

# Title IX Training

## Ohio Wesleyan University

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# Permission to Post

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# Today's Session

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- Title IX Themes
- Intake and Support
- Investigative Interviews
- Writing an Investigation Report
- Hearing Procedures
- Writing a Decision

Up next:

- Appeals Officer Training (January 12)

# Title IX Themes

# Themes of Title IX

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- Compliance
- Integrity
- Ethic of Care
- Neutrality
- Transparency

# Compliance

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- Title IX – 20 U.S.C. 1681 et seq.
- Regulations – 34 C.F.R. Part 106 (2020 version)
- Clery Act and Regulations – 20 U.S.C. 1092(f); 34 C.F.R. 668.46
- U.S. Department of Education Non-Regulatory Guidance
- U.S. Supreme Court Case Law
- U.S. Circuit Court of Appeals – 6th Circuit
- U.S. District Court for the Southern District of Ohio (yep, really)
- Occasionally, your state courts
- **Start with compliance.**

# Integrity

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- Yes, you personally require integrity, but that's not what I'm talking about!
- **Follow your policy. Follow your process.**
- You should be able to point to the part of the policy you are following.
- You should continually refer to the policy.
- When you provide updates, tell the parties what part of the policy you are on, and what you are doing next.
- The policy should be your guide.

# Ethic of Care

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- No policy can provide an answer for every possible situation.
- When your policy is silent, you should be guided by your ethic of care—the underlying values that drive your institution and the way your campus community is treated.
- Your ethic of care also involves supporting the parties, before, during, and after any formal process.
- “They are all our students.”
- Note also: you are a part of the campus community and are deserving of care.

# Neutrality

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- The policy doesn't put a finger on the scale, and neither should you.
- All Title IX team members (except for advisors) are expected to be neutral throughout the process.
  - No bias for or against complainants or respondents generally
  - No bias for or against a particular complainant or respondent
  - No conflicts of interest that would tilt your findings in one direction or another
- How do you stay neutral?
  - Stay curious. Don't make a determination until the last bit of evidence has passed through your fingertips.
  - Stay supportive.
  - Stay human.
- The biggest risk in terms of liability is to decide how the case “should” come out, instead of relying on the evidence.

# Transparency

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- “If the parties don’t hear from you, they will assume you are doing nothing or actively working against them.”
- The regulations require evidence to be shared equitably. What does this mean?
- We make sure parties know they have the right to an advisor, and we encourage them to bring one.
- We don’t do things by ambush.
- At the end of the process, even if the parties aren’t satisfied with the ultimate outcome, we want them to feel heard.

# Title IX Jurisdiction

# Title IX – Statutory Language

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“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...” 20 U.S.C. 1681(a).

Exceptions include Greek organizations, YMCA/YWCA, scouts, Boy/Girl Conferences, separate living facilities, etc.

# What is Sexual Harassment?

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- Quid Pro Quo
- Unwelcome Conduct on the Basis of Sex
- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

See 34 C.F.R. 106.30.

# Definition of Sexual Harassment (OWU Policy)

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

1. An employee conditioning the provision of an aid, benefit, or service of the University on an individual's participation in unwelcome sexual conduct.
2. Quid Pro Quo Harassment: Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature by a person having power or authority over another constitutes sexual harassment when submission to such sexual conduct is made either explicitly or implicitly as a term or condition of rating or evaluating an individual's educational or employment progress, development, or performance.
3. 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 University's education program or activity.
4. Sexual assault (*inclusive of: forcible rape, forcible sodomy, sexual assault with an object, forcible fondling, statutory rape, and incest*), dating violence, domestic violence, or stalking.

# When Does Title IX Apply?

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“Education Program or Activity”- for purposes of Title IX generally, means everything your institution does. 20 U.S.C. 1687(A)(2)(A).

For purposes of adjudicating Sexual Harassment, it includes:

- Locations, events, or circumstances over which your institution exercised substantial control over both the respondent and the context in which the sexual harassment occurs
- Also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

34 C.F.R. 106.44(a).

# Behavior + “The Box”

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- In order to fall under the Title IX grievance process, you must have a behavior that fits into the “Title IX Box”:
  - Must constitute sexual harassment if proved
  - Must have occurred in the recipient’s education program or activity
  - Must have occurred against a person in the United States
  - Formal Complaint must be filed while the complainant is participating in or attempting to participate in the education program or activity of the recipient
- What happens to behavior that doesn’t fit inside the Box?

