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Title IX/VAWA Sexual Harassment and Sexual Misconduct Training Series

Training for Investigators


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2


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3

Intro

Legal

Process

Investigation


Reports

Decision-making

Notices

Agenda

- 1 Introduction and Training Goals
- 2 Legal Updates and Requirements
- 3 The Grievance Process
- 4 Conducting Investigations
- 5 Drafting Investigation Reports
- 6 Decision-making
- 7 Drafting Notices of Determination


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Intro

Legal

Process

Investigation


Reports

Decision-making

Notices

Introduction

- Welcome
- About us
- About you
- About the work we all do
- Breaks!


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Intro

Legal

Process

Investigation

Reports

Decision-making


Notices

Training Goals: Going Beyond What is Required by Title IX and VAWA

- Training Requirements for Investigators:
 - Definition of sexual harassment
 - Scope of your programs/activities
 - How to conduct an investigation and grievance process
 - How to serve impartially and without bias and conflict of interest and without prejudgment
 - Issues of relevance to draft reports that fairly summarize evidence*
 - Conducting investigations that protect complainant's safety and promote accountability (impact of trauma)*

Maintain training records (7 years) and post on website

*VAWA only


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Legal

Process

Investigation

Reports

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Legal Updates

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Legal

Process

Investigation

Reports

Decision making

Notice

Legal Updates

- Final Regs – effective August 2020
- July 20, 2021 Q&A
- LGBTQ guidance
- *Victim Rights Law Center et al. v. Cardona et al.*, Civil Action No. 20-11104-WGY, 2021 WL 3185743 (D. Mass.)
- **OCR Letter to Students, Educators, and other Stakeholders re *Victim Rights Law Center et al. v. Cardona* (August 24, 2021)**
- Notice and Comment for Final Regs-- May 2022

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Legal

Process

Investigation

Reports

Decision making

Notice

Legal Requirements – Title IX (20 U.S.C. § 1681)

“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”

and

On May 6, 2020, the Department of Education released new Title IX regulations, with mandatory implementation date of August 14, 2020.

- Apply to all institutions that receive federal funds, including financial assistance
- Cover students, employees, and third parties
- Include all forms of discrimination based on sex such as sexual harassment and differential treatment
- Enforced by the Office for Civil Rights and courts

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Legal Requirements – Violence Against Women Act (“VAWA”)

- Amended Clery Act through the Campus Sexual Violence Act (“SaVE Act”) provision, Section 304
- Added domestic violence, dating violence, and stalking to the Clery crimes (which already included sexual assault)
- Requires adoption of institutional policies and procedures to address and prevent campus sexual violence
- Requires training of institutional personnel and students
- Requires prevention and awareness programs
- Clery Act Enforcement

General Title IX Regulations & VAWA Requirements

“Recipients” of federal funds must:

- Disseminate a policy that includes a Notice of Nondiscrimination
- Designate a Title IX Coordinator
- Adopt, publish, and follow grievance procedures that are equitable, prompt, and effective and provide for adequate, thorough, reliable, fair, and impartial investigations and adjudications
- Take action to address and prevent sex-based discrimination
- Train individuals serving in specified roles

Other Applicable Laws

- Family Educational Rights and Privacy Act (FERPA)
 - Exceptions under Title IX and VAWA for files shared during the process that permit disclosure of materials the laws require to be shared
 - Remedies are not shared except as necessary to enforce them (Title IX exception is for sharing the fact remedies were provided but not the details)
- Title VII
- Americans with Disabilities Act, Section 504 of the Rehabilitation Act (Disability and Accommodations)
- Mandatory reporting laws requiring the reporting of child abuse and neglect
- State laws

Legal Requirements: The Fundamental Obligation

Under **Title IX**, an institution is obligated to respond when: it has “**actual knowledge**” of “**sexual harassment**” involving a person who is participating or attempting to participate in an “**education program or activity**” of the institution and when the sexual harassment is directed against a person **in the United States**

VAWA protections:

- Allegation of sexual assault, dating violence, domestic violence, or stalking
- Involving student or employee
- Regardless of location and participation in program/activity

Title IX Response:

Actual Knowledge

Sexual Harassment

Education Program or Activity

In the United States

Title IX Response:

Actual Knowledge

Sexual Harassment

Education Program or Activity

In the United States

Legal

Process

Investigation

Reports

Decision making

Notices

Legal Requirements: Actual Knowledge and Officials with Authority

“means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the university who has the authority to institute corrective measures on behalf of the recipient”

- Notice need not be in the form of a Formal Complaint
- Constructive notice or vicarious liability “are insufficient to constitute actual knowledge”
- Mere ability or obligation (by policy) to report sexual harassment does not make you an official with authority
- Having been trained to report sexual harassment does not make you an official with authority

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16

Legal

Process

Investigation

Reports

Decision making

Notices

Title IX Response:

- Actual Knowledge
- Sexual Harassment
- Education Program or Activity
- In the United States

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17

Legal

Process

Investigation

Reports

Decision making

Notices

Legal Requirements: Title IX Sexual Harassment Defined

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

- (1) **Quid pro quo**: an employee conditions an aid, benefit, or service of recipient on an individual’s participation in unwelcome sexual conduct;
- (2) **Hostile environment**: unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or
- (3) **“sexual assault,” “dating violence,” “domestic violence,” or “stalking”**

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18

Legal Requirements: Title IX Sexual Harassment Defined

Sexual Assault: any sexual act direct against another person, without the consent of the victim, including instances where the victim is incapable of giving consent. This includes:

- **Rape:** carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- **Sodomy:** oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Legal Requirements: Title IX Sexual Harassment Defined

Sexual Assault (cont.):

- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity
- **Incest:** Sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.
- **Statutory Rape:** Sexual intercourse with a person who is under the statutory age of consent.

Legal Requirements: Title IX Sexual Harassment Defined

- **Dating violence:** any act of violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim and where the existence of such a relationship is determined based on a consideration of the length, type, and frequency of interactions between the persons involved in the relationship.
- **Domestic violence:** a felony or misdemeanor crime of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

* The VAWA crimes as defined in the Clery Act

Legal Requirements: Title IX Sexual Harassment Defined

- **Stalking:** a **course of conduct** directed at a specific person that would cause a **reasonable person** to fear for his or her safety or the safety of others or suffer **substantial emotional distress**
- **Course of conduct:** two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property
- **Reasonable person:** a reasonable person under similar circumstances and with similar identities to the Complainant
- **Substantial emotional distress:** significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling

* The VAWA crimes as defined in the Clery Act

Title IX Response:

Actual Knowledge

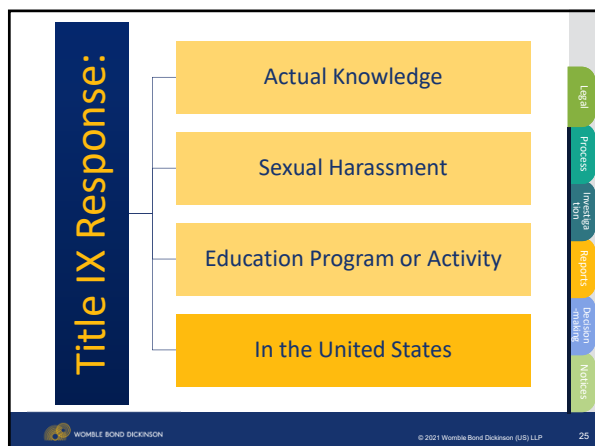
Sexual Harassment

Education Program or Activity

In the United States

Legal Requirements: Education Program or Activity

- Locations, events, or circumstances over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs
 - On campus or
 - Off campus, when:
 - Part of the recipient's operations
 - Occurs at any building owned or controlled by an officially recognized student organization (e.g., fraternities and sororities)



Legal Requirements: Response to Sexual Harassment

If recipient has actual knowledge, Recipient/Title IX Coordinator must:

- Respond promptly in a manner that is not *deliberately indifferent*, meaning the response cannot be clearly unreasonable in the known circumstances
- Follow the Title IX Regulations "Grievance Process"
- Promptly contact the Complainant to discuss availability of *supportive measures*
- Consider Complainant's wishes with respect to the supportive measures
- Inform Complainant of availability of supportive measures regardless of whether a formal complaint is filed
- Explain the process of filing a Formal Complaint
- Provide written notice of rights and options for allegations of sexual assault, dating violence, domestic violence, and stalking (VAWA)
- Notify Complainant of right to report to law enforcement and offer assistance (VAWA)

Legal | Process | Investigation | Reports | Decision-making | Notices

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Legal Requirements: Response to Sexual Harassment

Framework:

- Title IX:** actual knowledge, sexual harassment, in education program or activity, directed against someone in the US
- VAWA:** sexual assault, dating violence, domestic violence, or stalking; involving a student or employee; regardless of participation in program/activity
 - Some cases will involve both
- Others cases could be neither (e.g., hostile environment-type sexual harassment that is not severe, pervasive, *and* objectively offensive) and are governed by your Policies

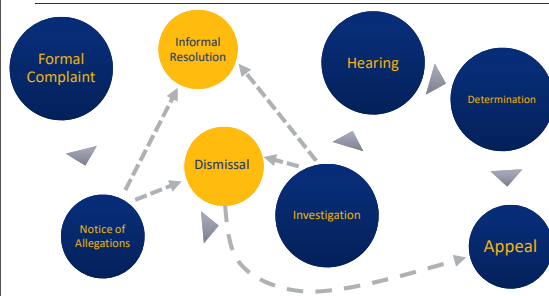
Legal | Process | Investigation | Reports | Decision-making | Notices

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The Grievance Process

Process
Investigation
Reports
Decision-making
Notices

Formal Grievance Process



Process
Investigation
Reports
Decision-making
Notices

Reports vs. Formal Complaints

Some process begins upon the receipt of information containing allegations of sexual harassment, a "report"

- Often made to others outside the Title IX team
 - Faculty, staff, employees, and student employees ("Responsible employees" under your policy?)
 - Confidential resources
 - Friends, fellow students, and family members
- Title IX Coordinator or designee determines the required (and equitable) response and promptly contacts Complainant

Process
Investigation
Reports
Decision-making
Notices

Title IX “Formal Complaint” Initiates Grievance Process

Formal Complaint under Title IX (but not required by VAWA):

1. Document;
2. Filed by a Complainant (or parent/guardian with legal right to do so) or signed by the Title IX Coordinator;
3. Alleging Sexual Harassment against a Respondent; **and**
4. Requesting an investigation of an allegation of Sexual Harassment

Important!

- Cannot be filed anonymously
- Can be filed in person, by mail, or email using Title IX Coordinator’s contact information or any other method designated (e.g., online reporting form)
- Must have digital signature or other confirmation for Complainant
- Title IX Coordinator who signs a Formal Complaint is not a “party”
- Complainant’s identity, if known, must be disclosed to Respondent (in contrast to a “report”)
- Complainant must be participating/attempting to participate in program or activity
- No statute of limitations
- Consolidation of Formal Complaints permitted for cases arising out of same facts or circumstances

Supportive/Interim Measures

Non-disciplinary, non-punitive, individualized services offered, as appropriate, as reasonably available, and without fee or charge to the Complainant or Respondent before or after the filing of a Formal Complaint or where none has been filed.

- Designed to restore or preserve equal access to the recipient’s program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient’s educational environment, or deter sexual harassment
- Must maintain as confidential to the extent that doing so would not impair the ability to provide them
- Also known as “interim measures” for sexual assault and VAWA crimes
- *If the action is listed in your policy as a sanction, it is likely disciplinary or punitive*

Supportive/Interim Measures

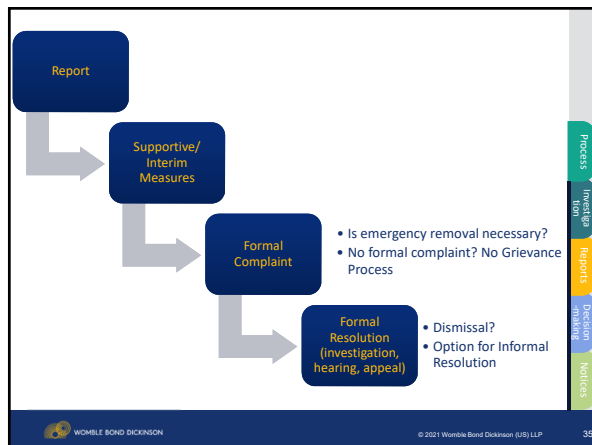
Title IX Regulations, they may include:

- Mutual no contact orders—**most common**
- Counseling and other health resources
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Changes in work or housing locations
- Changes to parking or transportation
- Leaves of absence
- Increased security or monitoring of certain areas of the campus
- Or other similar measures chosen by recipient
 - Or third parties who can provide services (MOUs)
- **Must consider Complainant’s desires for the options**

Emergency Removal/Administrative Leave

Emergency removal process is permitted, when:

- after an individualized safety and risk analysis, recipient determines there is an immediate threat to the physical health or safety of any students or other individuals arising from the allegations of sexual harassment
 - Must provide Respondent notice and opportunity to immediately challenge decision
- A recipient may place a non-student on administrative leave during the pendency of a grievance process.



Formal Grievance Process

Basic Requirements:

- No bias or conflicts of interest (as to party type generally or individuals)
 - Training required for all roles!
- Treat parties equitably
 - Participation in process and submission of evidence
 - Advisors and limits to participation (cannot limit cross-examination)
 - Access to directly related and relevant evidence
- Follow Grievance Process before imposing sanctions or other non-supportive measures
- Remedies designed to restore or preserve access to education or activity (need not be non-disciplinary or non-punitive) – occurs after a determination of responsibility

Formal Grievance Process

Basic Requirements (cont.):

- Describe range of supportive measures
- Remedies are often extensions of supportive/interim measures
Complainant received during process
- Presumption of not responsible
- State the standard of evidence and use the same one for all Formal Complaints regardless of who the parties are
 - Preponderance or clear and convincing
- Cannot seek to collect information protected by legally recognized privilege, unless the privilege has been waived
- Same for medical treatment records unless voluntary, written consent



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37

Formal Grievance Process

Basic Requirements (cont.):

- Reasonably prompt timeframes (temporary delays for good cause)
 - For each phase of the process (some are specified in the Regs)
 - With written notice to the parties citing reasons for delay and upon resuming investigation
 - Good cause includes: absence of party, advisor or witness; language assistance/disability accommodation; or concurrent law enforcement activity (brief, for fact gathering, not criminal prosecution) – **nothing included based on investigator's workload**
- Objective evaluation of all evidence, inculpatory and exculpatory
 - Credibility determinations cannot be based on status as Complainant, Respondent, or witness
- Describe range of sanctions and remedies
- Procedures and grounds for appeals
- **Plus any other provisions, rules, or practices adopted by the institution**



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38

More about Bias and Conflicts of Interest

- Case-by-case examination of the "particular facts"
- Recipients are encouraged to "apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased."
- If someone has a material connection to a dispute, or the parties involved, and a reasonable person would question that person's ability to be impartial
- **Could be** based on a number of factors or connections, including prior or existing relationships, past advocacy (survivor or respondent groups), prior interactions or involvement, professional experience and activities, areas of study, the decision-maker's position on campus, or financial and reputational interests of employee that aligns with the institution
 - "assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents" is unreasonable"
- Cannot make decisions based on characteristics of the parties—must be based on the facts of the case



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39

Formal Grievance Process — Dismissals

Two types:

1. Mandatory dismissal of Title IX Formal Complaint, when:

- the allegation, even if proved, would not need meet sexual harassment definition;
- did not occur in education program or activity; or
- did not occur against a person in the U.S.

