

Title IX Training - 2020

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Conducting thorough, prompt, and equitable investigations

- ▶ What do you want to ensure we cover/what do you want to know?
- ▶ Any particular areas of concern/anxiety?
- ▶ **General outline of an investigation:**
 - ▶ Complaint leads to meeting with Title IX Coordinator
 - ▶ Investigation
 - ▶ Live Hearing
 - ▶ Appeal

What is Title IX?

Title IX of the Education Amendments Act of 1972 is a federal law that states: *"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."*

WHAT IS TITLE IX?

No sex discrimination. No sexual assault. *Period.*



Updates

- ▶ Title IX is no longer governed by Dear Colleague letters.
- ▶ The new regulations are binding, and we must follow them.
- ▶ *What does that really mean?*
- ▶ The new regulations carry the full force of law, unlike the previous administration's "Dear Colleague" letters.

We need to record investigations and hearings.

What can a person who violates Title IX be charged with under the new regulations?

Possible Charges:

- ▶ Sexual Harassment
 - ▶ Domestic Violence
 - ▶ Dating Violence
 - ▶ Stalking
 - ▶ Sexual Assault

What if the misconduct does not fit under one of the charges in Title IX?

- ▶ Offenses that do not fall under *or do not rise to the level of Title IX* but still constitute a violation of University policy will be investigated using the procedures outlined in the Student Code of Conduct, Human Resources Manual, or Faculty Handbook respectively.
- ▶ The Code, Manual, or Handbook used will be based on the status of the Respondent (e.g. student, staff member, or faculty member).

For our purposes...

► Complainant

- An individual who is alleged to be the victim of conduct that could constitute sexual harassment, sexual assault, stalking, and/or dating and domestic violence.
- *Can a Complainant remain anonymous?*

► Respondent

- An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment, sexual assault, stalking, and/or dating and domestic violence.
 - From the time a report or Formal Complaint is made, a **Respondent is presumed not responsible** for the alleged misconduct until a determination regarding responsibility is made final.

For our purposes...

► Formal Complaint

- A document filed by a Complainant (or their parent(s)/guardian(s) if the Complainant is still legally considered a minor in Louisiana) or signed by the Title IX Coordinator alleging sexual harassment, sexual assault, stalking, and/or dating and domestic violence against a Respondent and requesting that the school investigate the allegation.
 - At the time of filing a formal complaint, a Complainant must be participating in or attempting to participate in the education program or activity of the school with which the Formal Complaint is filed.
 - Where the Title IX Coordinator signs a Formal Complaint, the Title IX Coordinator is not a Complainant or otherwise a party during a grievance process.

If a Complainant does not want to participate in an investigation, when will the University proceed with an investigation anyway?

- ▶ The Title IX Coordinator will make this decision based on concern for the safety or well-being of the broader University community.
- ▶ In making this evaluation, the University may consider the following:
 - ▶ The seriousness of the alleged incident;
 - ▶ The age of the alleged victim;
 - ▶ Whether there have been other complaints or reports of policy violations against the accused individual;
 - ▶ The increased risk that the accused individual will commit additional acts of sexual harassment, sexual assault, stalking, and/or domestic and dating violence.

Preliminary Assessment of Formal Complaints

Upon receipt of a Title IX report, the Title IX Coordinator will conduct a preliminary assessment to determine

- ▶ Whether the conduct, as reported, falls or could fall within the scope of this Title IX policy;
 - ▶ Examples of conduct that falls outside the scope of this Title IX policy:
 - ▶ The alleged sexual harassment, sexual assault, stalking, and/or dating and domestic violence did not occur against a person in the United States;
 - ▶ The alleged sexual harassment, sexual assault, stalking, and/or dating and domestic violence did not occur in or prevent a Complainant from accessing their education program or activity
- ▶ Whether the conduct, as reported, constitutes or could constitute Sexual Harassment, Sexual Assault, Dating and Domestic Violence, and/or Stalking

Written Notice

- ▶ The notice to both the Complainant and the Respondent shall include:
 - ▶ A physical copy of this policy or a hyperlink to this policy;
 - ▶ The potential policy violation(s) at issue;
 - ▶ The location where the potential policy violation(s) took place, the date(s) when the potential policy violation(s) took place, and other sufficient details known at the time so that the parties may prepare for an initial interview with the investigator, i.e. the identities of the parties involved in the incident (if known);
 - ▶ A statement that the Respondent is presumed not responsible unless the evidence shows otherwise at the conclusion of a grievance process;
 - ▶ Notification of the parties right to participate in an investigation and timelines for responding;
 - ▶ Notification of the identity of the Title IX Investigator and the decision maker and their ability to challenge the assignment of the Title IX Investigator and/or decision maker;
 - ▶ Notification of the parties' right to be accompanied by an advisor of their choice;
 - ▶ Notification of the parties' right to inspect and review evidence;
 - ▶ Notification of the University's prohibitions on retaliation and false statements;
 - ▶ Information about resources that are available on campus and in the community; and
 - ▶ Each shall be further advised that the investigation may proceed without the participation of either party

Jurisdiction

- ▶ What do you think is within our jurisdiction?
- ▶ We can investigate sexual misconduct occurring “under any education program or activity.”
 - ▶ This definitely covers on campus behavior.
 - ▶ It can also cover off campus behavior. *Under what circumstances?*
- ▶ According to the new regulations, sexual misconduct that occurs outside of the United States is not within our jurisdiction.
 - ▶ So, what if a student is sexually assaulted by another student while studying abroad?