# “Education Program or Activity”

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For purposes of Title IX generally, means everything your institution does.  
20 U.S.C. 1687(A)(2)(A).

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34 C.F.R. 106.44(a).

# Offramps

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- If behavior doesn't fit into the Box, it is often something that will still be addressed by your institution through another process:
  - If it's Sexual Exploitation, the case goes through a Non-Title IX Resolution Process
  - Student conduct of conduct
  - Employee disciplinary procedures
  - Faculty manual
  - Collective bargaining procedures
  - No trespass orders
- Note: If a case deals with behavior that is both inside and outside the box, the case must receive Title IX procedural protections. 34 C.F.R. 106.71.

# In the Box? Hypos

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- Sexual harassment occurs:
  - Between employees who are driving to Staples to get office supplies while on the clock
  - Between faculty members attending an off-campus department holiday party
  - Between student health center staff attending a work-related conference in Utah
  - At Respondent's home in Toledo over the summer; Complainant is a recent graduate who did not report until after graduation
  - At Respondent's home in Jamaica the week after Complainant and Respondent enrolled but before they began attending classes

# Intake and Support

# Reporting Sexual Harassment

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- Who: Complainants, respondents, third parties – to the Title IX Coordinator
  - Institutions can choose which employees are required to report and which employees are confidential resources
- When: We encourage reporting as soon as possible, but delays are common
- How: Preferably, in writing, but reports can be submitted by phone or in person
  - Anonymous reports may limit the institution's ability to respond

# What Happens When A Report Is Made?

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- Outreach from a member of the Title IX Team:
  - Link to the policy
  - Offer to speak about options
  - Availability of supportive measures
  - Prohibition on retaliation
- How many times does your campus do outreach to a party?

# Intake Meetings with Complainants

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- Information about the resolution process
- Discussion of Title IX jurisdiction
- Potential discussion of definitions
- Information about the interactions between the parties
- Supportive measures
- Protection from retaliation
- “I need to provide you with information, and it would be helpful for you to provide me with information. Would you like me to talk about the process first? Or would you like to share your concerns with me first? Either is fine, and if you can’t decide, I’m happy to help.”

# Initial Assessment

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- Goal: Get enough information to determine if they are speaking to the right office.
  - Sexual Harassment?
  - Title IX Box vs. Offramp?
- If the person wishes to move forward with a Formal Complaint, what are the appropriate charges?

# What is Trauma?

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- The Substance Abuse and Mental Health Services Administration (SAMHSA) defines trauma as “a result from an event, series of events or set of circumstances that is experienced by an individual as physically or emotionally harmful or life-threatening and that has lasting adverse effects on the individual’s functioning and mental, physical, social, emotional or spiritual well-being.”
- The CDC defines trauma as "a physical, cognitive, and emotional response caused by a traumatic event, series of events, or set of circumstances that is experienced as harmful or life-threatening."

# Trauma and Its Effects

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- Trauma can affect the way an individual responds in the moment while an incident is occurring
- Trauma can affect the way an individual encodes memories while an incident is occurring
- Trauma can affect the way an individual decodes memories when trying to relate what happened

# Intake: Being Trauma-Informed

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- Encourage them to bring an advisor.
- Limit the number of times a person is required to tell their story. Initial assessment doesn't require all the details.
- Offer autonomy whenever possible.
- Take breaks when needed.
- If the meeting is in person, have water, snacks, and tissues available.
- Take excellent notes and give the person the opportunity to review and suggest revisions after the meeting.
- Document what is discussed and send it in a follow-up email to the person.

# Supportive Measures

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- Non-disciplinary, non-punitive individualized services
- Offered as appropriate, as reasonably available, and without fee or charge
- Available before or after the filing of a formal complaint or where no formal complaint has been filed
- Designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party
- Includes measures designed to protect the safety of all parties or the educational environment, or deter sexual harassment
- Kept confidential except as necessary to provide the support

# Supportive Measures: Examples

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- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- Mutual restrictions on contact between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security and monitoring of certain areas of the campus
- Other similar measures

# Protection from Retaliation

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- Protecting parties and witnesses from retaliation is important to ensure the integrity of the process
- Retaliation means intimidating, threatening, coercing, or discriminating against any individual for the purpose of interfering with any right or privilege under Title IX, or because the 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 Title IX

# Options to Discuss

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- Make a report
  - Title IX
  - Law enforcement (if potentially criminal)
  - Both or neither
- Get supportive measures
- Formal Complaint
  - Informal Resolution
  - Formal Resolution
- Does any other policy apply?
- The choice that you make now can change later.