2. Discretionary dismissal (*at any time*), if:

- Complainant provides written notice to Title IX Coordinator of withdrawal of Formal Complaint or allegations
- Respondent no longer enrolled or employed by recipient
- specific circumstances prevent recipient from gathering sufficient evidence to reach a determination as to the Formal Complaint

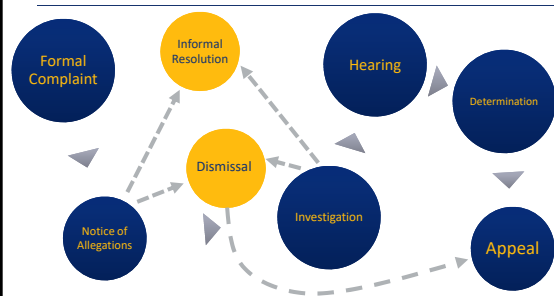
- *In either case, recipient must promptly send a written notice of dismissal and the specific reasons for it, simultaneously to the parties (appealable)*

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Formal Grievance Process



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Conducting Investigations

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42

Overview of Investigation Phases

- 1) Roles and Pre-investigation work (by recipient)
- 2) Investigator Preparation
 - a. Learn Policy Definitions
 - b. Prepare for Interviews
 - c. Trauma-informed practices
- 3) Gather Evidence
- 4) Review and summarize evidence
- 5) Draft/Finalize Investigative Report for Decision-maker(s)

Whose Responsibility is it?

The **burden of proof** and the **burden of gathering evidence** sufficient to reach a determination regarding responsibility rests on the recipient and not on the parties.

Understanding Roles — Investigator's Obligations

- Undertake "a **thorough search for relevant facts and evidence** pertaining to a particular case, while operating **under the constraints** of conducting and concluding the investigation under designated, reasonably prompt timeframes and without powers of subpoena."
- "Such conditions limit the extensiveness or comprehensiveness of the efforts to gather evidence while reasonably expecting you to gather evidence that is available."

Understanding Roles — Staying in Your Lane

Recipient's Role	Investigator's Role
<ul style="list-style-type: none"> Complying with legal obligations Establishing and overseeing grievance process Intake Notice of rights Dismissals and removal Clery/timely warnings/ASR Supportive/Interim measures Providing support resources Establishing advisor parameters Extending deadlines Decision-making 	<ul style="list-style-type: none"> Participating in required trainings Identifying conflicts or bias concerns Preparing for investigation Drafting notice(s) of meetings?? Gathering information <ul style="list-style-type: none"> Equal opportunities for parties to provide information and input Compiling and organizing information Making credibility determinations? Making recommendations?? <ul style="list-style-type: none"> Permitted under Title IX but cannot be the adjudicator/decision-maker Packaging materials for decision-maker(s) (investigative report)

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Understanding Roles — Title IX Regulations' Dividing Lines

- Title IX Coordinator can be an investigator but cannot be a decision-maker
 - Can make recommendations regarding findings
- Investigator cannot be a decision-maker (no single investigator model)
 - Can make recommendations regarding findings
- BUT decision-maker, regardless of recommendations, must independently and objectively evaluate the relevant evidence (no deferential treatment)

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Understanding Roles — Title IX Coordinator

Directly or through designee:

- Coordinating the recipient's response to discrimination on the basis of sex, including sexual harassment and misconduct
- Ensuring process is free from known or reported conflicts of interest or bias
- Responding to reports alleging sexual harassment
- Determining the appropriate process
- Overseeing the grievance process
- Ensuring the process is user-friendly
- Coordinating the effective implementation of supportive/interim measures
- Overseeing training requirements
- Separating roles and responsibilities
- Ensuring process is compliant and effective

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Investigation Phases: Pre-investigation Efforts by Others

Prior to commencement of the investigation:

- Receipt of report and/or formal complaint
- Meeting with Complainant
- Safety and risk analysis (Complainant and community)
 - Removal process, if applicable (very rare)
- Written notice of rights to Complainant and preservation of evidence (VAWA compliant)
- Notification of right to contact law enforcement (and note differences)
- Notification of right to obtain medical treatment
- Supportive/Interim measures
- Evaluate availability of informal resolution
- Evaluate potential grounds for dismissal
- Decision to move forward with an investigation
- Determination of which policy/process will be followed

Investigation Phases: Pre-investigation Written Notice Requirement

Prior to commencement of the investigation (cont.):

Upon receipt of the Formal Complaint, must send parties **Written Notice**:

- Explaining grievance process
- Containing sufficient details known **at that time** (and supplement later as necessary) and provided with sufficient time to prepare a response before any interview, including:
 - identities of the parties (if known)
 - conduct constituting sexual harassment
 - date and location of alleged incident(s) (if known)
- Stating that respondent is presumed not responsible
- Determination regarding responsibility is made at conclusion of the process
- Informing parties of any policy provision that prohibits participants from knowingly making false statements/submitting false information

Investigation Phases: Pre-investigation Written Notice Requirement & Advisors

Written Notice (cont.):

- Informing parties of their right to an advisor of their choice and that the advisor may, but need not be, an attorney
- Right of advisor to inspect and review evidence as stated in the applicable policy (most institutions have a branched approach, one for Title IX and one for non-Title IX allegations)

More on Advisors

- Both parties have the right to be accompanied by advisor to any meeting or proceeding during the investigation (Title IX and VAWA)
- Recipient may not limit the presence or choice
- But may establish restrictions around advisor participation in meetings or proceedings, as long as applied equally to both parties
 - Gag orders NOT permitted
 - May set parameters through advisor agreements
 - Nondisclosure agreements (NDAs)
 - Potted plant during process and interviews and no direct communication with recipient
 - Avoid direct engagement with advisor, address party and advise party of consequences
 - Involve Title IX Coordinator in decisions about advisor conduct
 - Take the same approach for all advisors, in all cases
- Recipient not required to provide an advisor at any time prior to hearing
 - May not restrict advisor's role in cross-examination

Understanding Roles — Coordination between Investigator and Title IX Coordinator

- Have clear understanding about who will:
 - Determine applicable policy and procedures
 - Determine who will (or will not) be interviewed
 - Arrange the interviews
 - Issue timely notice of meetings to the parties
 - Address advisor issues, including any advisor agreements and communications
 - Communicate with the parties about the status of the case
 - Decide whether to delay the investigation for good cause
 - Communicate notices of delay and recommencement of the investigation
 - Send any amended notice of investigation
 - Decide on close of evidence
 - Decide to re-open an investigation to gather more evidence
 - Decide what evidence is going to be included and excluded
 - Ensure compliance with timeframes in policy and required by Title IX

Case Study: Celia and Ryan

The Title IX Coordinator has received notification from the University's online reporting system. Celia alleges that Ryan had sexual intercourse with her and had her perform oral sex on him while she was blacked out.

Investigation

Spotting

Preparation


Investigation

Resolution

The Respondent: Ryan

The Respondent's name looks familiar to you and you look through your files to find that he was suggested as a witness in a sexual harassment investigation you completed during his freshman year. In that case, you reached out to him but never heard back.

What should you do?



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Investigation

Spotting

Preparation


Investigation

Resolution

Celia and Ryan: Notice of Allegations

After your conversation with the Title IX Coordinator, the Title IX Coordinator sent the parties a Notice of Allegations, which identified you as the investigator, and stated, in part:

On August 17, 2021, Celia submitted a complaint alleging that Ryan sexually assaulted her. In her complaint, Celia alleged that Ryan had vaginal sex with her and had her perform nonconsensual oral sex on him while she was blacked out on May 8, 2021.



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Investigation

Spotting


Preparation

Investigation

Resolution

Preparation Phase — Prepare for Investigation

- Clear conflicts/bias inquiries
- Issue spotting and legwork:
 - Review complaint, statements, documentation, notices to parties
 - Gather available information about parties and witnesses
 - Legwork on locations, geography, and publicly available information, including information, sources of information, and investigation steps
 - Develop plan for sequencing investigation, interviews, and evidence
- Know the policy/policies at issue and the applicable procedures, provisions, and definitions
 - Calendar the timeframes for the phases
- Outline your report and investigation steps



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Preparation Phase — Prepare for Interviews

Account for the circumstances and surroundings:

- Who will be participating?
 - Investigator(s)? Party? Advisor? Support person?
- By what method?
 - In-person? Video? Other method?
 - Recording?
- From what location(s)?
- Timing and sequencing
- Know applicable policy provisions around these items
- Go with the flow – be fluid and flexible

Investigation

Reporting

Decision making

Review

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Case Study: Definition of Title IX Sexual Harassment

- The term “Title IX Sexual Harassment” means conduct on the basis of sex* that satisfies one or more of the following:
 - An employee conditioning educational benefits on participation in unwelcome sexual conduct (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 educational institution’s education program or activity; and/or
 - Sexual Assault, Dating Violence, Domestic Violence, or Title IX Stalking

**including conduct based on sexual orientation and gender identity or expression*

Investigation

Reporting

Decision making

Review

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Case Study: Definition of Sexual Assault

- The term “**sexual assault**” includes the following actual or attempted acts:
 - **Rape (except Statutory Rape):** The carnal knowledge of a person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.

