

**STUDY GUIDE :
PATTERN & PREDATION**

20-Minutes-to...
Trained

PRESENTED BY:

- W. Scott Lewis, J.D., Partner, TNG & ATIXA Advisory Board
- Amy Zavadil, Ph.D., ATIXA Advisory Board





20-Minutes-to...*Trained*: Pattern and Predation Table of Contents

Learning Outcomes-----	Page 2
Discussion Questions-----	Page 3
Case Studies-----	Page 4
Karen and Dr. Yorke Multiple Assaults by Non-Student	
Case Study Questions & Answers-----	Page 7
Karen and Dr. Yorke	
ATIXA’s Position Statement: Consideration of Pattern Evidence in Campus Sexual Misconduct Allegations-----	Page 8
Multiple Assaults by Non-Student Case Study-----	Page 13
ATIXA’s Guidance: Investigations with Pattern Elements-----	Page 14
ATIXA’s Tip of the Week: Establishing a Pattern Through Investigation-----	Page 19
ATIXA’s Tip of the Week: Multiple Reports Against the Same Responding Party-----	Page 20

representatives in the course of these training modules. While this training may include compliance elements, ATIXA offers no warranties or guarantees as to content, and accepts no liability for how the content is interpreted or implemented by reviewer.



20-Minutes-to...*Trained*: Pattern and Predation Learning Outcomes

- Participants will be able to define the three kinds of pattern.
- Participants will be able to assess sufficiently similar facts and determine whether they indicate a pattern or predation.
- Participants will recognize that pattern must be proven by a preponderance of the evidence.
- Participants will be able to explain the two ways to evaluate pattern evidence: 1) in evaluating the information in the current report; 2) in assessing appropriate sanctions.
- Participants will understand that pattern and predation can be used as aggravating factors in sanctioning.



20-Minutes-to...*Trained*: Pattern and Predation Discussion Questions

- What are the three types of pattern and how might an investigator evaluate evidence that reflects pattern?
- What are tools and techniques used in grooming? What online or social media evidence might exist that displays a pattern?
- What investigative techniques can be used to explore pattern of behavior that does not ask about prior sexual partners in a judging or shaming way?
- When you have multiple reports but one of them is a reluctant reporter, how might you move forward? Should an investigator use their report?
- What facts will assist a Coordinator determine whether cases should be handled together as one case or as separate cases where a pattern is present?
- Who should make determinations around pattern and predation? The investigator? The decision-maker?



20-Minutes-to...*Trained*: Pattern and Predation Case Studies

Karen and Dr. Yorke

The Title IX Coordinator at Vexler University, a large 4-year public university, recently received a call from Dr. Conway, the associate dean of the College of Arts & Sciences. Dr. Conway explained that one of his college's academic advisors had contacted him after meeting with Karen, a graduate student in the geology department who is expected to graduate with her master's degree at the end of the upcoming fall semester. According to Dr. Conway, the advisor said that Karen had stopped by her office unexpectedly and asked about her academic schedule for the upcoming fall semester, specifically whether she could take GEOL 6315, a course in which she was enrolled for fall semester and needed in order to graduate, with someone other than Professor Yorke, the instructor of record.

When the advisor told Karen that Professor Yorke was the only professor teaching the course that semester, Karen seemed visibly concerned. When the advisor asked Karen why she didn't want to take Professor Yorke's class, Karen said that she "just didn't feel comfortable" being in his class and would not provide any further explanation. In looking at Karen's academic transcript, the advisor noted that Karen appeared to have just finished a course taught by Professor Yorke in the second summer semester, which concluded a week prior to their meeting. Concerned by how adamantly Karen seemed to want to avoid being in a class with Professor Yorke, the advisor referred the concern up to Dr. Conway, who scheduled a meeting with Karen to see if he could help.

Dr. Conway told the Coordinator that when he met with Karen, he told her that there was likely no alternative class, but that he really wanted to understand her concerns related to Professor Yorke and would try to help as best he could. Though initially reluctant, Karen eventually said, "Well, Dr. Yorke was our professor for this summer's field camp, the seminar class, where we camp out in the hill country for a couple weeks and do all types of hiking, mapping, and measuring. I mean, he's a good professor, he really is, I actually had him for another class my first year in grad school and it was fine, but, I don't know, some stuff happened during field camp and I'd just feel more comfortable taking a section taught by someone else, if that's at all possible."