Jurisdiction

- ▶ A person says they were sexually assaulted by a Loyola student but they are not enrolled at Loyola, and they are not taking part in our educational programs or activities.
- ▶ *Do we have jurisdiction?*
- ▶ A Loyola student is sexually assaulted at an unofficial fraternity/sorority house off campus.
- ▶ *Do we have jurisdiction?*
- ▶ A Loyola student is sexually harassed by a local not affiliated with Loyola while at their internship site.
- ▶ *Do we have jurisdiction?*

Jurisdiction

- ▶ To determine whether the misconduct occurred in an education program or activity, we should consider the following factors:
 - Whether the conduct occurred in a location or in a context where the University owned the premises;
 - Whether University exercised oversight, supervision, or discipline; or
 - Whether the University funded, sponsored, promoted, or endorsed the event or circumstance.

Ultimately, we have jurisdiction when...

- ▶ The conduct occurs on campus;
- ▶ The conduct occurs off-campus, in the United States, and in the context of University employment, education, or research programs or activities, including but not limited to University-sponsored internships, graduate/professional programs, intercollegiate athletics, or other affiliated programs.
- ▶ If the conduct occurs off-campus outside the context of a University program or activity but in the United States, the University will consider the effects of the off campus conduct in order to evaluate whether it has continuing adverse effects on campus or in any University program or activity, including the creation of a hostile environment on campus or in an off-campus education program or activity.

So what's changed?

- ▶ Prior guidance on jurisdiction:
 - ▶ Schools must process complaints, regardless of where conduct occurred.
 - ▶ Title IX also protects third parties from sexual harassment or violence in a school's education programs and activities.
- ▶ Current regulations on jurisdiction:
 - ▶ Based on University's degree of control over the harasser and environment in which harassment occurs
 - ▶ Under certain circumstances, Universities are responsible for redressing a hostile environment on campus even if it relates to off-campus activities.

Interim Removals

An interim suspension or removal from campus is permissible only when an individualized assessment finds an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment, sexual assault, stalking, and/or dating and domestic violence. If an interim suspension is found to be warranted after an assessment, the Title IX Coordinator will communicate this in writing to the Respondent. If a Respondent is removed from campus on an interim basis, they shall be given five (5) working days from the notice of interim removal to challenge the removal; the Title IX Coordinator will assign the challenge to the University Board of Appeals or an Appellate Officer for review. An employee can be placed on administrative leave as well using these guidelines. For all other Respondents, including independent contractors and guests, the University retains broad discretion to prohibit such persons from entering onto its campus and other properties at any time, and for any reason, whether after receiving a report of Sexual Harassment, Sexual Assault, Dating and Domestic Violence, and/or Stalking or otherwise.

Standard of Evidence

- ▶ The new regulations permit the use of a clear and convincing standard of evidence for sexual harassment cases.
 - ▶ *What does the clear and convincing standard of evidence mean?*
- ▶ The same standard of evidence must apply for complaints made against students and employees (including tenured faculty).
 - ▶ *What standard of evidence do we currently use for each?*
- ▶ May use preponderance of the evidence standard only if school uses this standard for Code of Conduct violations that do not involve sexual harassment, but carry the same maximum disciplinary sanction.
 - ▶ *What does a preponderance of the evidence standard mean?*
- ▶ We have decided to stick with our preponderance of the evidence standard for all Title IX cases; this is the same standard we use in Conduct cases.
 - ▶ *Why do you think we have chosen to use this standard?*

BURDENS OF PROOF

Beyond a Reasonable Doubt

Requires elimination of every reasonable doubt.

Clear and Convincing Evidence

Firm belief or conviction.