Investigation

Reporting

Decision making

Review

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Definition of Sexual Assault (cont.)

- **Sodomy:** Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.
- **Fondling:** The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of their age or because of their temporary or permanent mental or physical incapacity.

Case Study: Definition of Consent

- Sexual activity of any kind requires "consent," which consists of the following:
 - Consent means clear and voluntary agreement between participants to engage in the specific act.
 - Consent requires a clear "yes," verbal or otherwise; it cannot be inferred from the absence of a "no."
 - Consent must be ongoing throughout a sexual encounter and can be revoked at any time.
 - Consent to some sexual acts does not necessarily imply consent to others.
 - Past consent does not mean ongoing or future consent.

Case Study: Definition of Consent (cont.)

- Consent cannot be obtained by pressure, threats, coercion or force of any kind, whether mental or physical. Consent means actually agreeing to the specific sexual activity, rather than merely submitting as a result of pressure, threats, coercion or force of any kind, whether mental or physical.
- Consent cannot be obtained from an individual who is under the legal age of consent.
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another.

Case Study: Definition of Consent and Incapacitation

- Consent cannot be obtained from someone who is unconscious, asleep, physically helpless, or **incapacitated** (including, but not limited to, mentally incapacitated). A person is **incapacitated** when they are unable to make a rational decision because the person lacks the ability to understand their decision. A person who is **incapacitated** is unable to consent to sexual activity. A person can become **incapacitated** as a result of physical or mental disability, involuntary physical constraint, being asleep or unconscious, or consumption of alcohol or other drugs. A person can consume alcohol and/or drugs without becoming **incapacitated**. A person who engages in sexual activity with someone that person knows or reasonably should know is **incapacitated** does not have consent and will be found responsible for a Policy violation.

Case Study: Definition of Retaliation

- The term "**retaliation**" means intimidating, threatening, coercing, harassing, taking adverse employment or educational action against, otherwise discriminating against an individual in any way, and/or interfering with any right or privilege secured by Title IX or its implementing regulations, including through online communications and activities such as social media, because the individual made a report or complaint under this Policy or these Procedures, participated in any way in the investigation or resolution of such a report or complaint, opposed conduct that they reasonably believed to be prohibited under this Policy, these Procedures, or applicable law regarding discrimination or harassment, or exercised any right or responsibility under this Policy or these Procedures.

Case Study: Definition of Retaliation (cont.)

- Retaliation includes conduct that is reasonably likely to deter an individual from making a complaint or report under this Policy or from participating in the investigation or resolution of a complaint or report, or from opposing conduct that they reasonably believe to be prohibited under this Policy, these Procedures, or applicable law regarding discrimination or harassment.

Preparation Phase — Prepare for Interviews

Create Opening Script:

- Identify yourself and explain your independent, fact gathering role (and anyone else with you), distinguishing it from others' roles (Coordinator, Decision-makers)
- High level explanation of how the interview fits in the process and how information might be used (written reports and hearing)
- Let them know they will have the opportunity to provide information and evidence throughout the investigation process, beyond the interview (parties)
- Explain reasons for your notetaking/recording, confirm they are not recording
- Acknowledge anyone with them (advisor) and reiterate limited role
- Explain that you may be asking difficult questions about sensitive matters
- Invite/permit them to ask questions
- Ask them not to read anything into the questions
- Tell them they can ask for a break whenever they need one
- Tell them to let you know if any question is unclear, confusing, or difficult to understand

Investigation
Reports
Decision making
Witnesses

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Preparation Phase — Prepare for Interviews

Opening (cont.):

- Ask them to distinguish between information they have heard from other sources and information based on personal knowledge or experiences
- Address investigation confidentiality (can request it of witnesses, cannot require it for parties)
- Discuss policy against retaliation (assurance and warning)
- Address any amnesty provision and importance of providing known information
- Provide name and contact information for Title IX Coordinator for questions about the process or retaliation
- Ask that they commit to tell the truth
- For virtual interviews:
 - Confirm they are in a private space and ask about any potential disruptions
 - Pan the room?
 - Explain that institution is trying to replicate the in-person process (video required?)
 - Discuss plan for handling any disconnections

Investigation
Reports
Decision making
Witnesses

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Preparation Phase — Prepare for Interviews

Closing Scripts:

- Ask if they think there is any additional information that is important for you to know
 - Anything they thought you would be asking about but you did not?
- Ask if they have talked about it with any others
- Ask if there are other witnesses they believe are important
 - AND what each would provide
- Ask if there is any other evidence they believe you should review
 - Texts, social media, emails, videos, journals
- For parties, any questions they would like you to consider asking the other party?
- Opportunity to contact you/Coordinator with any additional information
- Alert them to the possibility of an additional interview (especially parties)
- Reminders: confidentiality, retaliation, questions to Title IX Coordinator
- Ensure they know how to contact you
- Thank them for their time

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Reports
Decision making
Witnesses

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Preparation Phase — Prepare for Interviews

Interview *Outline*:

- This is not a deposition
- List the topics to be covered in the interview
 - Chronology of the "chapters"
- Focus on what must ultimately be determined and list the elements, for example:
 - Alleged sexual activity
 - Consent? Will need the specific details about how it was communicated/understood
 - Incapacity? Need information about the impact of alcohol and indications of incapacity
 - Coercion? Details about the pressure and consequences if refused
 - Chronology of events
- For the most critical questions, work on the wording in advance:
 - E.g.: what were the words or actions that indicated to you that complainant consented to the sexual activity
- Regs require that you not rely on sex stereotypes
- Be mindful of trauma-informed practices

Trauma Informed Education

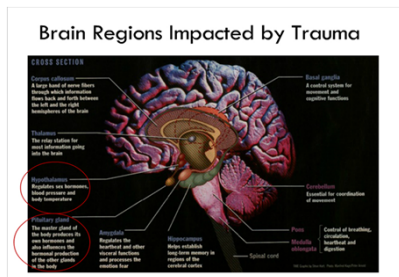
Experience and research reveal:

- Sexual assault on campus often involves people who know each other
- Complainants frequently blame themselves
- Complainants commonly delay in reporting or do not report
- Cases often involve friendship groups
- Different people respond to trauma differently
- Alcohol is frequently involved
- Appearing to display symptoms of trauma does not mean that trauma was suffered

Neurobiology of Sexual Assault

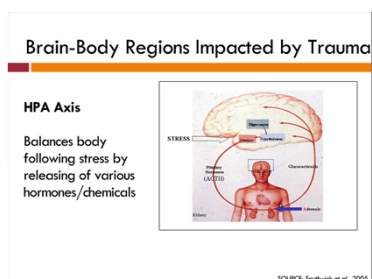


Neurobiology of Sexual Assault: Trauma and Impact on the Brain



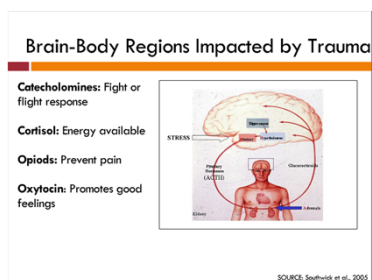
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Neurobiology of Sexual Assault: Trauma and Impact on the Brain



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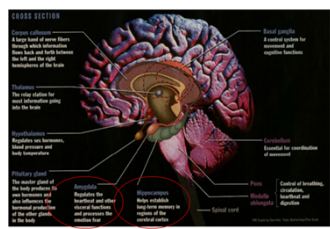
Neurobiology of Sexual Assault: Trauma and Impact on the Brain



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Neurobiology of Sexual Assault: Trauma and Impact on Memory

Brain Regions Impacted by Trauma



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76

Neurobiology of Sexual Assault: Trauma and Impact on Memory

Memory Processes Impacted by Trauma

Hippocampus processes information into memories

Encoding = Organizing sensory information

Consolidation = Grouping information into memories and storing them

Amygdala specializes in the processing of emotional memories (works with the hippocampus)

Both structures are **VERY** sensitive to hormonal fluctuations

SOURCE: Southwick et al., 2005

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77

Neurobiology of Sexual Assault: Trauma and Impact on Memory

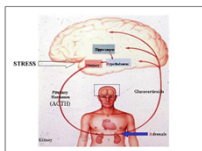
Like These . . .

