

# Title IX Sexual Harassment Policy and Procedure Training

Part II



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# Agenda for Session II

- Investigation Process
  - Planning the investigation
  - Conducting interviews
  - Gathering evidence
- Investigation Report Writing and Best Practices
- Review and Comment Procedures



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# Before an investigation

- College learns of allegations that may constitute Sexual Harassment under Title IX.
- Title IX meets with complainant; determines if supportive measures are appropriate.
- Implementation of supportive measures.
- Grievance Process begins if FORMAL COMPLAINT filed.
- Title IX Coordinator will review any Formal Complaints to determine if criteria for *mandatory dismissal* or *discretionary dismissal* exist.



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# Before an investigation

- Notice of Formal Complaint is sent to the parties, which should include, if known, the identity of the parties, the conduct alleged to be Sexual Harassment, and the date(s) and location(s) of the incident(s).
- Parties have the right to select an advisor of their choice who may attend meetings and interviews with that party.
- Advisors may confer with their party during meetings and interviews, but generally may not speak on behalf of the party.



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# Investigation Overview



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# Investigation Overview

- Title IX Coordinator will appoint an Investigator or Investigators to conduct a fair, thorough and impartial investigation
  - **Fair** – the investigation is conducted in a manner that is consistent with the College’s Policy and transparent to the parties
  - **Thorough** – the investigation includes interviews with all parties and relevant witnesses and reviews all relevant evidence
  - **Impartial** – the investigation is conducted by individuals who do not have a conflict of interest or bias for or against either party, or complainants or respondents generally and who are properly trained



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# Investigation Overview

- Generally, the Title IX Coordinator and Director of Campus Security will serve as Investigators, but other employees and/or outside individuals can be appointed as Investigators
- Investigators will meet with both parties and any other witnesses identified in the Formal Complaint and gather relevant evidence.
- Both parties can identify potential witnesses and submit evidence to the investigators.
- Burden of proof and burden of gathering sufficient evidence rests on the College.



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# Investigation Overview

- During the investigation, the investigators should:
  - Develop a strategic investigation plan
  - Provide proper notice for all meetings and interviews
  - Keep parties regularly appraised of the status of the investigation
  - Provide parties with an equal opportunity to present witnesses and evidence
  - Prepare an investigative report



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# Role of the Investigator(s)

- The Investigator acts as a **fact finder**.
- Investigator's role is not to make a conclusion or a determination of responsibility, not even to make a suggested/proposed conclusion or determination.
- Investigators do not make credibility determinations – they only report the facts learned in the investigation.



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# Investigation Overview

- Important to notify the Title IX Coordinator if:
  - You become aware that any of the mandatory dismissal criteria apply (not Sexual Harassment under the policy, outside the College education program or activity, against a person outside the U.S.)
  - You become aware of a conflict of interest
  - You learn of additional allegations that need to be investigated so the notice of investigation can be updated



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# Planning an Investigation



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# Develop an Investigation Plan

- To start, review the Formal Complaint and the Notice of Investigation sent to the parties.
- Clarify any questions about allegations or scope with Title IX Coordinator.
- Identify any special considerations – such as:
  - Was there an emergency removal?
  - Alleged criminal conduct?
  - Timing and availability of witnesses



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# Develop an Investigation Plan

- **Who** will you interview?
- **What** questions will you ask?
- **What** documents do you need to review?
- **Where** will you interview each person?
- **When** will you interview each person?
- **How** will you order your interviews?
- **Why** will each person be important to your investigation?



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# Develop an Investigation Plan

- Investigation Plan
  - Identify the scope of the investigation
  - Consider the timeline
  - Identify potential witnesses
- Gathering Resources in Advance
  - Written policies and procedures
  - Police or other official reports (if available)
  - Photos, videos, texts, voicemails
  - Personnel files or work logs



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# Develop an Investigation Plan

- Interviews
  - Need for special provisions? (translator, assistive devices, etc.)
  - How will interviews be conducted? (in person, video conferencing, etc.)
  - Outline of topics for each interview
- Determine potential witnesses from preparation phase and during interviews
- Review any documentation available from any witnesses or other sources



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# Develop an Investigation Plan

- Stay focused on the issues to be investigated
- Adjust the plan as necessary as you learn more and parties suggest additional witnesses
- Refer back to the Formal Notice for allegations and to the Policy for important definitions.



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# Hypothetical

- You are assigned to investigate a Formal Complaint alleging dating violence. A student alleges that his boyfriend, who is also a student, has hit him several times on campus, including once at the cafeteria in front of two classmates. He also alleges that his boyfriend strangled him in his dorm room.