Preponderance

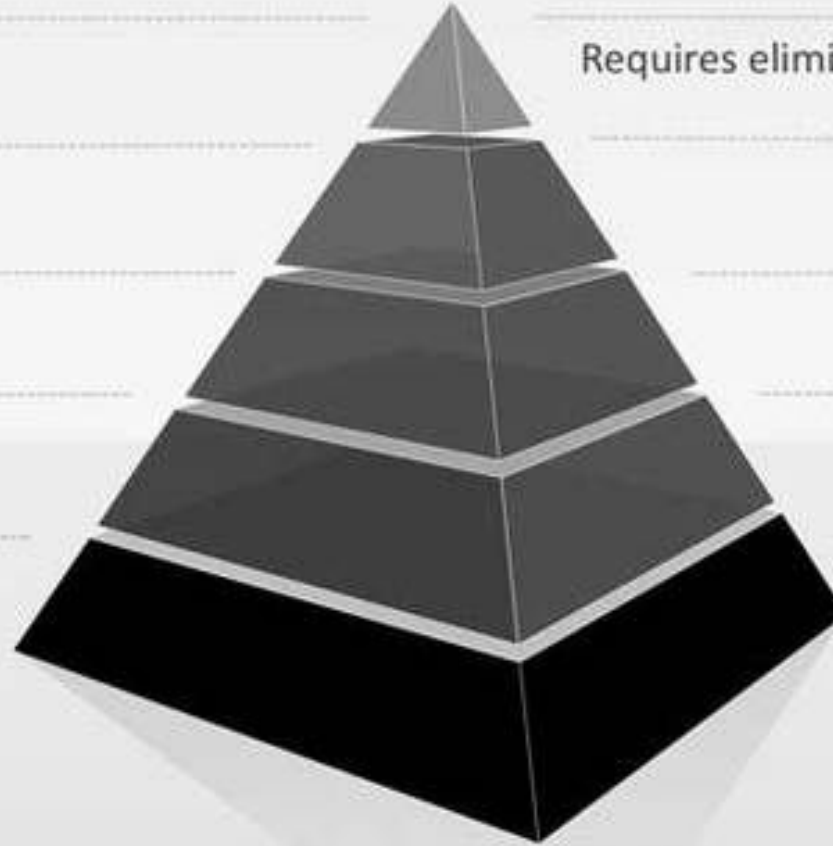
More likely than not.

Probable Cause

Facts and circumstances lead an ordinary person to believe.

Reasonable Suspicion

Specific and articulable facts.



VARGHESE
SUMMERSETT

Why a pyramid? | As the level of proof required rises, the fewer number of cases meet the level of proof.

Preparing for an Investigation

- ▶ Ask yourself some critical questions to help prepare yourself for an investigation:
 - ▶ What is the relevant policy language (*i.e.*, critical issues)?
 - ▶ Where is there agreement and disagreement?
 - ▶ Where is the evidence?
 - ▶ How long will it be there?

*For our returning investigators, are there any other questions you think through **before** beginning an investigation?*

Sexual Harassment

- ▶ Unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party that satisfies one or more of the following:
 - ▶ A school employee conditioning education benefits on participation in unwelcome sexual conduct (i.e., quid pro quo)
 - ▶ Unwelcome conduct that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity (i.e. hostile environment)
 - ▶ Sexual assault, dating violence and domestic violence, or stalking

What are some examples of sexual harassment?

Examples of Sexual Harassment

Some specific examples of conduct that may constitute Sexual Harassment if unwelcome include, but are not limited to:

- ▶ Unreasonable pressure for a dating, romantic, or intimate relationship or sexual contact
- ▶ Unwelcome kissing, hugging, or massaging
- ▶ Sexual innuendos, jokes, or humor
- ▶ Displaying sexual graffiti, pictures, videos, or posters
- ▶ Using sexually explicit profanity
- ▶ Asking about, or telling about, sexual fantasies, sexual preferences, or sexual activities
- ▶ E-mail and Internet use that violates this policy
- ▶ Leering or staring at someone in a sexual way, such as staring at a person's breasts or groin
- ▶ Sending sexually explicit emails, text messages, or social media posts
- ▶ Commenting on a person's dress in a sexual manner
- ▶ Giving unwelcome personal gifts such as lingerie that suggest the desire for a romantic relationship
- ▶ Insulting demeaning, or degrading another person based on gender or gender stereotypes

What would be some good questions to ask if a student is charged with sexual harassment?

Take a moment to review the definition of sexual harassment.

Write down questions you might ask to determine if there has been a policy violation.

Domestic Violence

- ▶ Violence committed by:
 - ▶ A current or former spouse of the victim
 - ▶ An intimate partner of the victim
 - ▶ A person with whom the victim shares a child in common,
 - ▶ A person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner
 - ▶ A person similarly situated to a spouse of the victim
 - ▶ Any other person against an adult or youth victim who is protected from that person's acts under Louisiana law (e.g. a parent/legal guardian)

Dating Violence

- ▶ Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim.
- ▶ *Does Dating Violence have to be physical?*

Domestic and Dating Violence

- ▶ ***Domestic and Dating Violence*** encompasses abusive behavior, *including threats, verbal and/or emotional abuse, and physical assault*, between persons in an intimate and/or dating relationship.
- ▶ **What are some concrete examples of domestic/dating violence?**
- ▶ Examples of domestic and dating violence include, but are not limited to:
 - ▶ Intimidation
 - ▶ Threats
 - ▶ Physical harm
 - ▶ Preventing a partner from making contact with others among the partner's family, friends, or peer group.
- ▶ This includes behavior towards another person when the intimate and/or sexual relationship has ended.

What would be some good questions to ask if a student is charged with domestic or dating violence?

Take a moment to review the definition of domestic and dating violence.

Write down questions you might ask to determine if there has been a policy violation.

Stalking

- ▶ Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - ▶ Fear for their safety or the safety of others; or
 - ▶ Suffer substantial emotional distress
- ▶ *What does a course of conduct mean?*

Stalking

- ▶ A course of conduct means *two or more acts* in which a person directly, indirectly or through third parties, by any action, method, device or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person or interferes with a person's property.
- ▶ *Stalking includes, but is not limited to:*
 - ▶ The intentional and repeated uninvited presence of the alleged perpetrator at another's home, workplace, school, or any place which would cause a reasonable person to be alarmed, or to suffer emotional distress as a result of verbal or behaviorally implied threats of death, bodily injury, or sexual assault.