Dr. Conway said he asked Karen if she would feel comfortable telling him more about what happened during field camp, but she was resistant. Dr. Conway said he told Karen, "It doesn't sound like your concerns with

Professor Yorke are ‘academic’ in nature,” to which he said Karen responded with a subtle shake of her head. Dr. Conway contacted the Title IX Coordinator shortly after Karen left his office.

When the Title IX Coordinator asked Dr. Conway whether he was aware of any other concerns regarding Professor Yorke, Dr. Conway said, “No, not at all. He’s been with the department for over 20 years, he’s a highly respected researcher in his field, and the students really seem to love him.” He went on to say, “I would describe Dr. Yorke as very hip, very down-to-earth. He’s the ‘cool professor’ in the department, I’d say. He can be very outspoken at times, not afraid to raise eyebrows, but I’ve not necessarily heard of him saying anything super offensive.”

The Title IX Coordinator met with Karen soon thereafter and, though initially reluctant, Karen eventually told the Coordinator about her interactions with Professor Yorke during field camp. Karen said that they just recently returned from field camp, adding that grades had not been posted yet. Karen described field camp as an extensive, multi-week outdoor graduate course where she and 12 other graduate students in the geology department, a teaching assistant (TA), and Professor Yorke all drove out to the nearby hill country and camped for several weeks, breaking every few days to stay at a local hotel for showers and air conditioning. Karen said days were spent hiking the area, mapping the terrain, and studying various rock and geologic formations, while nights were typically spent finishing assignments and then eating, talking, and singing around the campfire. Karen said it was fairly common for Professor Yorke to break out his acoustic guitar.

Karen said that, on multiple occasions during the daily hikes, Professor Yorke would make comments or ask her questions that made her feel uncomfortable, often when the other students were scattered about taking measurements and few were within earshot. On one occasion, she said Professor Yorke told her, referencing the spaghetti-strap tank top she was wearing, “You might want to pull those straps down onto your arms so you don’t get tan lines.” On another occasion, as she and one of her female classmates were climbing up some rocks and Professor Yorke was climbing up behind them, Karen said that Professor Yorke remarked, “I’m not sure how you ladies do this in such tight shorts. Looks very constricting.” Karen said they just tried to laugh it off, but were decidedly aware of the fact that he was staring at their butts.

Karen said that on the last night of field camp, as everyone sat around the fire, Professor Yorke squeezed into a small space next to her with his guitar, despite there being other places to sit with more room. She said he began to play his guitar and kept urging her to sing with him, saying that “everyone talks about how beautiful your voice is.” Karen said that at first it seemed playful, but he persisted even after she refused several times, and it embarrassed her. Later, as other students started leaving for their respective tents, Karen said Professor Yorke turned to her and asked offhandedly if she was dating anyone. When she said no, he asked her if there was anyone in the geology department she would consider dating. Karen said she just laughed and said, “probably not.”

Karen said a few minutes later, Professor Yorke leaned in, started talking more quietly, and began telling her about his wife and how she doesn’t understand the type of work he does, and how much he enjoys talking to women who understand geology and can have engaging conversations with him about the subject matter. Karen said she just listened and didn’t say much, looking for an opportunity to head to her tent. Karen said, “Finally, Elise came to save me—she was my tent mate. I think she could tell I was uncomfortable and she kind of interrupted Professor Yorke to tell me to come to the tent. I think she made up something about it being cold and needing my body heat.”

Karen said that the following day they packed everything up and started the drive back to campus, with all the students in the van driven by the TA, and Professor Yorke following them in the Suburban carrying all the supplies. Karen said as she sat in the back of the van with a few of her classmates, she received a text message from Professor Yorke. She explained to the Coordinator that everyone had exchanged phone numbers at the start of field camp and that a group text had been the primary means of communication between Professor Yorke and the students. This text, however, was sent only to her and read, "I can't get the thought of your face glowing in the firelight out of my mind. I really wish we could have sung together; I would have loved to hear your beautiful voice." Karen said she did not know how to respond but felt like she should say something, so she replied, "Haha, thanks Professor! Camp was a lot of fun and I definitely learned a lot." Karen said she still has the text messages on her phone.