# Intake for Respondents?

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- Yes – this typically occurs once Respondents are aware of the situation. (They are not usually notified until a no-contact order or notice of allegations is issued.)
- What is the difference between intake for complainants and respondents? There isn't any difference!
  - Respondents may have experienced trauma as a result of the same incident.
  - Respondents may have prior trauma that affects the way they respond to this incident.
  - Respondents may have claims against the Complainant for sexual harassment.
  - Respondents may have claims that can be reported to law enforcement.
  - Etc.

# Formal Complaints

# Formal Complaints (cont.)

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- Document is filed by a complainant or signed by a Title IX Coordinator
- Alleges sexual harassment against a respondent
- Requests that the recipient investigate the allegation of harassment
- At the time of the filing of the formal complaint, the complainant must be participating in or attempting to participate in an education program or activity of the recipient
- Can be filed with the Title IX Coordinator in person, by mail, by e-mail, using the contact information in the policy, or by any other method established by the recipient

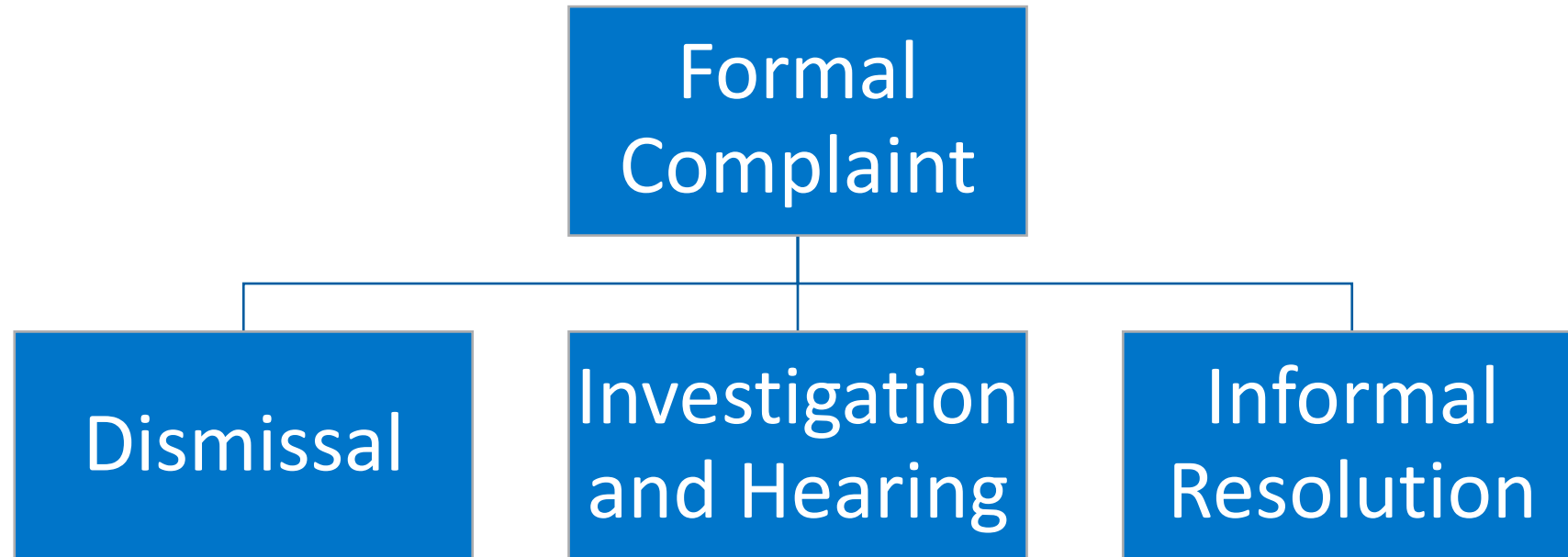
# Filed by Title IX Coordinator?