What would be some good questions to ask if a student is charged with stalking?

Take a moment to review the definition of stalking.

Write down questions you might ask to determine if there has been a policy violation.

Sexual Assault

- ▶ The term “sexual assault” means any **nonconsensual sexual act** including when the victim lacks capacity to consent.
 - ▶ Is attempted rape sexual assault?
 - ▶ Can a partner (e.g. boyfriend, girlfriend, etc.) commit sexual assault against the person they are dating?
 - ▶ Is unwanted touching of someone’s private body parts sexual assault?
 - ▶ What is the age of consent in Louisiana?
 - ▶ What does it mean to “lack capacity to consent?”

What would be some good questions to ask if a student is charged with sexual assault?

Take a moment to review the entire definition of sexual assault.

Write down questions you might ask to determine if there has been a policy violation.

Consent

- ▶ Consent to engage in sexual activity must exist from beginning to end of each instance of sexual activity.
- ▶ Consent is demonstrated through mutually understandable words and/or actions that clearly indicate a willingness to engage in a specific sexual activity.
- ▶ Silence alone, without actions evidencing permission, does not demonstrate consent.
- ▶ While consent may be expressed by words or by actions, it is highly recommended that consent be expressed and obtained verbally.
- ▶ *Non-verbal consent expressed through actions may lead to confusion and potential for misunderstandings, which may lead to a violation of this policy.*

Consent

- ▶ Consent must be knowing and voluntary.
- ▶ To give consent in Louisiana, a person must be at least 17 years old.
- ▶ Assent does not constitute consent if obtained through “coercion” or from an individual whom the Respondent knows or reasonably should know is “incapacitated.”
- ▶ An individual’s use of alcohol or drugs does not diminish that individual’s responsibility to obtain consent.
- ▶ **Consent to engage in sexual activity may be withdrawn by any person at any time. *Once withdrawal of consent has been expressed, the sexual activity must cease immediately.***
- ▶ Consent is automatically withdrawn by a person who is no longer capable of giving consent.
- ▶ A current or previous consensual dating or sexual relationship between the parties does not itself imply Consent or preclude a finding of responsibility for misconduct.

Good questions to ask about consent

1. What are the mutually understandable words which clearly indicated a willingness to engage in a specific sexual activity?
2. What are the mutually understandable actions?

Other questions you might ask?

What if complainant said “yes,” but then says they changed their mind? What might we ask?

Incapacitation

- ▶ An individual is considered to be incapacitated if, by reason of mental or physical condition, the individual is manifestly unable to make a knowing and deliberate choice to engage in sexual activity.

What are the signs of incapacitation from alcohol and/or drugs that we specifically look for?

Incapacitation

- ▶ Individuals who are asleep, unresponsive or unconscious are incapacitated.
- ▶ Among the factors the University will use to assess whether someone is incapacitated are:
 - ▶ Inability to communicate coherently
 - ▶ Inability to dress/undress without assistance
 - ▶ Inability to walk without assistance
 - ▶ Slurred speech
 - ▶ Loss of coordination
 - ▶ Vomiting
 - ▶ Inability to perform other physical or cognitive tasks without assistance.
 - ▶ *The existence of any one of these factors will support a finding of incapacitation.*

Good questions to ask about incapacitation

1. What type of alcohol did you consume? Over what period of time? How quickly? Did you eat? How much? When? Were you taking any medication?
2. Describe the impact of the alcohol.
3. Was the complainant conscious or unconscious?
4. Did the complainant black out? Vomit?
5. Describe the complainant's condition when last seen.
6. Did the complainant understand where s/he was going? Could the complainant walk on their own?
8. Could the complainant speak clearly?
9. What physical tasks was the complainant performing?
10. Was the complainant able to remove his/her own clothing?

Other questions you might ask?

Coercion

- ▶ The use of express or implied threats, intimidation, or physical force which places an individual in reasonable fear of immediate harm or physical injury.
- ▶ *What is not explicitly in this definition of coercion?*

Good questions to ask about coercion

- ▶ The key question you are trying to determine is: Has the respondent put an **unreasonable amount** of pressure on the complainant to engage in sexual activity?
- ▶ Was the complainant in reasonable fear of immediate harm or physical injury?
 - ▶ How many times did the complainant say “no”?
 - ▶ Over what period of time?
 - ▶ Was the complainant isolated?
 - ▶ What was the intensity of the ask?

What if the Complainant acquiesces? E.g. “Let’s just get it over with.” Is this coercion?

Investigations: Forensically Sound Interviews

- ▶ Rapport-building phase
 - ▶ What might you discuss to build rapport?
- ▶ Substantive phase
- ▶ Closure phase

Sample first meeting

1. Introduce myself and, more importantly, my role
2. Thank for reporting (for complainant) and acknowledge difficulty of conversation
3. Provide overview of investigation
4. Discuss available resources with both parties
5. Explain process and prohibition on retaliation

Retaliation - is intimidation, threats, coercion, or discrimination against any individual for the purpose of interfering with any right or privilege secured by Title IX and its implementing regulations or because an individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this policy.