When they arrived back on campus, Karen said she could sense that Professor Yorke was looking in her direction as they got out of the van, but that she purposefully averted her eyes, quickly grabbed her belongings, and went to her car and left campus without saying much to anyone. Karen said she has not spoken to Professor Yorke since leaving campus that day and has been very reluctant to tell anyone about the situation. Karen said she thought seriously about reporting her concerns, but feared that it would jeopardize her grade in the class.

She said that since she is graduating soon, she didn't want to do anything to derail that and thought, rather than making it into a big deal, she would just try to avoid having another class with him. Karen also mentioned that Professor Yorke has a reputation in the geology department, particularly among the graduate students, as being somewhat flirtatious toward female students, adding that since it hadn't been addressed before, she wasn't necessarily crazy about being the first person to make an issue out of it. However, after discussing the situation with the Title IX Coordinator, Karen indicated that she would be willing to participate in an investigation, so long as she could be assured that nothing adverse would happen to her, academically or otherwise.



20-Minutes-to...*Trained*: Pattern and Predation Case Studies Question & Answer

Karen and Dr. Yorke

For Discussion:

- What facts lend themselves to evidencing a pattern?
 - Karen reports that other graduate students find that Dr. Yorke is flirtatious but have not come forward to report the behavior.
 - Karen's roommate seemed to be acutely aware that Karen was uncomfortable by Dr. Yorke's behavior at the campfire.
 - Dr. Yorke takes a group of students on the camping trip each year.
- If Karen does not wish to move forward, should the investigator move forward with an investigation? What steps might the Coordinator take to determine whether there is a pattern?
 - The allegations may indicate that Dr. Yorke has a pattern of sexually harassing graduate students.
 - The Coordinator should check their records to determine whether there have been previous reports naming Dr. Yorke as a responding party.
 - The Coordinator could interview Dr. Conway further about whether he has heard any rumors regarding Dr. Yorke.
 - The Coordinator may also interview Karen's roommate.
 - The Coordinator could ask Karen whether she would share names of other graduate students who have been approached by Dr. Yorke.
- If another reporting party comes forward and both wish to proceed with a formal hearing, how might the institution move forward?
 - Hold one decision process or panel for both incidents.
 - Hold two separate panels with the same membership but then combine the matters during sanctioning.
 - Hold two separate panels with different membership but allow each reporting party to be a witness at the other panel. Consider bringing the cases together for sanctioning.



ATIXA POSITION STATEMENT

ATIXA POSITION STATEMENT ON CONSIDERATION OF PATTERN EVIDENCE IN CAMPUS SEXUAL MISCONDUCT ALLEGATIONS

ABOUT ATIXA

Founded in 2011, ATIXA is the nation's only membership association dedicated solely to Title IX compliance and supports our over 3,500 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification in the U.S., having certified more than 3,000 Title IX Coordinators and more than 8,000 Title IX investigators since 2011. ATIXA releases position statements on matters of import to our members and the field, as authorized by the ATIXA Board of Advisors. For more information, visit www.atixa.org.

July 17, 2018

ATIXA issues this position statement to provide guidance to our members on the consideration of pattern evidence in sexual misconduct investigations and resolutions. Contradictory research, recent court opinions, and common questions regarding the existence and admission of pattern evidence suggest a need for clearer guidance for the field.

First, it is important to establish what we mean when we reference a pattern. ATIXA defines an alleged pattern to include allegations or other evidence that one person has engaged in two or more substantially similar incidents or behaviors toward one or more targets. A confirmed pattern exists when a preponderance of the evidence supports that the alleged acts actually occurred. The similarity can be in the type of act, commonality of chosen victims, location, consistency of premeditation, and/or signature or *modus operandi* (method of operation) of the perpetration.

Second, it is important to recognize that under Title IX, an investigation can occur within three different frameworks: incident, pattern, or climate/culture. When 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 taxonomy of investigation types is crucial to understand, because it is important to recognize the framework for your investigation at the outset, when possible. You may be working with more than one framework at a time, and, as an investigation unfolds, you may need to shift frameworks. What starts with an investigation of an incident can become an investigation of a pattern or climate (or vice-versa) as you learn more and more incidents become known. Or, you may start off thinking you have a pattern, but it turns out to be only an incident. Similarly, initial information about a pattern can turn into a larger investigation of a climate, and vice-versa.