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# Reluctant Witnesses

- Anticipate questions and concerns of witnesses
- Have a conversation in advance of the interview about concerns
- Presence of others during interviews
- Non-employee or non-student witnesses who cannot be compelled to cooperate
- Advise witnesses about non-retaliation policies



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# Special Considerations for Criminal Conduct

- If alleged conduct is also subject to criminal investigation by law enforcement, investigators will need to work with Title IX Coordinator to ensure investigation does not impede law enforcement's efforts.
- Can be good cause for a brief delay in the investigation.
- Communications with law enforcement on these issues should be carefully documented.



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# Notice for Interviews

- The Investigator will provide written notice of any meetings or interviews to the parties and/or witnesses at least 3 days in advance of the meeting or interview, unless the party or witness requests to meet sooner.
- Must be sufficient time for the party or witness to prepare for the interview or meeting.
- This notice will include the date, time, and location for the meeting, as well as who will be participating in the meeting and the purpose for the meeting.



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# Conducting Interviews and Collecting Evidence



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# Conducting Interviews

- Creating comfortable conditions –
  - Give thought to the location and conditions for the interview
  - Conduct interview (if possible) in a location that will make the party/witness as comfortable as possible (e.g. private room, etc.)
- Be cognizant of scheduling and requirements for notice
- Identify and inform advisors of any interviews
- Treat every person interviewed with courtesy and respect



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# Conducting Interviews

- Introduce yourself in your role as investigator – explain that your role is not to prove or disprove, but simply to gather information
- Explain the scope of the investigation
- Explain the reason for the interview (e.g. “You have been identified as someone who may have information about this investigation”)
- Advise of timeframe and further steps as necessary
- Explain what information might be shared outside of the interview
- Build rapport with interviewee while being professional and unbiased



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# Conducting Interviews

- Request confidentiality regarding the interview, but clearly explain importance and reasons for requesting confidentiality – make sure the interviewee understands why confidentiality matters.
- Clearly explain the College's prohibition against retaliation and identify the Title IX Coordinator as someone to whom the individual may report concerns of retaliation. Ensure that the interviewee knows how to contact the Title IX Coordinator.
- Document the information provided to the interviewee.



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# Notes on Confidentiality

- Do not promise confidentiality
  - A summary of the witness/party interview will appear in the report, which is shared with the parties and hearing body.
  - Sometimes, the law compels disclosure
- Make sure witness knows this
- Encourage all involved in the investigation to keep proceedings confidential
- Choose discrete locations and times
- Do not share information with colleagues if they are not directly involved in the investigation



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# Conducting Interviews

- Questioning:
  - Ask open-ended questions. Ask what interviewee is able to remember.
  - Allow sufficient time for interviewee to respond.
  - Let the individual give a statement in his/her own words without interruption before asking follow-up questions.
  - Use plain language that avoids appearance of bias (avoid terms like victim, attacker, legal terms, slang).



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# Conducting Interviews

- Questioning:
  - Ask follow-up questions to gain specifics such as time, location, people in questions.
  - \*Note that trauma may impact a person's ability to recall – but just because someone has difficulty remembering does not mean they experienced trauma.
  - Verify responses as necessary to avoid confusion or incorrect information. This may mean repeating back to a witness what you think they said in your own words.



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# Conducting Interviews

- Questioning:
  - Ask for clarification when there are inconsistencies or counter-intuitive behaviors from either party or a witness
    - Do so in a respectful, non-judgmental manner
    - E.g. “help me understand”...
  - Treat the interview like a conversation, not an interrogation.



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# Conducting Interviews

- Questioning:
  - Ask the interviewee to identify other persons, documents, or other evidence they believe would be helpful.
  - Ask if there is anything you have not asked about that they believe you should know.
  - Explain to the parties that no conclusions will be made until the entire process is complete.
  - Reiterate that there can be no retaliation against anyone participating in the investigation.



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# Conducting Interviews

- Concluding the interview:
  - Ask again if the interviewee has any additional information to add.
  - Thank the interviewee for cooperation.
  - Remind interviewee of need for confidentiality.
  - Provide method for follow up if the interviewee has anything to add.



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# Conducting Interviews

- Be Objective
  - Only form an opinion once the investigation is over
  - Do not let personal feelings and prior dealings with either party or any witness affect your investigation
  - It is okay to be skeptical of a witness, but approach them with an open mind to get all of the information!
- Be Thorough
  - If a witness uses a vague terminology (e.g., some, many, a lot) or subjective terms (e.g., acted strange, seemed upset), ask for more detail
  - If relevant, ask for detailed information about dates, times, location, injuries, acts committed, witnesses, etc.