11. Explain what to do if there is any confusion about questions

Questioning Guidelines

- ▶ What's better open ended questions or close ended questions? *Why?*

Questioning Guidelines

- ▶ Open-ended questions will generate more information while closed-ended questions will clarify specifics.
- ▶ When possible, start with open-ended questions (What happened?) rather than close-ended (“Did you go to the bar?”).
- ▶ Open-ended questions will allow the person to answer as long as he or she desires, possibly yielding more information than requested. For example:
 - ▶ Where would you like to begin?
 - ▶ What are you able to tell me about your experience?

Trauma Informed Interviewing

- ▶ Five senses questions
 - ▶ What could you see?
- ▶ Sometimes you have to flip the script and go from specific to broad.
 - ▶ Did the Respondent touch you?
 - ▶ How did the Respondent touch you?
- ▶ Understand that the person may not be able to put events in the correct chronological order, and they may struggle with questions about chronology.
 - ▶ “Start at the beginning and tell me what happened” becomes “Where would you like to start?” or “Tell me what you can remember.”
- ▶ Try to rephrase “why” questions. *Why?*
 - ▶ “*Why did you do X?*” becomes “*When (specific event happened), what were you thinking and feeling?*”

Questioning Guidelines

- ▶ Credibility: If you have concerns that a person is not providing complete and accurate testimony, respectfully explain the reason for your concern and indicate that you are interested in hearing the student's response to your concern. For example,
 - ▶ Help me understand
 - ▶ You said X. The Witness said Y. Can you explain the difference?

Questioning Guidelines

- Generally speaking, save tough, close-ended questions for the end
- Ask the difficult but relevant questions: We want to give both parties an opportunity to address your concerns in the context of the interview and not after the fact. For example,
 - Did you ask the Respondent to grab a condom?

Ask about other evidence

- ▶ Does the student have witnesses they'd like you to interview?
 - ▶ Ask questions to determine relevancy. For example,
 - ▶ Did this person witness the incident directly?
 - ▶ If you spoke to this person about the incident, when did you speak to them? What did you say? Did you talk in person, over text, etc.?
- ▶ Does the student have other evidence they'd like to submit like text messages, pictures, or videos.
 - ▶ If a student sends you a screenshot of a text conversation, what follow up questions might you ask?

Closing an interview

- ▶ Go over any next steps
- ▶ Remind them to reach out if they have questions
- ▶ Ask that they e-mail or call if they think of additional information
- ▶ Tell them how to submit further evidence
- ▶ Remind them of support resources

Any other suggestions from our returners?

Follow Up Interviews

- ▶ THERE ALMOST ALWAYS NEEDS TO BE FOLLOW-UP INTERVIEWS WITH COMPLAINANTS & RESPONDENTS
- ▶ At the very least, you need to type up the statement of anyone you interview and allow them to review and certify that statement.
- ▶ If someone makes changes to their statement, does it mean they are lying?
- ▶ How do we address changes to the statement in the investigative report?

Timeline

- ▶ Make sure you document EVERYTHING you do in an investigation.
- ▶ You will need to have a timeline of your investigation
 - ▶ E.g. I interviewed person X on Y date
- ▶ The investigator's report must also include a timeline of the alleged event.
 - ▶ The timeline should note areas of agreement.
 - ▶ E.G. Both parties agree they arrived at The Boot around 1 am on Saturday, August 29th.
 - ▶ The timeline can also include areas of disagreement.
 - ▶ E.G. The Complainant states he and the Respondent arrived at the Residence Hall together around 1:30 am.
 - ▶ The Respondent states he arrived at the Residence Hall alone around 2 am.

Documentation, Documentation, Documentation

- ▶ We often hear, “They ignored evidence.”
- ▶ While we don’t have subpoena power, we can be meticulous in our documentation. So...
 - ▶ Identify relevant information and witnesses
 - ▶ Ask for evidence and witnesses
 - ▶ Meticulously document efforts to obtain this evidence and/or to interview witnesses
 - ▶ Reach out to witnesses at least three times; use at least two different mediums (e.g. e-mail and text)

What additional evidence might exist?

1. Text messages
2. Social media posts
3. Card swipes
4. On and off-campus video
5. Police reports
6. Medical reports
7. Teaching evaluations
8. Internal reports
9. Call logs
10. Other disciplinary records
11. Other?

A word on text messages...

1. Can be powerful evidence in these cases, but beware.
2. Be skeptical of print outs - **ask to see originals for full context**
3. Check contact information associated with contact
4. Look for time stamps
5. **Corroborate with opposing party**
6. Is there any process where complete messages can be provided that might have been deleted?

What is relevant?

- **Key question to ask yourself:** Is the fact or information that is being offered likely to prove/disprove an issue in the investigation?
- If likely to prove/disprove, even indirectly, it is relevant. If it is not likely to do so, it is irrelevant.