While certainly an inexact science, recognizing patterns within the evidence of good faith reports involving the same responding party requires thorough investigation. Only through careful investigative methods is one able to identify repeat elements or details, if those details are sufficiently similar to create a pattern, represent a method or *modus operandi*, and/or, when considered in the aggregate, evidence an overarching scheme. This is pattern evidence. If pattern evidence is identified, we consider this evidence in two ways: in evaluating the information obtained in the current report (to aid in our credibility assessments and/or to aid in determining whether the evidence makes the current reported misconduct more likely to have occurred) and in assessing appropriate sanctions.

OCR alluded to pattern behavior in the 2001 guidance. For example, in discussing pattern as a basis for finding a hostile environment, OCR said to consider “[t]he type, frequency, and duration of the conduct. In most cases, a hostile environment will exist if there is a pattern or practice of harassment, or if the harassment is sustained and nontrivial.”

OCR further noted:

In addition, by investigating the complaint to the extent possible including by reporting it to the Title IX coordinator or other responsible school employee designated pursuant to Title IX the school may learn about or be able to confirm a pattern of harassment based on claims by different students that they were harassed by the same individual. In some situations there may be prior reports by former students who now might be willing to come forward and be identified, thus providing a basis for further corrective action.

And, footnote 77 of the 2001 Guidance, excerpted in its entirety below, is quite concrete about pattern:

For example, a substantiated report indicating that a high school coach has engaged in inappropriate physical conduct of a sexual nature in several instances with different students may suggest a pattern of conduct that should trigger an inquiry as to whether other students have been sexually harassed by that coach. See also Doe v. School Administrative Dist. No. 19, 66 F.Supp.2d 57, 63-64 and n.6 (D.Me. 1999) (in a private lawsuit for money damages under Title IX in which a high school principal had notice that a teacher may be engaging in a sexual relationship with one underage student and did not investigate, and then the same teacher allegedly engaged in sexual intercourse with another student, who did not report the incident, the court indicated that the school's knowledge of the first relationship may be sufficient to serve as actual notice of the second incident).

OCR has also suggested, in correspondence with ATIXA, that pattern could be broadly construed, and prior good faith allegations and/or findings of any of the behaviors on the Title IX continuum could be evidence that helps to prove the current allegations. This is quite a different approach to the student conduct model, which typically only considers previous findings in determining sanctions. But pattern can and should impact the underlying finding as well, both on campus and in court, as discussed further below.

In our role as practitioners, one of our responsibilities – as referenced by OCR above – is to remedy hostile environments. To do this, we must look for evidence of patterns and address them if they are discernible; patterns contribute to and exacerbate a hostile environment and may indicate the possibility of future recurrence. But assessing whether individuals engage in patterned behavior and deciphering which elements create a pattern is not often a straightforward task. This can be a critical skill for Title IX administrators, not

just in making a finding, but in assessing the risk of a situation where a reporting party is reluctant to proceed. Pattern can be one of the reasons that a Title IX administrator decides the school or college should proceed despite the reluctance or non-participation of the reporting party.

Research on repeat offenders provides some insight into the role of pattern evidence in assessing future risk. David Lisak, a well-known clinical psychologist, has spent his career studying interpersonal violence and has been broadly published and featured in numerous documentaries. According to Lisak, a select few individuals account for the majority of campus sexual assaults, with many of these individuals committing multiple acts.

More recent research published in *JAMA Pediatrics* by Kevin Swartout and a group of researchers, suggests that sexual assaults on campus are not, as Lisak proposed, perpetrated by a small percentage of individuals but instead are carried out by a larger percentage of young men who don't neatly fit into a serial rapist profile. Swartout's conclusion is difficult to digest because it bucks the commonly accepted orthodoxy established by Lisak. It posits there is not a small and easily-identified group of perpetrators on campus, and suggests instead that individuals have a multitude of motivations for their actions and may or may not engage in patterns of misconduct.