Catecholamines: Fight or flight response

Cortisol: Energy available

Opioids: Prevent pain

Oxytocin: Promotes good feelings



THESE HORMONES IMPAIR MEMORY CONSOLIDATION

SOURCE: Southwick et al., 2005

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78

Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

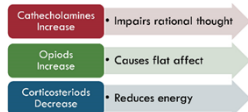
What Happens During A Sexual Assault



SOURCE: Baris, 2002; Southwick et al., 2005

Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault



SOURCE: Baris, 2002; Southwick et al., 2005

Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

What Happens During A Sexual Assault



SOURCE: Baris, 2002; Southwick et al., 2005

Neurobiology of Sexual Assault: How Does This Play Out in Sexual Assault?

Tonic Immobility (TI)

- AKA: "Rape-induced paralysis"
- Autonomic (uncontrollable) mammalian response in extremely fearful situations
- Increased breathing, eye closure, paralysis
- 12-50% rape victims experience TI during assault
- TI is ~more common in victims who have been assaulted before (childhood, adolescence, or adult)

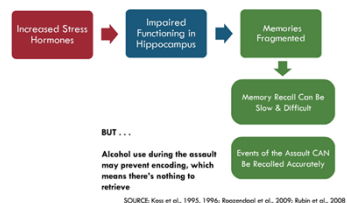
SOURCE: Foa et al., 2007; Gellera et al., 1993; Hebl et al., 2005

Recap of How Trauma Plays Out in Sexual Assault

- Flight/Flee – Try to run or get away from the threatening situation
- Fight – Body tries to fight back against the traumatic event
- Limits Rational Thought Process
- Flat Affect
- Freeze – Unable to move or fight back

Neurobiology of Sexual Assault: What Happens in Terms of Memory?

What Happens During A Sexual Assault



Neurobiology of Sexual Assault: What Does This Mean For Practitioners?

- Neurobiological changes may result in flat affect or perceived “strange” emotions
- Neurobiological changes may impact memory consolidation and recall
 - Slowed Recall
 - Disorganized and Fragmented
 - May appear like the account is changing
 - If alcohol was involved the memory may not be retrievable

Related Concepts to Consider

- Secondary Victimization
 - “the victim-blaming attitudes, behaviors, and practices that exacerbate sexual assault survivors’ trauma” or cause them to relive it
 - “made them feel guilty, depressed, anxious, distrustful of others, and reluctant to seek further help”
 - questions about decision-making, alcohol consumption, sending mixed signals, or appearance/clothing
- Use of sensory information to help recall memory affected by experiencing trauma
 - Asking about what the person could see, smell, taste, feel, or hear

Thank You

Womble Bond Dickinson gratefully acknowledges the U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, for allowing us to reproduce, in part or in whole, Dr. Rebecca Campbell’s *The Neurobiology of Sexual Assault*. The opinions, findings, and conclusions or recommendations expressed in this video are those of the speaker(s) and do not necessarily represent the official position or policies of the U.S. Department of Justice.

Phase: Gather Evidence

Investigation

Reports

Decision making

Reflection

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88

Phase: Gather Evidence — Notice of Meetings

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Reports

Decision making

Reflection

Title IX:

Parties must be given written notice of the date, time, location, participants, and purpose of all hearings, *investigative interviews*, or other meetings where the party's participation in such meetings is invited or expected. The written notice to the parties of such meetings must be provided with sufficient time for the party to prepare to participate.

VAWA:

Both parties are to receive timely notice of meetings in which either might participate as part of the informal or formal disciplinary process

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89

Putting Training into Practice: Investigation Techniques for Interviews

Investigation

Reports

Decision making

Reflection

- Be thoughtful about the time of the interview, time allotted, and location
- Make the party comfortable and develop some rapport
- Be empathetic
- Calm and professional demeanor throughout
- Be patient, do not rush: slow down, give them space to think and answer
- Use open-ended questions, allow for them to answer questions in the narrative (initial interview)
- Do not interrupt
- Do not form judgments based how they are acting/presenting
 - Demeanor or emotions (trauma informed/stressful process)
 - Alcohol can impair memory
 - Avoid secondary victimization (complainant)

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90

Putting Training into Practice: Investigation Techniques for Interviews

Beyond **being** impartial and not prejudging, take steps to help **communicate** your impartiality during interviews:

- Avoid confusion: explain and establish your role clearly and early and return to it as needed throughout the interview and process
- Demonstrate impartiality through neutral language
 - Do not use conclusory language about contested or unknown facts
 - Do not appear to take sides or even agree with the party/witness account
 - Do not appear to provide support ("I'm sorry this happened to you") *but* you should be familiar with the resources available and be able to reference them/information about them
 - Use terms "account" or "experience," not "story" or "version"
- Maintain your calm demeanor
 - Do not react or supply energy to the information received or interview generally (words or expressions/body language)
 - Stay engaged
- Stick to your role, any deviation can be confusing, cause mistrust, or create appearance of bias

Phase: Gather Evidence — Interviews

Questioning:

- Start with opening script
- Goal is to collect the full account of the events surrounding the allegation, typically through narratives (take note of new allegations)
 - Try to obtain the information necessary to create a timeline for the events (even if they do not recall the specific time)
 - Want information to recreate the scene: who, what, when, where, and how
 - Start with open-ended questions to obtain account
 - Keep the conversation open-ended and flowing throughout ("And then what happened")
- Listen carefully to the responses to formulate follow up questions
 - Limit follow up questions to information necessary to understand the account
 - If you are not sure, do not ask
- Do not frame questions that in a way that shares information, unless it is truly necessary
- Distinguish personal knowledge and secondhand information

Phase: Gather Evidence — Interviews

Questioning (cont.):

- Do not "confront" them with other accounts or evidence (in *initial* party interviews)
- Ask clarifying questions for descriptions or words with multiple or unclear meanings
 - Clinical terms instead of "did it," "had sex," "oral," "got together," and "hooked up"
 - Do not draw a conclusion because it might seem self-explanatory
- Ask questions seeking all relevant information, even if they are very personal and uncomfortable
- Avoid "why" questions (unnerving, feel and sound judgmental)
- Recap, restate, or summarize what they have said, in the way they said it
 - Do not interpret or change the wording
 - Complete the "chapter"
- Closing script
- Write up your notes as soon as possible afterward (summary/draft report/recording)

Gather Evidence — Alcohol

- Incapacitation more extreme than impairment or intoxication
- Varies by person and their personal characteristics, including biological and other factors
- Use 1 (sober) to 10 (passed out) scale with descriptions of impact?
- **Potential** indicators:
 - Slurred speech
 - Bloodshot eyes
 - Trouble standing or walking/lack of equilibrium
 - Vomiting
 - Other extreme or unusual behavior
 - Disorientation
 - Falling asleep
 - Fully or intermittently unconscious
 - Memory loss/"black out"

Phase: Gather Evidence — Special Considerations For Witness Interviews

- **Witness Interviews:**
 - Greater sensitivity to not sharing information
 - Early assessment of what they know will help guide your approach
 - If they do not know why they are a witness, start broadly and funnel down?
 - Leading questions often provide less reliable information
 - Give yourself time to consider whether to ask more pointed, detailed questions
 - Confidentiality

Celia's Interview

Celia's Interview



During Celia's interview, she pulled out a folder and asked you to look at it. When you asked what was in the folder, she told you it contained a copy of her SANE exam.