When in doubt, err on the side of allowing it and giving it the weight it is due

The Complainant and/or Respondent's character or reputation with
During the investigation and hearing processes, the investigator and decision maker, as the case may be, are not permitted to access, consider, disclose, permit questioning concerning, or otherwise use:

1. A party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party; or
2. Information or records protected from disclosure by any other legally-recognized privilege, such as the attorney client privilege;
3. Unless the University has obtained the party's voluntary, written consent to do so for the purposes of the investigation and hearing process.

Notwithstanding the foregoing, the investigator and/or decision maker, as the case may be, may consider any such records if the party holding the privilege affirmatively discloses the records or information to support their allegation or defense, as the case may be.

Regulations Pertaining To Access to Evidence

- ▶ Do we have to share all evidence with Complainants and Respondents even if it's evidence we do not intend to use in order to render a decision of responsibility or non-responsibility?
- ▶ Is there any evidence we can't share without the consent of the Complainant and/or Respondent?

Access to Evidence

- ▶ All evidence “directly related” to allegations, even if school does not intend to rely on it must be shared with the Complainant and the Respondent.
- ▶ This evidence must be made available electronically before the investigative report is final.
 - ▶ How will we preserve privacy if evidence is being shared?
 - ▶ Complainants and Respondents should be provided 10 days to respond to this evidence.
 - ▶ The investigator should address their responses in the investigative report.
- ▶ Evidence related to mental and/or physical health records cannot be shared without the consent of the relevant party.

What about evidence or questions related to prior sexual history?

The Complainant and/or Respondent's character or reputation with respect to other sexual activity is never relevant and will not be considered as evidence. However, prior sexual history may be considered under the following limited circumstances:

- i. Where there was a prior or ongoing relationship between the Complainant and Respondent, and the Respondent asserts that consent was sought and given, the prior sexual history between the parties may be relevant to assess the manner and nature of communications between the parties. As noted in other sections of the policy, however, the mere fact of a current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Evidence of a prior consensual dating or sexual relationship between the parties by itself does not imply consent or preclude a finding of sexual harassment, sexual assault, stalking, and/or dating and domestic violence.
- ii. To establish that someone other than the Respondent committed the alleged offense.

Report Writing

- ▶ From our returners, what do you think is the most difficult part about writing the investigative report?
- ▶ Tips?

Common Mistakes

- ▶ Conclusory determination of credibility
- ▶ General lack of clarity
- ▶ Chronology of events is hard to follow
- ▶ Failing to spell out the allegations and relevant policies
- ▶ Including insufficient information on important issues
- ▶ Including too much information about irrelevant details
- ▶ Not addressing “inconvenient facts”
 - ▶ What do we mean by “inconvenient facts?”
- ▶ Leaps of logic

Critical Elements

1. Summary of the Allegations
 - ▶ Preliminary case information
 - ▶ History of the Case, if any
2. Applicable policies/procedures
 - ▶ Misconduct Policy
 - ▶ Standard of Proof
3. Evidence considered
 - ▶ Undisputed facts
 - ▶ Disputed facts
4. Factual findings
5. *Analysis and conclusion*
6. *Recommendations and/or sanctions*

Report: Steps in Case

- ▶ How did the institution respond to the report?
 - ▶ E.g., rights and options provided, notification of respondent
- ▶ When, how, and where were parties and witnesses interviewed?
- ▶ Explain any apparently unreasonable delays.

Summarizing Allegations in the Report

- ▶ Goal: identify and articulate what part of complainant's story, if true, is a violation of the institution's policy
- ▶ Focus on who, what, where, when, how

Applicable Policies and Procedures

- ▶ Reference sexual misconduct policy and procedures, including specific language which is pertinent to the allegation
 - ▶ E.g., include relevant definitions
- ▶ Attach full copy of sexual misconduct policy and procedures to report

Standard of Proof

- ▶ Preponderance of the evidence
- ▶ Be sure to actually apply it in your analysis
- ▶ You may never know with 100% certainty exactly what happened

Evidence Considered

- ▶ Include a **summary** of evidence collected and reviewed during investigation
 - ▶ Parties' correspondence with institution
 - ▶ Summary of party and witness interviews (by person)
 - ▶ Text messages, emails, tweets, posts, letters, etc.
 - ▶ Police/medical reports
 - ▶ Video from surveillance cameras
 - ▶ Card key data
 - ▶ Phone logs
 - ▶ Other?

Factual Findings

- ▶ Goal: reaching resolution of disputed facts
- ▶ How to do this?
 - ▶ Show your work
 - ▶ Explain your credibility assessments

Language Matters

- ▶ Use objective terms (i.e., “complainant” and “respondent” rather than “victim” and “perpetrator”)
- ▶ Avoid vague phrasing like “had sex”
 - ▶ What does this mean? Remember the definition of sex is not universal; different communities have sex in different ways and therefore define it in different ways (E.G. Heterosexual Sex vs. Homosexual Sex)
- ▶ Do not include speculation
- ▶ Do not include irrelevant points and discussion

Example of Non-precise vs. Precise Language

- ▶ “Jane alleges that John had sex with her without her consent.”

vs.

- ▶ “Jane alleges that John laid on top of her, penetrated her vagina with his penis, and held her down so she could not move.”