Lisak's study could serve as justification to place special emphasis on possible patterns, whereas Swartout's conclusions, while equally concerning in their own way, are less supportive of a lethal risk of repeat perpetration. Given the difference in repeat perpetration findings ranging from 25%-63% depending on which study is cited, ATIXA suggests reviewing the literature carefully, digesting the methodological critiques about each study and the recency of the data to make determinations regarding pattern evidence based on these two disparate schools of thought. No matter which study holds sway with you, the literature evidences some level of repeat perpetration risk; your job is to assess the actual risk of a particular situation, not the speculative potential of possible re-perpetration. This assessment may be a key opportunity to work with your BIT (behavioral intervention team) or TAT (threat assessment team) so that your decisions are evidence-based and not assumption-based.

While the research is inconsistent, and there is no definitive OCR policy statement on how to incorporate or assess pattern evidence, two recent judges' opinions offer valuable insight into what "sufficiently similar" means so as to establish a pattern, and how pattern evidence is utilized. Both opinions occurred in the criminal legal context, where due process requirements exceed those of colleges and schools. Courts follow articulated, established rules of evidence and years of precedential case law, a very different arena from campus proceedings. Despite these distinctions, the below summaries provide some framework for considering and utilizing pattern evidence as existing within the construct of due process, rather than a violation of it. If this evidence is admissible in criminal courts, it certainly can be considered in the less formal environment of a college or school proceeding.

In a sexual assault case currently being litigated against an ex-Michigan State University football player, prosecutors sought to admit as evidence information relating to several earlier incidents involving the player.¹ The judge allowed details related to two prior incidents, one in 2013 and the other in 2014, to be admitted as evidence. In each of these interactions, the reporting party had informed police that the football player had pulled down their pants and used force during their respective sexual assaults. Because these reports had similar details to the report in the present case, the judge allowed these prior reports into evidence. The judge

¹ Mencarini, Matt. "Past rape reports against ex-MSU football player Robertson can be used in trial." *Lansing State Journal* 2 May 2018. 6 Jul. 2018

ruled that two additional incidents were *not* sufficiently similar to the allegations at issue to be admitted: in one of the incidents, the football player allegedly grabbed a woman and asked her about sex, but she pushed him away and left; in the other, the player allegedly told a woman he was going to rape her but didn't take further action. This opinion establishes helpful parameters for determining what conduct is considered by the courts to be sufficiently similar.

The judge's decision to allow testimony from five additional women in the retrial of Bill Cosby is also informative. This testimony was admitted under two interrelated exceptions to the prior bad acts doctrine. The first exception is the theory that the additional testimony could, in conjunction with the charged crime, evidence a larger plan. The second exception is the theory that the additional testimony demonstrated Cosby's *modus operandi* which evidenced not simply a propensity to commit sexual assault, but Cosby's actual intent – given the remarkably similar reports of Cosby's approach to drugged sexual interactions – to penetrate the victim in the present case without her consent.

Of course, our school and campus proceedings are not bound by the same evidentiary constraints as the courts, though we must observe basic due process or essential fairness. To put a fine point on this – though it may conflict with what you may hear from the responding party – consideration of pattern evidence can be required by (rather than violative of) the principles of due process and basic fairness. How we review pattern evidence is more flexible and dependent on both circumstances and policy provisions. Where there are two or more individuals who report separate incidents involving the same responding party, and, after investigation, there is a potential pattern of behavior, there are three primary avenues by which to proceed:

- Combine the resolutions into hearing panels or resolution proceedings with two (or more) distinct phases, provided that the school's procedures allow for this. In this process, each phase consists of a hearing involving a separate reporting party; the testimony provided may both support the determination of the existence of a pattern and may also contribute to the preponderance of the evidence and responsibility finding for the other reporting party, assuming the pattern is present with substantially similar incidents, targets, premeditation, approaches, etc.
- Hold two (or more) hearing panels or resolution proceedings, with the same decision-maker(s) for each allegation, but then conjoin the allegations when it is time to make the finding and impose any sanction.
- Hold two (or more) hearing panels or resolution proceedings with differing decision-makers. Allow each reporting party to be a witness at the panel of the other. Make separate findings, and bring together for sanctioning, if appropriate. Keep in mind that this approach requires the reporting parties to testify multiple times, which is not ideal and may contribute to re-traumatization, and may not enable comprehensive pattern consideration, making it the least viable model.