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- Check your policy for guidance on when to move forward even if the complainant does not wish to file a complaint
- Most commonly this is done at the complainant's request to help them avoid retaliation
- Other factors to consider might include:
  - Behavior is particularly severe
  - Behavior was caught on camera
  - Allegations are against an employee
  - Complainant is willing to participate in process
- Note: The Title IX Coordinator is not the complainant!

# Formal Complaint Process: Overview

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# Dismissal

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- Mandatory:
  - Does not constitute sexual harassment even if proven
  - Did not occur within the education program or activity
  - Did not occur within the United States
- Discretionary:
  - Complainant withdraws the complaint in writing
  - Respondent is no longer enrolled or employed by the institution
  - “Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein”
- Dismissal typically means the case is off-ramped to another procedure, but this can be confusing to parties.

# Informal Resolution

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- Must be voluntary by the parties and cannot be required
- Cannot be offered until a formal complaint is filed
- Can be offered any time after the formal complaint is filed and before a determination is reached
- Is not required to be offered in any case
- Cannot be offered for allegations that an employee sexually harassed a student

# Informal Resolution: Notice

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- Both parties must receive a notice that includes:
  - The allegations
  - The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations
  - Any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
  - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared

# Informal Resolution: Consent

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- Both parties must provide voluntary written consent to the informal resolution process

# Informal Resolution: Agreement

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- Informal resolution, if successful, should result in a signed written agreement that resolves the allegations in the formal complaint.
- What will it take for the parties to be able to move forward from this situation?
- In a stalking case, what happens if Respondent continues with a course of conduct?
- In a quid pro quo or unwelcome conduct case, what happens if Respondent continues the behavior?
- How can the agreement be enforced?

# Formal Complaint: Starts with Notice

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- Provided to both parties in writing
- Includes:
  - Allegations of behavior potentially constituting sexual harassment
  - Sufficient details known at the time, including identities of the parties, conduct that was reported to constitute sexual harassment, date, and location
  - Respondent is presumed not responsible for the alleged conduct and a determination of responsibility will be made at the conclusion of the grievance process
  - May have an advisor of choice who may be but is not required to be an attorney
  - May inspect and review evidence
  - Provision in the recipient's code of conduct that prohibits making false statements or knowingly submitting false information during the process
- Must be amended if new allegations of sexual harassment surface

# Investigative Interviews

# Investigation: Role of the Coordinator

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- Ensure compliance with the policy
- Answer process questions
- Track the case to ensure it is moving forward appropriately
- Continue to provide supportive measures, the need for which may change over time
- Monitor case to determine whether additional allegations should be added to the Notice of Allegations
- Assist external investigators in obtaining information from other parts of the institution where appropriate

# Investigation: Role of the Investigator

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- Offer the parties an opportunity to sit for an interview, suggest witnesses, provide evidence, and suggest questions for witnesses
- Interview witnesses
- Gather evidence from the parties and witnesses as they may be willing to provide it
- Gather evidence from other sources: surveillance footage, card swipes, class schedules/rosters, grades, medical/counseling records (with written consent from the patient for use in the Title IX case), police records, court proceedings
- Prepare an investigative report that fairly summarizes the relevant evidence gathered
- Stay curious – predetermining a case will result in asking fewer questions than necessary to gather all relevant evidence!

# Investigation: Role of the Advisor

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- Support their party
- At the discretion of their party:
  - Attend interviews and meetings
  - Help their party think about witnesses and any questions they should be asked
  - Help their party think about what evidence might be relevant
  - Remind their party about the availability of supportive measures if they need them
- Advisor *do not* provide answers on behalf of their party.

# Initial Outreach

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- Introduction
- Advisor of Choice
- Scheduling an interview (complainant only, for now)
- Start thinking about evidence, witnesses, questions you may want asked
- Remember: supportive measures, no retaliation

# Preparing for an Interview

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- Bring with you:
  - Policy
  - Notice of Allegations
  - Formal Complaint
  - Any evidence provided to you in advance
- What questions must you ask regarding each element of the policy violations that are alleged?
  - Do not forget to ask about impact!
- In person: snacks, water, tissues.
- If you are not recording, plan to take prodigious notes.