Investigative Report - Non-Negotiables

- ▶ After the investigation process is complete, the Title IX Investigator will produce a typed record of each party's statement.
 - ▶ Complainants, Respondents, and Witnesses will be given a chance to review their statement and will be asked to certify its accuracy.
- ▶ Then, the Title IX Investigator will draft an investigation report that fairly summarizes the various steps taken during the investigation, summarizes the relevant evidence collected, lists material facts on which the parties agree, and lists material facts on which the parties do not agree.
- ▶ When the investigation report is complete, the investigator will transmit a copy to the Title IX Coordinator and Decision Maker. The investigator will also transmit the investigation report to each party and their advisor, in either electronic or hard copy form.

Live Hearings

- ▶ This represents one of the biggest changes with our Title IX process.
- ▶ Our previous model, the single investigator model, is no longer allowed.
- ▶ Universities must have live hearings for resolutions of formal complaints.
 - ▶ Even though it's a live hearing, it can be conducted virtually. All parties must be able to see and hear each other.
- ▶ The Decision Maker cannot be the same as the investigator or the Title IX Coordinator.

The Decision Maker

- ▶ The decision maker will oversee the hearing process and render a determination of responsibility for the allegations in the Formal Complaint, at the conclusion of the hearing process.
- ▶ They will have access to the investigative report and all evidence.
- ▶ They can ask questions during the live hearing of any party.

The Decision Maker

- ▶ The decision maker will transmit written notice to the parties setting a deadline for the parties to submit any written response to the investigation report;
- ▶ setting a date for the pre-hearing conference;
- ▶ setting a date and time for the hearing;
- ▶ and providing a copy of the University's Hearing Procedures.

Neither the pre-hearing conference, nor the hearing itself, may be held any earlier than ten (10) days from the date of transmittal of the written notice.

Response to the Investigative Report

- ▶ A party's written response to the investigation report must include:
 - ▶ To the extent the party disagrees with the investigation report, any argument or commentary regarding such disagreement;
 - ▶ Any argument that evidence should be categorically excluded from consideration at the hearing based on privilege, relevancy, the prohibition on the use of sexual history, or for any other reason;
 - ▶ A list of any witnesses that the party contends should be requested to attend the hearing pursuant to an attendance notice issued by the hearing officer;
 - ▶ A list of any witnesses that the party intends to bring to the hearing without an attendance notice issued by the hearing officer;
 - ▶ Any objection that the party has to the University's Hearing Procedures;
 - ▶ Any request that the parties be separated physically during the pre-hearing conference and/or hearing;
 - ▶ Any other accommodations that the party seeks with respect to the pre-hearing conference and/or hearing;
 - ▶ The name and contact information of the advisor who will accompany the party at the pre-hearing conference and hearing;
 - ▶ If the party does not have an advisor who will accompany the party at the hearing, a request that the University provide an advisor for purposes of conducting questioning.
- ▶ A party's written response to the investigation report may also include:
 - ▶ Argument regarding whether any of the allegations in the Formal Complaint are supported by a preponderance of the evidence;
 - ▶ Argument regarding whether any of the allegations in the Formal Complaint constitute Sexual Harassment, Sexual Assault, Dating and Domestic Violence, and/or Stalking.

Pre-Hearing

- ▶ During the pre-hearing conference, the decision maker will discuss the hearing procedures with the parties;
- ▶ address matters raised in the parties' written responses to the investigation report, as the decision maker deems appropriate;
- ▶ discuss whether any stipulations may be made to expedite the hearing;
- ▶ discuss the witnesses the parties have requested be served with notices of attendance and/or witnesses the parties plan to bring to the hearing without a notice of attendance;
- ▶ and resolve any other matters that the decision maker determines, in the decision maker's discretion, should be resolved before the hearing.

Live Hearing - Minimum Requirements

- ▶ Opportunity for each party to address the decision maker directly and to respond to questions posed by the decision maker;
- ▶ Opportunity for each party's advisor to ask directly, orally, and in real time, relevant questions, and follow up questions, of the other party and any witnesses, including questions that support or challenge credibility;
- ▶ Opportunity for each party to raise contemporaneous objections to testimonial or non-testimonial evidence and to have such objections ruled on by the decision maker and a reason for the ruling provided;
- ▶ Opportunity for each party to submit evidence that the party did not present during the investigation due to mistake, inadvertence, surprise, or excusable neglect;
- ▶ Opportunity for each party to make a brief closing argument.
- ▶ The decision maker, at their discretion, may also permit the parties or advisors to make opening statements.

