Pattern adds complexity, but to familiar conceptual frameworks

Civil rights investigations are characterized by certain procedural elements: report of incident, initial response, collection of relevant testimony and evidence, assessment of testimony and evidence in the context of policy, and determination of whether a violation has occurred. Multiple allegations of substantially similar conduct by the same responding party or allegations related to a program or organization may require some repetition within the investigation (e.g. multiple
gatekeeping determinations during the investigation), or adjustment to account for a potential pattern (e.g. accounting for patterns during gatekeeping).

Multiple reports and/or multiple reporting parties add complexity to any civil rights investigation. However, there is no need for a new or dramatically different process. Instead, repetition of certain phases or steps will ensure all allegations from all sources are thoroughly investigated. Title IX administrators need not master additional skills but will need increased organization in order to expand the process to encompass all allegations. If any additional talent is needed, it is the ability to analyze how multiple allegations impact on each other and form potential patterns. The mere presence of multiple allegations should not cause a circumvention of these best practices, nor a rush to judgment regarding a responding party’s responsibility. Steady progression through the investigative steps with a nimble strategy that can accommodate for the presence of evidence indicating a pattern will protect the integrity of the process, yield efficient consideration of evidence, and produce reliable resolutions.

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