# Interview Format

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- Reminders regarding process
- Monologue
- Follow-up questions
- Sensory specific questions
- Reflection and paraphrasing

# Reminders

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- Who are you, and what is your role?
- Do you make a decision in this case?
- What happens to the information they give you today?
- Who will see what they say today?
- After they talk to you, is there more to the process?
- Retaliation protections

# Monologue

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- “Do you know what I called you in to speak about today?”
- “Where do you feel comfortable starting?”
- “What happened next?”
- “And then what happened?”
- “Tell me more about that.”

# Follow-Up Questions

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- Establish a chronology
- Get more details
- Explore evidence and witness regarding particular portions of the incident
- Clarify things that were unclear during the monologue
- Get a good understanding of where things happened, room layout, building layout, etc.
- If you were a camera in the room, could you describe what you saw?

# Sensory Specific Questions

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- Sensory questions can be helpful when a person is having difficulty recalling a particular portion of an interaction.
- What did you see, hear, taste, smell, or feel?
  - Where were your arms?
  - Where was their body weight?
  - Could you feel anything on your legs?

# Reflections and Paraphrasing

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- Reflect information back to the person to make sure you understand it.
  - This is particularly helpful for establishing a chronology.
- Paraphrase what they have said and see if they agree. If they don't, it suggests that you have more questions to ask so that your understanding is complete.

# Relevance

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- Does it help to better understand what happened and the context surrounding it?
- Does it help to better evaluate credibility?
- Is it permissible? (Impermissible evidence is not relevant.)

# Impermissible Topics

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- Complainant's sexual predisposition or prior sexual behavior, unless such questions and evidence:
  - Are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
  - If the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.
- Privileged information, where such privilege has not been waived by the holder. (Example: Attorney-client privileged information)
- Medical or counseling records for which the patient has not signed specific consent for the records to be included in the evidence for the case

# Using Relevancy To Guide An Investigation

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- What do you do if someone hands you irrelevant evidence?
- What do you do if someone wants you to gather evidence and you don't know if it is relevant?
- What do you do if someone asks you to interview a witness and you don't know how they could be relevant?

# Questions about Verbal Consent

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- Before that started, was there any conversation about it?
- Did they ask you if you wanted to do that? Did you ask if you could do that?
- Did they tell you they were going to do that? Did you tell them you were going to do that?
- Did they say anything in response?
- Was there any conversation while it was occurring?
- Did you say anything to them? Did they say anything to you?
- Did they say [whatever they alleged they said]?
- Did you say [whatever they alleged you said]?

# Questions about Non-Verbal Consent

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- When they started to do that, how did you respond?
- When you started to do that, how did they respond?
- When they started to do that, did you move your body in any way?
- When you started to do that, did they move their body in any way?
- Did you move your body to help them do that?
- Did they move their body to help you do that?
- How did they know they liked what you were doing?
- How did you show you didn't like what they were doing?
- Did it seem like they were into it? Why or why not?
- Was there any kissing during this? Were they kissing you back?
- Who was controlling the speed of what was happening?

# Questions about Positioning

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- How were you positioned? How were they?
- While they were on top of you, where was their body weight?
- Where were your arms, legs, hands, head? Where were theirs?
- Were the lights on or off? Could you see their facial expressions?
- Did you change positions at all? How did you get from one position to the next?
- Were you still wearing clothes? What clothes had been taken off? Do you remember how and when they came off?

# Questions about Alcohol/Drugs

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- Reason for asking + amnesty reminder
- Had you consumed alcohol or drugs? When? How much? Over what period of time?
- Had you eaten? If so, what, when, and how much?
- Were you taking any medication that interacted with alcohol/drugs? What effect does that medication typically have on you, if you know?
- Can you describe the impact the drugs/alcohol had on you at that point in the evening?
- Do you think that alcohol/drugs played a role in what you can remember from that night? Why?

# Questions about Intoxication

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- Did the person appear to be intoxicated? How did you know?
- Was the person unconscious at any point?
- Did the person vomit?
- Was the person's speech slurred? Could you understand them?
- Were they able to walk and balance? Did they need help walking?
- Did they seem confused about who they were with, what they were doing, or where they were?
- Were you worried about them?
- Was the person able to text and use their smartphone?
- Was the person able to pour their own drinks?
- Was the person able to remove their own clothing?
- What clues did you see that made you believe that the person was not intoxicated?
- Did Respondent see Complainant [describe symptom of intoxication]?