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# Documenting the Interview

- Note name of interviewee, location of interview, date, time, additional persons in the interview.
- Note any documents being provided by the interviewee, if applicable.
- Consider recording interviews, or have one Investigator designated as note taker to ensure accurate notes.
- Prepare the summary of the party/witness statement as soon as possible after the interview when the information is fresh and you recall details



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# Documenting the Investigation

- Keep a record of any other information or evidence gathered, and from whom the information was received.
- Consider keeping a contact log – when parties/witnesses were contacted with a summary of the contact



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# Relevant Evidence

- As witnesses are identified, investigators should ask – what information can this witness provide?
- To the extent an investigator determines that the information that the witness is purported to provide is not relevant, the reasoning for that decision should be included in the Investigation Report.



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# Relevant Evidence

- Note that the Complainant and Respondent will have the right to review evidence that is “directly related” to the allegations – even if that evidence would not be used in reaching a determination of responsibility.
- So, what is not “relevant” at investigation stage?
- At hearing, Hearing Officer will have to make relevancy determinations; during investigation, information not categorically excluded (and having some relationship to allegations) would generally be received by Investigator(s).



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# Relevant Evidence – Rape Shield Provision

- Categorically, evidence about a complainant's prior sexual behavior will be deemed **irrelevant** unless:
  - It is offered to prove that someone other than the Respondent committed the alleged misconduct, or
  - It involves prior conduct with the Respondent and is offered to prove consent.



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# Relevant Evidence

- Also considered irrelevant:
  - Information that is protected by privilege (e.g. attorney-client privilege);
  - Any party's medical, psychiatric, psychological, or counseling records without that party's voluntary, written consent.



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# Additional Evidence

- As witnesses identify information, ask those witnesses to provide such information
- If witnesses do not have access to documents or other evidence, determine if there is another way to obtain the information.
- Make attempts to obtain information and document any limitations.



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# Additional Evidence

- Look for physical or documentary evidence that can corroborate a witness or party's statement.
  - E.g. surveillance video, records of meal swipes, class schedules, etc.
- May be provided by the witness, or may be something you locate through other sources
- Consult with the Title IX Coordinator, as needed.



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# Hypothetical

- A male student alleges that a female instructor is requiring him to engage in sexual acts in exchange for grades. The male student says there are emails to this effect, though he no longer has them.



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# Hypothetical

- A female student alleges that a male student sexually assaulted her in her dorm room. She alleges that the student admitted assaulting her in messages over Snapchat.



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# The Investigative Report



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# Evidence Review and Comment

- At the conclusion of the investigation, the Investigators will send a copy of the evidence that is directly related to the allegations in the Formal Complaint to the parties and their advisors for inspection and review.
- The parties will then have 10 days in order to submit a written response to the evidence, if they choose to do so.



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# Evidence Review and Comment

- Can start preparing the investigative report before the evidence review and comment but cannot finalize the report until the close of the review and comment period.
- The Investigators will consider any written response to the evidence before the completion of the investigative report.



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# Investigative Report

- The report should include a detailed summary of the investigation, including:
  - Summary of the procedural steps in the investigation
  - Summary of all interviews
  - Summary of any physical or documentary evidence
  - Photographs, logs, emails, text messages, police reports, forensic evidence, etc.
  - Attach copies of statements and documents to the report



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# Investigative Report

- What is the purpose of the Report?
  - It is the College's (not either parties') responsibility to identify information for purposes of the Title IX Sexual Harassment grievance process
  - The report is where the College "shows" its work.
  - Sets out information identified during investigation.



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# Investigative Report

- What is the purpose of the Report?
  - Allows parties to determine if there is other information that is missing/should be considered.
  - Provides baseline for the Hearing Officer about what information may be available for hearing.
  - Assists parties and the Hearing Officer in preparing for hearing.



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# Investigative Report

- Make a plan before you start drafting
- How will you organize the information?
  - Chronologically (i.e., in the order that you met with each witness)
  - By allegation, if there are multiple allegations
- Will you include an overall chronology or summary at the end?
- What are some key sections that you should include?



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# Investigative Report

- Potential Outline/Sections to include:
  - Introduction/Background
  - Summary of Allegations/Formal Complaint
  - Relevant Policies
  - Investigation Process
    - Include witnesses interviewed and documents/evidence reviewed
  - Narrative/Summaries of Witness Interviews
  - Exhibits



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# Introduction and Background

- Start by introducing the Complainant and providing some background –
- Describe the complaint, including how, when, and to whom the complaint first came to the College's attention
- Identify the Complainant and Respondent and their association with the College (i.e. employee, student, etc.)
- Explain when the investigation began and provide an overview of the investigation



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# Summary of Allegations

- Include all allegations that were made in the Formal Complaint
- If additional allegations were raised during the course of the investigation and were included in the scope of the investigation, specify what those allegations were



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# Relevant Policies

- Include relevant portions of the Title IX Policy, including important definitions.
- For example, if the allegation involved a non-consensual sexual assault, include the definition of sexual assault and the definition of consent.