Cross Examination During Live Hearing

- ▶ Party's advisor is allowed to cross examine the other party and witnesses.
 - ▶ The Decision Maker may also ask questions of the parties and witnesses during the live hearing.
 - ▶ *Decision maker decides what questions are relevant and appropriate.*
- ▶ Testimony of persons who refuse to submit to cross-examination is excluded.
 - ▶ Can you assume someone is responsible or lying if they refuse to be cross examined?
 - ▶ Why might someone refuse to be cross examined?
- ▶ Must provide support person for purposes of cross examination if party does not have one.
- ▶ *What if one party can afford a lawyer to serve as their advisor and the other can't?*

Advisors

- ▶ Except for the questioning of witnesses during the hearing, the advisor will play a passive role and is not permitted to communicate on behalf of a party,
 - ▶ insist that communication flow through the advisor, or
 - ▶ communicate with the University about the matter without the party being included in the communication.
-
- ▶ In the event a party's advisor of choice engages in material violation of these parameters, the University may preclude the advisor from further participation, in which case the party may select a new advisor of their choice

Lessons from a Judge to a Jury

Model Juror Instructions

- ▶ “In weighing the testimony of the witnesses, you may consider the witness’s **manner and demeanor** on the witness stand, any feelings or interest in the case, or any **prejudice or bias** about the case, that he or she may have, and the **consistency or inconsistency** of his or her testimony considered in the light of the circumstances. Has the witness been **contradicted by other credible evidence**? Has he or she made **statements at other times and places contrary to those made here on the witness stand**? You must give the testimony of each witness the credibility that you think it deserves.”
- ▶ “You are not to decide this case by counting the number of witnesses who have testified on the opposing sides. **Witness testimony is weighed; witnesses are not counted.** The test is not the relative number of witnesses, but the relative convincing force of the evidence. The testimony of a single witness is sufficient to prove any fact, even if a greater number of witnesses testified to the contrary, if after considering all of the other evidence, you believe that witness.”

Manner, Demeanor, and the Truth

[J Appl Psychol](#). 2004 Feb;89(1):137-49.

Detecting true lies: police officers' ability to detect suspects' lies.

[Mann S¹](#), [Vrij A](#), [Bull R](#).

[+ Author information](#)

Abstract

Ninety-nine police officers, not identified in previous research as belonging to groups that are superior in lie detection, attempted to detect truths and lies told by suspects during their videotaped police interviews. Accuracy rates were higher than those typically found in deception research and reached levels similar to those obtained by specialized lie detectors in previous research. Accuracy was positively correlated with perceived experience in interviewing suspects and with mentioning cues to detecting deceit that relate to a suspect's story. Accuracy was negatively correlated with popular stereotypical cues such as gaze aversion and fidgeting. As in previous research, accuracy and confidence were not significantly correlated, but the level of confidence was dependent on whether officers judged actual truths or actual lies and on the method by which confidence was measured.

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A Wipe of the Hands, A Lick of the Lips: The Validity of Demeanor Evidence in Assessing Witness Credibility

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Credibility

- ▶ Compare verifiable facts to witness statements.
- ▶ Are there major inconsistencies in testimony?
- ▶ Do neutral witnesses corroborate or contradict?
- ▶ Are there documents such as diaries, calendar entries, journals, notes or letters describing the incidents?
- ▶ What have witnesses told others?
- ▶ Have there been similar complaints against the respondent?
- ▶ Do any of the witnesses have a motivation to lie, exaggerate or distort information?
 - ▶ You should ask questions to determine their relationship to the parties. *Why?*
 - ▶ You should also ask questions to determine if they've discussed the incident with the parties prior to providing you a statement. *Why?*

Analysis and Conclusion

- ▶ The Decision Maker should put everything together
- ▶ Analyze whether a violation of policy occurred (*not the law*)
- ▶ Discuss each allegation and your decision on each
- ▶ Explain your reasoning
- ▶ Deal with inconvenient facts
- ▶ Phone the Title IX Coordinator if necessary

Check Your Work

- ▶ The report must be able to stand on its own
- ▶ Spelling and punctuation matter—proofread the report!
- ▶ Double check that the allegations match the notice
- ▶ **Include what's convenient and what's inconvenient**

Notice of Outcome and Appeals

- ▶ Transmittal of the written determination to the parties concludes the hearing process, subject to any right of appeal.
- ▶ Both parties have a right to appeal.
- ▶ The University Board of Appeals or an Appellate Officer will hear any appeals.

A final note...

- ▶ The University may dismiss a formal complaint at any point during the investigation or hearing process if the Complainant requests it in writing;
- ▶ if the Respondent is no longer enrolled in or employed by the University;
- ▶ or if specific circumstances prevent the gathering of sufficient evidence to reach a determination.

If a formal complaint or allegation is dismissed, the parties will simultaneously receive a written explanation for the dismissal and notice of the ability to challenge the dismissal on appeal.

What can we do to support students during this process?

- ▶ Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, without fee or charge, to the Complainant and Respondent, before or after the filing of a Formal Complaint or where no Formal Complaint has been filed.
- ▶ Such measures are designed to restore or preserve access to the recipient's education program or activity, without unreasonably burdening the other party; protect the safety of all parties and the recipient's educational environment; and deter sexual harassment, sexual assault, stalking, and/or dating and domestic violence.
- ▶ Supportive measures may include but are not limited to:
 - ▶ Counseling
 - ▶ Course related adjustments
 - ▶ Modifications of work or class schedules
 - ▶ Campus escort services
 - ▶ Increased security and monitoring of certain areas of campus
 - ▶ Mutual restrictions on contact between the parties (e.g. mutual no contact orders).

The purpose of supportive measures is equal access to education.

Questions?