# Investigators: Being Trauma Informed

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- Remember your ABCs: Advisor, Breaks, Comfort
- **Be curious**, not judgmental.
- If you sense a question may be misread, explain why you are interested before you pose the question.
  - What were you wearing?
  - Had you been drinking or doing drugs?
- Not asking the difficult questions now may make the process harder down the road.
- If information doesn't make sense, ask more questions.

# Mock Investigative Interview

# Band Bus Hypo - Disclaimer

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- This scenario is entirely fabricated and is to be used for training purposes only. It is not meant to malign any Marching Bishops (or any other marching band's membership).

# Initial Report – Band Bus Hypo

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- Incident Date/Time: August 23 and 30, 2025
- Report Date: September 5, 2025
- Complainant: Nadine Morset (student)

“Alan Coolray and I were on the band bus coming home from the Super State game on August 23, 2025 when he digitally penetrated me. He also groped my breasts at a party on August 30, 2025 while I was substantially impaired, and then he apologized the next day.”

# Formal Complaint – Band Bus Hypo

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I am writing to file my formal complaint against a student, Alan Coolray. On August 23, 2025, he digitally penetrated me on the band bus on the way home from Super State without my consent. On August 30, 2025, at a party at the Band Fraternity House, he groped my breasts while I was too intoxicated to consent. Later on August 30, 2025, he sent me a text that read, “I’m sorry about how last night went down.” I would like an investigation into these sexual assaults, and I would like Alan removed from the band and from campus as soon as possible. I want to make sure he knows exactly what he did to me.

(Signed, dated, and delivered to the Title IX Coordinator)

# Notice of Investigation – Band Bus Hypo

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Includes the following charges:

- Sexual assault with an object [digital penetration]
- Forcible fondling

# Writing an Investigative Report

# Writing Interview Summaries (1 of 2)

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- No magic formula
- Try to draft them near the time of the interview
- Summarize the discussion with as much detail as possible
  - Include policy and procedure discussions
  - Include questions asked and answered
  - Use quotations when possible

# Writing Interview Summaries (2 of 2)

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- Must be readable
- Must be accurate
- Incorporate feedback promptly
  - Otherwise you might forget what was said or what the feedback is referencing
- Put the work in
  - If your summaries are accurate and readable, they may become the bulk of your report (depending on your institution's report format)
  - Putting the work in now may save you time later

# Writing Investigation Reports

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- From the Title IX Regulations...
  - The 2020 Regulations provide that the investigator must create a report that “fairly summarizes relevant evidence.”
    - 34 C.F.R. §106.45(b)(5)(vii)
  - What does this mean?

# Preparing to Write the Report

## Timing and Form

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- Don't start writing the Final Report before the investigation has concluded, if you can help it
  - However, your interview summaries may be the bulk of your report and you will write those as the investigation proceeds
  - Starting the report too soon might give the impression that you have pre-judged the facts or have confirmation bias
- Find out whether your institution has a template for reports
  - Use it and your policy as a checklist

# Investigation Reports (Basics)

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- Summarize **facts**
- No findings of fact; No determinations
- Parties get at least 10 days to review and comment on the preliminary investigative packet
- Final investigative report is provided to parties and advisors, and they have the opportunity to provide a written response at least 10 days before the hearing
- Final investigative report should incorporate any responses received from the parties regarding the preliminary investigative packet

# Things to Keep in Mind

## Two or More “Stories”

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- Each case includes at least TWO stories, maybe more
  - (1) The underlying case
  - (2) The investigation of the underlying case

# Story One of (at least) Two

## The Underlying Facts

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- Each case includes at least TWO stories in one:
  - 1) The facts of the underlying case
    - On August 25, 2020, Complainant and Respondent attended a party together at Thompson Point Residence Hall
    - Complainant reports A, B, and C
    - Respondent reports X, Y, and Z

# Story Two of (at least) Two

## The Investigation of the Underlying Case

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- Each case includes at least TWO stories in one:
  - 2) The investigation of the underlying case
    - On August 30, 2020, Complainant filed a formal complaint
    - On September 5, 2020, Complainant spoke with Investigator
    - On December 10, 2020, Complainant shared the Investigation Report with Witnesses 1, 2, and 3