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# Investigation Process

- Include all steps take during the investigation process
- List witnesses interviewed, and include the date of the interview
- List all evidence or documents reviewed during the investigation
- Document any delays to the process
- Include any other steps taken



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# Summaries of Witness Interviews

- When summarizing witness interviews –
  - Explain who the witness is and how he/she is connected to the College and the investigation
  - State when and where you interviewed the witness
  - Identify any other individuals present during the interview (e.g., an advisor)
  - Describe in detail each event or topic discussed during the interview



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# Summaries of Witness Interviews

- With respect to each event or topic discussed –
  - Note the date, time, and location
  - Provide a chronology of the event as reported by the witness (who said what and in what order)
  - For any key statements, document verbatim what the witness reported was said
  - Describe in detail any alleged gestures or physical contact
  - Note the name of any other witnesses identified by the witness
  - Describe any documents or other evidence provided by the witness



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# Summaries of Witness Interviews

- Identify what information you provided to the witness about the complaint or your investigation
- Note any discussions about confidentiality, retaliation, next steps, etc.
- Describe in detail how the witness responded to the information provided
  - What did the witness say?
  - Did they have a physical or emotional response?
  - Did they deny having any relevant information?



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# Summaries of Witness Interviews

- Remember tone and voice
- Investigators are fact-finders
- When recounting information from the parties or witnesses, identify the source of the information and avoid conclusory statements
- Good
  - “Maria reported that Dave called her fifteen times on Tuesday evening after class.”
  - “The following is a summary of the information provided by Maria: . . .”
- Not so good
  - “Dave called Maria fifteen times after class.”



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# Summaries of Witness Interviews

- Note your observations about the witness's behavior, demeanor, and attitude during the interview
- BUT only report factual observations, no conclusions
- Good
  - Maria cried when talking about X.
  - Dave looked at the floor when talking about Y.
- Not So Good
  - Maria cried when talking about X, so I believe she was telling the truth.
  - Dave looked at the floor when talking about Y, so I believe he was lying.



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# Summaries of Witness Interviews

- Note inconsistencies in the witness's account or discrepancies between what the witness says during the interview and any subsequent communications
- BUT again, avoid conclusions
- Good
  - During my initial interview with Maria, she said Dave did X. After informing her that Dave denied doing X, she explained that Dave had actually done Y.
- Not So Good
  - Maria lied during her initial interview when she said Dave did X. She later admitted that Dave had actually done Y.



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# Summaries of Witness Interviews

- For any follow up interviews, same rules above apply
- Identify the reason for the follow-up interview and what information you provided to the witness
- Describe in detail the witness's response to the information provided



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# Other Evidence

- E.g. Screen shots of text messages, emails, videos...
- Describe the evidence
- Summarize relevant portions
- Attach to the report if appropriate



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# Additional Information

- If a witness was not contacted, explain why
  - Were they unavailable?
  - Did they refuse to participate?
- If certain evidence was not obtained, explain why
  - Was it not accessible?
  - Was it deemed irrelevant? Why?
- Consider including an overall, chronological summary of the alleged incidents of Sexual Harassment



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# Investigative Report

- A Good Investigative Report is ... **as specific as possible**
  - Avoid vague terms like “some,” “many,” “a lot”
  - Provide dates, times, locations, when available
  - The more details, the better



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# Investigative Report

- A Good Investigative Report is ... clear
  - Error on the side of over-explaining
  - Assume the reader knows nothing about the individuals involved
  - Introduce each individual the first time they are mentioned in the report and provide their title and/or explain their involvement in the complaint and investigation
  - Use consistent terminology throughout



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# Investigative Report

- A Good Investigative Report is ... **objective**
  - Focus on the facts – who, what, when, where, why, how
  - Avoid using subjective terms (e.g., acted strange, seemed upset)
  - Leave your personal feelings or conclusions out
  - This is the information-gathering part of the process – the determination will come later



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# Investigative Report

- A Good Investigative Report is ... helpful to the Hearing Officer
  - What is the Hearing Officer looking for?
  - What is helpful?
  - What is not helpful?



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# Investigative Report – Finishing Touches

- Review the Report
- Is it easy to read?
- Is everything included?
- Does it look professional?
- Is it consistent with other similar reports?
- Will it make sense to someone with no knowledge of the complaint and investigation?
- Does it contain a full description of how the matter was brought to the College and what was done to investigate the complaint?



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# Review of Investigative Report

- The Investigators will send a copy of the report to the parties and their advisors at least 10 days prior to any hearing for the parties' review and written response.



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# Conclusion of Investigation

- The Investigators will make all evidence that is directly related to the allegations available at the grievance hearing.
- Investigators will provide the investigative report to the Hearing Officer.



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# Final Notes

- Remember – the Investigators are NOT the decision makers!
- Be mindful that the process is meant to be fair - be even-handed and impartial
- Be mindful of the impact of the process on all involved



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# Thank you for attending!

For questions, please contact:

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