How do you respond?

Investigation

Reporting

Decision making

Follow-up

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Celia's Interview



During her initial interview, Celia states that her "off-campus" housing is "technically" a University apartment building because the University is using it to supplement the dorms as part of its COVID measures.



Do you need to do anything with this information?

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Reporting

Decision making

Follow-up

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Moving Forward



- The Title IX Coordinator calls you back the next day and tells you that Celia's off-campus apartment was indeed secured by the University and is being used as University housing. The Coordinator has met with the Complainant, who confirmed that she is moving forward with her Formal Complaint, and the Coordinator notified both parties that the case will proceed under the University's Title IX Sexual Harassment Policy.
- The Coordinator tells you that you will receive a copy of the Amended Notice of Investigation sent to the parties earlier in the day.

Investigation


Reporting

Decision making

Follow-up

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Celia's Interview



Celia stated "tensions have been high" in the marching band following her report, because "everyone is taking sides." Celia stated that Bryce, a leader in the marching band organization and one of Ryan's close friends, came up to her and told her that "it would have been better if she had handled things within the band" and "maybe [Celia] shouldn't come to band parties anymore."



Do you do anything with this information?

Investigation

Report

Decision making

Reflection

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100

Ryan's Interview

Investigation

Report

Decision making

Reflection

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101

Ryan's Interview



During Ryan's interview, Ryan tells you that he wanted to tell Celia that they had sex but his lawyer told him not to do it because it would make him look guilty.



What do you do?

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Report

Decision making


Reflection

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102

Ryan's Interview





You receive an email from Celia with a list of 50 questions she wants you to ask Ryan. One of the questions states:

- Ask Ryan why he was suspended from band for an entire month during his freshman year.



What should you do?


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Ryan's Interview

At the conclusion of Ryan's interview, he tells you his advisor will be sending you witness statements but it is going to take a few weeks to get them together.



How do you handle it?


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Ryan's Witnesses


Ryan sends you an additional list of witnesses to interview. One of the witnesses is his pastor.


Ryan says his pastor will be able to tell you about Ryan's deep sense of fairness and the conflict he has felt during this process between defending himself and trying to ease Celia's pain.

Ryan goes on to explain that he believes he has been too unselfish in this process.



What should you do?


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Phase: Gather Evidence — Special Considerations For Follow Up Interviews

• Party follow up interviews:

- Complete draft investigation report prior to follow ups
- Evaluate all of the evidence to know differences in accounts and inconsistencies or conflicts with own account, other accounts, and other evidence
- Outline the follow up interview
- Not a re-examination: collect the information you need to complete the account/fill in any gaps
- Ask follow up questions based on evidence collected (from all sources)
- Offer the opportunity to respond, if they wish, to other party's information
- Ask suitable "cross-examination" questions from other party's list

Celia's Follow-Up Interview



During Celia's follow-up interview, you offer Celia the opportunity to respond to Ryan's account of the sexual contact in the bedroom, which included details about the kissing, Celia's rubbing of Ryan's penis, Ryan touching her breasts.

Celia becomes very emotional, tells you she had no memory of any of it, and comments that Ryan completely violated every part of her that night.

What, if anything, do you do?



The Investigation



You talk to the Title IX Coordinator who meets with Celia. The Title IX Coordinator issues an Amended Notice of Allegations.

Celia submitted a formal complaint of alleged nonconsensual sexual penetration (vaginal and oral) with her and nonconsensual fondling of her breasts and Ryan's penis in her room in the University's apartment complex.



Phase: Gather Evidence — Interviews

Remember exclusions (evidence that is “not relevant”):

- Do not ask about prior **sexual predisposition** or **sexual behavior** of the *Complainant*, unless:
 - The questions (or evidence) are related to prior sexual contact with the respondent and are offered to prove consent, or
 - Respondent alleges someone else committed the conduct
- Privileged **records**— do not ask/initiate discussion about them:
 - Medical, psychological, or similar treatment records
 - Attorney-client
 - Clergy
 - Spousal
- Privilege can be waived through “voluntary, written consent”

Phase: Gather Evidence — Beyond Interviews

Other Common Categories of Evidence:

- Texts, chats, and other electronic messages/communications
- Photos and videos
- Voicemails
- Recordings (thorny)
- Emails
- Social media posts
- Surveillance video
- Access data: Wi-Fi, key card
- Police report
- Medical and treatment records (must have a written waiver)
- Employment/student records
- Diagrams, maps, and drawings

Phase: Gather Evidence—Beyond Interviews

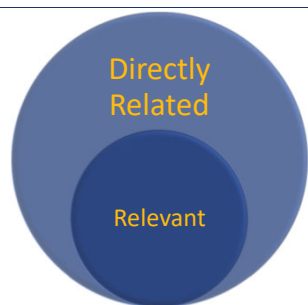
- Title IX Regs prohibit categorical exclusion of evidence
- Common examples of evidence institutions previously excluded or typically deemed not relevant include:
 - Lie detector results
 - Expert reports
 - Medical records, including rape kits
 - Character evidence
 - Prior bad acts
 - Witness statements submitted by party or their advisor
 - *Unduly prejudicial/evidence “whose probative value is substantially outweighed by the danger of unfair prejudice”*

Phase: Review and Summarize Evidence

Title IX (*only*):

- Both parties must be given equal opportunity to inspect and review any evidence obtained during the investigation that is **directly related** to the allegations in the formal complaint, including:
 - evidence upon which recipient does not intend to rely in reaching a responsibility determination
 - inculpatory and exculpatory evidence obtained from a party or other source
 - and all must be available at the hearing as well
- Evidence must be **sent to each party**, and their advisors (if any), in an electronic format or hard copy
 - BUT can require protections: NDAs, limit use to the process, digital encryption, confidentiality stamps, and use of watermarks
- Party must be given ten (10) days to submit a response in writing to the "directly related evidence"
- Investigator must consider any response before finalizing investigative report

"Directly Related" Evidence



"Directly Related" Evidence

- May take the form of a **draft** investigative report
- Includes most evidence gathered
- Interviews: interview summaries or rough transcripts for recorded interviews
- Documentary evidence:
 - Employment or student records
 - Text messages, group chats, apps, emails, photos, videos, social media posts
 - Campus police or other law enforcement records
 - Data: key fob, Wi-Fi, surveillance videos
 - Other documents: medical records, diagrams, bank statements, receipts, and maps
- Sexual disposition/history is included **if** directly related (and even if not "relevant")
- Medical and privileged materials not included without a waiver (may redact)
- Prior to sharing evidence with parties: review final contents with Title IX Coordinator
 - Document the decisions made and reasons for excluding certain evidence

Checklist for Closing Investigation Process

- Confer with Title IX Coordinator about timing and mechanics of providing to parties **and their advisors** for review (Title IX)
 - If a VAWA case not proceeding under the Title IX policy or procedures, this probably occurs in conjunction with providing parties access to the final investigative report

Checklist for Closing Investigation Process — Protecting the File

Prior to providing the “directly related” evidence (or the report for VAWA) to the parties, build in protections:

- Remove or redact information that is not directly related
- Require parties and their advisors to use the evidence and any report only for the purposes of the institution’s process
- Prohibit parties and advisors from sharing the documentation or disclosing the information to others
- Non-disclosure agreement?
- Use digital encryption to protect privacy
- Use party-specific watermarks
- **Use the same practices for the final report**

Ryan’s Call




The day after the parties received the “directly related evidence,” Ryan calls you furious that you did not include his statements about Celia having had relationships with women in your file. He explained again, as he did in the interview, that one of Celia’s motives for bringing the case is her embarrassment for having been with a man.



Should you have included this evidence of Celia’s motive?


Phase: Finalize Investigative Report

- First:
 - Review and consider any response received
 - Confer with Coordinator about any response received
 - Determine whether further investigation, interviews, or follow up is needed
 - Identify evidentiary or relevance issues
 - Determine whether you need additional expertise
- Then:
 - Draft the final investigative report


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
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Reports
Decision making
Follow-up

Celia's Call




A week after Celia receives the "directly related evidence," she leaves you a voicemail saying she has "new information" related to the case and asks that you call her at 5:30 that night.