# Different Ways to Tell These Stories

## Structural Considerations

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- Template
- Typical practice for your institution
- Common structural tools
  - Chronology
  - Topic or allegation
    - Perhaps by chronology within each topic or allegations
  - Chronology of how the information came into the investigation
  - By Witness Summary

# Where to Begin? (1 of 2)

## Structuring Your Report – Introduction

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- Should preview both stories
  - How did the underlying “story” get to the Title IX Office?
  - What about the underlying story was reported?
- Identify relevant individuals with just factual information
  - Complainant
  - Respondent
  - Investigator
  - Witnesses

# Where to Begin? (2 of 2)

## Structuring Your Report – Introduction

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- The Allegations
  - Refer back to the Notice when drafting your descriptions of the allegations
    - Do they match your description?
    - If not – why?
  - Did both parties receive Notice of the issues you’ve investigated?
  - Did something come up during the investigations that requires further notice or charges?
  - Remember to use the names and definitions of violations as they existed when the conduct is reported to have occurred
    - Same policy for definitions and procedure? Or a split?

# Identify and include all alleged policy violations

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- Always include definitions of prohibited conduct alleged from applicable policy
  - Consider adding a copy of the applicable policy to the Appendix.
- Always include related definitions as appropriate (e.g. consent) or any code of conduct included if done together
- Include verbatim, in entirety
  - This will take up space but it's worth it
    - Acts as a check on the process to ensure accuracy
    - Gives the parties and advisors a reference point within the report itself

# Process and Procedure

## Structuring Your Writing – Step-by-Step

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- Procedural Steps beginning with Formal Complaint:
  - Can work well between the introduction and discussion of facts
  - Pieces of this description may need to be repeated later
  - Include the following for your Decision-Maker(s):
    - Formal Complaint
    - Notifications to the parties
    - Interviews with parties and witnesses
    - Site visits
    - Methods used to gather other evidence

# Explaining the Facts

## Structuring Your Report – What Happened According to Whom?

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- Infinite ways to structure a report
  - We are providing suggestions *ONLY*
- Structure may need to change depending on the type of case and information presented
  - Think about this early in the writing process
- Remember – you are telling at least TWO stories to anyone reading your report
  - Both must be readable

# Explaining Your Structure

## Example Explanation

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- “The information in this report is a summary of facts provided by the participating parties and witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

# Other Basics to Include

## Issues of Relevance and Procedure

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- Address any relevance determinations you made during the investigation
  - Witnesses NOT interviewed (and why)
  - Records NOT requested (and why)
- Any procedural anomalies that need explained?
  - Explaining them in the report gives the parties an opportunity to address them prior to the hearing

# A statement regarding relevant evidence

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- “All relevant information gathered during the course of the investigation has been included in this report.”
- Identify if you thought something was not relevant and why – consider including in attachment(s) for the decision-maker, even if you’ve concluded it is not relevant
- Provide a table or list of all relevant evidence gathered and attach that evidence

# Helpful Synthesis

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- If you can, synthesize the information from multiple parties and witnesses
  - May work best in an overview/introduction section or a conclusion section
- Where the stories diverge:
  - “Information from [Complainant]”
  - “Information from [Respondent]”

# Synthesis 101

Look for opportunities to logically combine related facts

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- Undisputed facts at the beginning
  - May give a framework without creating repetition
- Disputed facts
  - Facts may be related by:
    - Timing
    - Source
    - Topic

# Synthesis Example #1

Logically combine related facts to tell a story

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## Pre-Gaming at Apartment 12

Complainant and Witnesses A, B, and C, reported that they each took 3 shots of vodka when they arrived at Apartment 12. Appendix, pp. 6-9. Witnesses agree that approximately two hours after Complainant and Witnesses A, B, and C arrived and took vodka shots, Respondent arrived at Apartment 12 with Witness D. Appendix, pp. 4-9. During his Title IX interview, Respondent reported that he did not take any shots of vodka and had a clear memory of the night. Respondent also reported that he did not observe Complainant take any shots of vodka that night, did not see Complainant stumbling when she walked around the apartment, and did not hear Complainant slur her speech at any time. Appendix, p. 7.

# Synthesis Example #1 – Takeaways

Can you apply these takeaways in your cases?