Whether conduct constitutes a pattern is for the institution to determine by a preponderance of the evidence. ATIXA recommends that information on pattern, previous violations, and other relevant history be included in an appendix to the investigation report that is not shared with the reporting party, unless relevant. Because it is the responsibility of the school or college to identify, consider, and remedy patterns, the reporting party does not generally need this information and there may be a bar to sharing it under FERPA. An exception would be in situations where prior pattern directly corroborates the present report or has aided in the credibility assessment of the current reporting party. In such a situation, that evidence would directly relate to

the present proceeding and the inclusion of the prior incidents, or some portion thereof, in that the report provides relevant evidentiary support for the findings of the investigation.

In applying pattern rules, a final caution is not to confuse validated patterns with the aggregation of unsubstantiated allegations. This is also known as the “if there is smoke there must be fire” approach to investigation. However, if a student engaged in offensive conduct in a residence hall that did not rise to the level of an objectively hostile environment and then later engaged in offensive conduct in another residence hall that also did not rise to the level of an objectively hostile environment, you can’t combine the two separate instances to conclude by a preponderance of the evidence that the responding party’s conduct created a hostile environment. Put another way, $49\% + 49\% \div 2 = 49\%$, not a preponderance proving a substantiated pattern of misconduct.

This position statement has been ratified by the ATIXA Board of Advisors, as of July 13, 2018.



Multiple Assaults by Non-Student

At our University, we have several students who have reported that they have been sexually assaulted by an individual (non-student) who lives off campus and often has parties that some of our students attend. All of the students who came forward with a report have a similar story. They drank too much (encouraged by the individual), he led them to a separate room to “rest” and then assaulted them. None of them wish to follow through with a police investigation.

Police are aware of the situation and have had additional victims who have started to file a complaint and then stopped. The suspected individual has been ordered not to come onto our university campus and, as is our protocol when someone is banned from campus, an e-mail went out to all students with a picture of the individual, stating he was banned and if seen on campus to call campus safety.

I want to know if we should send out something else. I feel like we are just waiting for the next party and next victim. It’s very frustrating that he is just raping our students and nothing is happening! Should we send out another e-mail? How would we word it if we did? I would like to warn our students in a method that is legal and ethical to the suspect and victims. I know we can’t use the individuals name but would a general email be useful at all? Any advice?



ATIXA Guidance Investigations with Pattern Elements

Authored by Joseph Vincent, M.L.S., Anna Oppenheim, J.D., Daniel C. Swinton, J.D., Ed.D., and Brett A. Sokolow, J.D.

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
- 2) 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-punitive) 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.

Issued November 21, 2018



ATIXA Tip of the Week January 21st, 2016

Establishing a Pattern Through Investigation

Tip of the Week authored by Brett A. Sokolow, J.D., Executive Director, ATIXA

During your investigation, you find information regarding nearly identical circumstances of behavior from another case through a different office on your campus. The respondent of the Title IX case is currently involved in another case, similar to your own, just with a different complainant. What does an investigator do with this information if they believe this establishes pattern?

You need to establish through investigation if it is a pattern, what the similarities are, and why it makes the current accusation more likely. If you determine all of that, write it up accordingly in your report. It is evidence. I know of no written authority on this, OCR is telling us we have to address patterns as evidence.



ATIXA Tip of the Week
January 26th, 2018

Multiple Reports Against the Same Responding Party

By [Brett A. Sokolow, Esq.](#), ATIXA President

We have two women who came forward and reported two incidents of sexual assault involving the same responding party. The reporting parties were not aware of each other. Reporting Party One's incident occurred in August 2016 and Reporting Party Two's incident occurred in April 2018. After the investigation, there is a potential pattern of behavior. Our student code of conduct says when violations stem from the same incident they can be heard by one panel. Obviously, these are not the same incidents. How are other institutions handling multiple reports against the same responding party when there is a potential pattern?

I think you have at least three choices:

1. Combine the resolutions into one process/panel. This is my preferred approach, and you can do this unless your procedures say you can't.
2. Hold two separate panels, with the same membership for each allegation, but then conjoin the two allegations when it is time to make the finding and impose any sanction. This is not a bad option if you are public.
3. Hold two separate panels with differing membership. Allow each reporting party to be a witness at the panel of the other. Make two findings, and bring together for sanctioning, if appropriate. This isn't my preferred approach because it requires the reporting parties to testify twice.