What do you do?


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Reports
Decision making
Follow-up


Celia's Call



You called Celia, who says she learned from multiple band members that, at a band party a few weeks prior, Ryan had been intoxicated and had told members of the band that "Celia's whole case against me is false because she's just an angry lesbian."

She stated that she heard about Ryan's alleged statements during the investigation period but initially "brushed them off." However, thinking more about it, she decided to report his "blatantly homophobic comments." She wants action and wants it now.

Now what?


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Reports
Decision making
Follow-up

Ryan's Call

After receiving the report, Ryan emailed you and said he needs to talk to you about something important. He stated that you misquoted him in the investigation report and wants to clarify that right away.

Investigation
Reports
Decision-making
Follow-up

What do you do?

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121

Reports

Investigation
Reports
Decision-making
Follow-up

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Phase: Finalize Investigative Report

After the review and response period:

- Title IX
 - Create an investigative report that fairly summarizes **relevant evidence**, and
 - at least 10 days prior to a hearing, send the report to each party **and** their advisor (if any) for their review and written response (in an electronic format or a hard copy)
 - Investigator cannot be the decision-maker
- VAWA:
 - Provide the **party** with **access** (can used supervised access, no copies)
 - to the information to be used in the decision-making process
 - Investigator can be the decision-maker

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Reports
Decision-making
Follow-up

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123

Phase: Finalize Investigative Report

Relevant evidence:

- “The final regulations do not define relevance, and the ordinary meaning of the word should be understood and applied.”
- “Focus investigations and adjudications on **evidence** pertinent to **proving whether facts material** to the **allegations** under investigation **are more or less likely to be true** (i.e., on what is relevant).”

Phase: Finalize Investigative Report

Preparation:

- Develop a template for the structure
- Know the scope (fact gatherer and reporter, single investigator, credibility assessments, recommendations?)
- Stay organized throughout the process and build the report and evidence as you go
 - Create your interview summaries as you go
 - Compile and organize documentary evidence
 - Include meetings and other case events and timelines in working draft as you go
- Identify “directly related” evidence that is distinct from “relevant evidence”

Phase: Finalize Investigative Report — Overview of Report Elements

- Introduction
- Summary of the Allegations and Complaint
- Documents/Evidence Reviewed
- Interview Methodology
- Witnesses Interviewed
- Factual Summary
- Recommendations (for non-Title IX, if applicable)
- Conclusion

Phase: Finalize Investigative Report — Introduction

- Source, recipient, and date of report/complaint
- Date of the notice of allegations/investigation
- Reason for the investigation
- Your appointment as the Investigator (reference policy)
- Your role (investigator, single investigator, credibility, recommendations?)
- Date of the close of evidence
- Date the parties received directly related evidence and description of the form*
- Date the parties provided responses to directly related evidence*

*for Title IX investigations

Phase: Finalize Investigative Report — Summary of Allegations

- A brief summary of the allegations made
 - usually a paragraph or two
 - similar to description in the Notice of Allegations
- Date/timing of the allegations
- Specify the same for amended or additional allegations
- Include allegations made by the other party if the investigations are consolidated

Phase: Finalize Investigative Report — Documents/Evidence Reviewed

- List the "relevant" documents item by item (and attach them)
- Describe the evidence, identify the source and time
 - E.g.: May 27, 2021 text messages between Complainant and Respondent provided by Complainant
- Provide a description for documents received but not deemed relevant (and not attached)
- Party responses to the "directly related" evidence or the final report (depending on your process)

Phase: Finalize Investigative Report — Interview Methodology

- Items from opening script:
 - Role
 - Confidentiality (your treatment and, for witnesses, their adherence)
 - Retaliation policy
- Asked general questions and follow up questions when necessary
- Limitations on sharing of information
- Offered opportunity to provide evidence and suggest witnesses (and basis for suggestions)
- Parties' opportunities to suggest questions for cross-examination (parties only)

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130

Phase: Finalize Investigative Report — Witnesses Interviewed

- Names of witnesses and those present (advisors, too)
- Date(s)
- Location
- Note the reasons for the interview (party request?)
- If recorded, include a reference
- For those suggested but not interviewed, note the reasons
- Identify efforts to interview witnesses who did not agree to participate

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131

Phase: Finalize Investigative Report — Factual Summary

- Determined by your institution's practices
- For most cases:
 - Background section (parties' description of their relationship to each other and to witnesses, witnesses description of relationships to parties)
 - Organize the facts by in chronological order by allegation/event (Complainant's account, Respondent's account, Witness accounts)
 - Weave in other evidence provided
- Recited neutrally and consistently
 - E.g., Celia stated/said, Ryan stated/said or "Ryan and Celia agreed" for each fact
 - Avoid words like "according to," "admitted," "acknowledged," "conceded," or "opined"
- Include facts necessary to decide case, including those related to credibility (and address it if that is part of your role)
- **Separate section for recommendations**

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132

Finalize the Investigative Report and Provide it to the Parties

Title IX:

- Similar to access to “directly related evidence,” must provide electronic or hard copy to party and advisor
- 10 days prior to any hearing
- Must provide parties opportunity to provide written response
- All evidence subject to review and response by the parties must be available at the hearing
- Can institute same types of protections (NDA, limitations on use of information, encryption, watermarks)

Finalize the Investigative Report and Provide it to the Parties

VAWA:

- **Controlled access** to information relied upon by any decision-maker permitted
- Supervised reviews (without smart phones)
- Confidential: no copies, photos, or downloads
- If remote, replicate in-person protections:
 - Controlled and supervised access
 - Secure site, monitored through Zoom
 - Advisor’s access through party

Celia’s Response

- In her response to the final investigation report, Celia states that no one should believe anything Matt has to say because another band member recently told her Matt had raped her.
- What do you do?

Decision-making

NOTES

Decision-Making

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136

Decision-making

NOTES

Decision-Making

Similar and identical requirements for decision-makers:

- Process must be prompt and fair
- Impartial: bias and conflict free, avoid prejudgment of facts
- Objective evaluation of all relevant evidence
 - Both inculpatory and exculpatory
 - Address evidence that supports the conclusion
 - Address certain evidence that is contrary to the conclusion (take on material information)
 - Credibility not based on status (complainant, respondent, or witness)
- Make determination independently (no deference to investigative report)
- Reminder about Training
 - On technology to be used at the hearing
 - Issues on relevance of questions and evidence, including sexual predisposition and prior sexual behavior
 - Institution's policies, including definitions

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Decision-making

NOTES

Decision-Making — General Requirements of Title IX Hearing

- Live hearing
 - In-person, with separation of parties *or* virtual
- All "directly related evidence" available
- Provide cross-examination: permit each party's advisor to ask "all relevant and follow-up questions" of the other party and witnesses
 - Institution provides advisor for cross-examination if the party does not have one
 - *Decision-maker determines relevancy for each question and party must be afforded the opportunity to challenge relevancy determinations*
- Cannot require participation of party or witness
- Audio recording or transcript
- Issue a written determination of responsibility

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Decision-Making — Title IX Hearing

Flexibility (must apply equally):

- To determine advisor role beyond cross-examination
- Choice of decision-makers
- Use of pre-hearings
- Format of hearing beyond cross-examination
 - Openings? Investigator testimony? Direct examination? Closings?
 - In-person, with separation of parties or virtual
- Decorum (to make the process respectful and professional)
- Handling objections
- Time limits for various phases of hearing



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139

Decision-Making — Title IX Hearing

- Ensure that you clearly understand your role in the hearing process
 - Testimony?
 - Bring or present evidence?
 - Subject to cross-examination?
 - Provide recommendations or weigh credibility?
- Seek any clarity about your role or the evidence from Title IX Coordinator, not decision-makers
 - No "ex-parte" type conversations with decision-makers
- Same approach to non-Title IX decision-making



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Decision-Making Framework

- Keep in mind what must be decided:
- Make a decision about whether the policy was violated
 - For sexual harassment: determine what conduct occurred and whether it was welcomed or unwelcomed
 - For sexual contact: what conduct occurred and was it with consent or without consent
- Using the applicable **standard of evidence**
- With rationale for finding on each allegation
- Sanctions (institution-specific)
- Remedies (institution-specific)



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141

Decision-Making

Standard of evidence:

Preponderance: more likely than not that respondent violated the policy (50% and a feather) or insufficient evidence to conclude it is more likely than not

Clear and convincing: “highly probable” or insufficient evidence to conclude it is “highly probable”

- Under Title IX, must apply the same **standard of evidence** to all Formal Complaints of sexual harassment

Decision-Making — Evidentiary Issues

Always irrelevant under **Title IX**:

- Complainant's sexual predisposition or prior sexual behavior (unless one of the two exceptions apply)
- Medical, psychological, or treatment records (without voluntary, written consent)
- Information protected by legally recognized privilege without a waiver
- **Party or witness statements that have not been the subject of cross-examination at a live hearing**
 - Know your policy and procedures

Decision-Making — Evidentiary Issues

Determine **weight** to be given to relevant evidence:

- Regs require consideration of both inculpatory and exculpatory—what does that mean?
 - Address evidence that supports the finding/conclusion
 - Address certain evidence that does not support the finding/conclusion—acknowledge and address it (including witness or party statements)
- Explain factors for some evidence “outweighing” other evidence—what are the reasons?
- What about matters that feel like one person's word versus another's? How do you evaluate **credibility**?

Decision-Making — Evidentiary Issues

Credibility:

- Credibility cannot be based on status (complainant, respondent, or witness)
- Is there corroborating evidence and information
 - Objective documentation
 - Contemporaneous accounts and information
- Is it based on firsthand knowledge—how did the person obtain the information
- Is the information “plausible”
- How strong is their recollection or confidence in the accuracy of the information
- Was the person forthcoming with the material information

Decision-Making — Evidentiary Issues

Credibility (cont.):

- Does the person have a reason to not be truthful about that information
 - In both directions: self-serving statements and statements against interest (if the fact is harmful to the person but they disclose it anyway)
- Relationship of person providing information to each of the parties
- Other factors impacting believability?
 - Prior bad acts or pattern of this conduct
 - Substantially similar and distinct conduct? Allegations or determinations?
 - Timing?
- *Demeanor?*

Making a Determination: Decide Whether Ryan Violated the Policy

Decision-Making Phase: Draft Notice of Determination

NOTICE

Decision-Making — Written Determination

Elements:

1. Identification of the allegations alleged to constitute sexual harassment;
2. Procedural steps taken from receipt of the Formal Complaint through the determination regarding responsibility (writings, meetings, interviews, reviews, hearings, evidence collected);
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the recipient's code of conduct to the facts;
5. Decision-maker's rationale for the result of each allegation, including rationale for the determination regarding responsibility;
6. Any disciplinary sanctions imposed on the respondent, and whether the recipient will provide remedies to the complainant; and
7. Information regarding the appeals process

** Only one notice (re: responsibility with sanctions/remedies) and must be provided to the parties simultaneously*

NOTICE

Phase: Decision-Making — Draft Notice of Determination

Title IX and VAWA require a written Notice of Determination (policy determines whether it is required for non-Title IX sexual harassment)

Sample format of Notice of Determination (which aligns with both):

- Summary of allegations
- Summary of procedures
- Policy Provisions Section
- Findings of Fact
- Decision and Rationale
- Sanctions and Rationale
- Remedies
- Appeal Information

NOTICE

Phase: Decision-Making — Draft Notice of Determination

Title IX requires that it include:

- **Identification of allegations potentially constituting sexual harassment**
 - Summarize the allegations contained in the Formal Complaint
 - All allegations, for both parties, in a factual and concise manner
- **Description of the procedural steps from formal complaint through determination, including all:**
 - notifications to parties,
 - Interviews with parties and witnesses,
 - site visits,
 - methods used to gather other evidence,
 - any hearing held
- Include information about who was present and their roles

NOTES

Phase: Decision-Making — Draft Notice of Determination

Policy Provision Section:

- Identify the policies at issue
- Include applicable definitions
 - Regarding conduct (e.g., sexual assault, consent, incapacitation) and the elements
 - Standard of proof
 - Burden of proof
 - Presumption of not responsible
 - Retaliation, if applicable

NOTES

Phase: Decision-Making — Draft Notice of Determination

- Findings of fact supporting the determination
- Conclusions regarding application of policy to the facts
- Statement of, and rationale for, the result as to each allegation, including determination regarding responsibility, sanctions, and whether remedies designed to restore or preserve equal access to education program/activity to complainant

In practice:

- Discuss all material facts
- Apply the policy definition and standard of proof to the facts
- To reach conclusions that are
- Explained through the evidence available, how it was *weighed*, and how it supports, or does not support, the outcome (including credibility)

NOTES

Phase: Decision-Making — Draft Notice of Determination

Findings and Rationale (cont.)

- **Sanctions and rationale**
 - And procedure for failing to abide by them
- **Remedies provided**

NOTES

Phase: Decision-Making — Draft Notice of Determination

- **Procedures and basis for appeal**
 - Explain the process, general requirements, roles, and the timeframes
 - Permissible grounds for appeal
 - How to file it
 - On what timeline
 - To be decided by whom (by name, title, or otherwise)
- **Appeal bases must include:**
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time the determination regarding responsibility (or dismissal) was made, that could affect the outcome
 - Title IX Coordinator, Investigator, or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
- Plus any other grounds listed in the policy

NOTES

Phase: Decision-Making — Draft Notice of Determination

Delivery of the Notice of Determination (Title IX):

- Know in advance who is responsible for delivering the notice to the parties
- Must be a written notice
- Must be provided to the parties simultaneously

Sexual Assault and VAWA crimes:

- Simultaneous notice, when the decision becomes final
 - AND for any change to the results prior to it becoming final

Effective Date (Title IX Regs):

- Final at conclusion of appeal or, if no appeal is filed, on the date on which the appeal would no longer be considered timely

NOTES

Phase: Decision-Making — Sanctions and Remedies

- Know your role
- Separate the finding on responsibility from the sanctions and remedies
 - If credibility is part of the sanctions determination, whomever makes credibility determinations should decide sanctions
- Know your process
 - Based solely on the investigation and hearing files?
 - Parties to submit impact statements?
- Sanctions and remedies should align with the determination
 - "close evidentiary calls" do not warrant lesser sanctions
 - evidentiary standard should not be raised because of the severity of the sanctions
- Designed to stop the discriminatory conduct, prevent its recurrence, and address its effects



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157

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Phase: Decision-Making — Sanctions and Remedies

- Range of possible sanctions should be listed in your policy (required by VAWA)
 - Requires the sanctions to be specific, including the type and length of suspension and reinstatement requirements
 - Must be included in notice of determination
 - Any information relied upon by decision-makers must be available to parties
- Sanctions must be included in the singular Notice of Determination (Title IX)
- ***Policies list the range of sanctions and sanctioning considerations***



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158

NOTES

Decision-Making — Appeals

Pertinent Title IX Requirements (not exhaustive):

- Equitable
 - offered to both parties from: decision and from dismissal of Formal Complaint
- Required Grounds:
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time the decision was made and could affect the outcome
 - ***Bias or conflict by Title IX Coordinator, investigator, or decision-maker***
- Permitted to provide additional bases for appeal, as long as equally
- Additional written and notice requirements as well



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159

NOTES

Phase: Decision-Making — Appeals

VAWA:

- No appeal requirement but, if provided, it must be offered equally to the parties with the same procedural protections as provided throughout the process

NOTES

Recordkeeping — Title IX

Must maintain certain records for seven years, including:

- For each sexual harassment investigation including any determination regarding responsibility and any audio or audiovisual recording or transcript required by the Regulations, any disciplinary sanctions imposed on the Respondent, and any remedies provided to the complainant designed to restore or preserve equal access to the education program or activity
- Any appeal and the result
- Informal resolution
- Supportive measures
- Training materials for Title IX Coordinators, Investigators, decision-makers, and those who facilitate informal resolution (and post on website)
- Actions taken in response to a report or formal complaint sufficient to document why the response was not deliberately indifferent

NOTES





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