---

- Several things worth noting in this example:
  - ⑩ The information is presented under a topic heading
    - "Pre-Gaming at Apartment 12"
  - ⑩ Information comes from different sources and is blended together
    - Parties and witnesses
    - References to appendix suggest that the information came from several different interview summaries

# Synthesis Example #2

## Logically combine related facts to tell a story

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### Report that Respondent choked Complainant

As previously mentioned, Complainant reported four separate acts that might rise to the level of a policy violation. First, Complainant reported that Respondent choked her during their argument on September 1, 2020. Formal Complaint, p. 1. When Complainant described this incident to the Title IX investigator, she said that Respondent used his hand to encircle her throat and then squeeze, preventing her from breathing or talking. (Sept. 10<sup>th</sup> Interview of Complainant). Complainant submitted photographs of her neck during the Title IX investigation, which are included in the Appendix to this Report on pages 10 and 11. Two witnesses, Witness A and Witness B, reported to the Title IX investigator that they observed bruising on the Complainant's neck when they saw the Complainant the morning of September 2, 2020. (Sept. 12<sup>th</sup> Interview of Witness A; Sept. 20<sup>th</sup> Interview of Witness B).

Respondent denied that he choked Complainant. In his statement to the Title IX Investigator...

# Synthesis Example #2 - Takeaways

Can you apply these takeaways in your cases?

---

- Several things worth noting in this example:
  - ⑩ The information is presented under a topic heading
    - “Report that Respondent Choked Complainant”
  - ⑩ Information comes from different sources and is blended together
    - Parties and witnesses
    - References to multiple interview summaries and photographs
    - When things cannot be logically combined, begin a new paragraph (“Respondent denied...”)

# Analysis of Disputed & Undisputed Facts

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- Be careful to avoid drawing any conclusions

- **Complainant and Respondent's Accounts of Events**

- A. Areas of Agreement

- B. Areas of Disagreement

# Consider Feedback

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- And document that Consideration
  - Remember...
    - **“Prior to completion of the investigation report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.”**
  - Make sure the investigation report reflects your consideration
    - Don’t just go through the motions

# Common Writing Mistakes

## Consistent and Precise Language

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- Inconsistent Terminology
  - Referring to individuals or locations differently in different places in the report
  - May leave the reader with the impression that you are talking about different places or people
    - Tom, Tom Smith, Mr. Smith, Thomas
    - Tom's room, Room 4A, Hubbard Hall
- Word choice
  - Be as precise as possible
  - This can add time to the writing process, but can pay off in terms of clarity
  - Avoid charged language

# Common Writing Mistakes

## Empathy and Tone

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- Empathy
  - Stay away from charged words of advocacy
    - Clearly/obviously
    - Innocent/guilty
    - Victim/perpetrator
  - Watch your use of adjectives and adverbs – unless they are in a quote
    - “really drunk”
    - “forcefully pushed”
- Tone
  - Be non-judgmental
  - Recognize the impact of your words

# Common Writing Mistakes

## Cite Your Source

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- Failing to include sources of information
  - If explaining this in every sentence (“Bob stated this happened”) weighs down your writing, use footnotes to add clarity.
  - Citing the source of your information helps the reader and underscores your neutrality
- Confusing Quotation Marks
  - Is the quoted language from the interviewee?
  - Is the quoted language actually a quote from someone else?
    - Footnote 10:           The quoted language was attributed to Respondent by Complainant during Complainant’s October 10, 2020 Title IX interview.

# Common Writing Mistakes

## Structure

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- Topic sentences and transitions
  - Provide a roadmap in your introduction and under new headings
  - Sentences should flow from one-to-another
  - Remember – telling two or more stories to someone unfamiliar with the case
- Pronouns
  - Be careful of pronoun usage so that the reader always knows who is saying or doing what
  - When using pronouns, make sure you are using the right pronouns for the individual

# Common Writing Mistakes

## Miscellaneous

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- Typos
  - They happen to everyone, but
  - Typos in every sentence undermine the integrity of a summary/report
- Run-on sentences/Sentence fragments
  - Make sure each sentence has a subject and a verb
  - If combining multiple independent clauses, consider whether to separate sentences

# Hearing Procedures

# Hearings: Role of the Title IX Coordinator

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- Ensure compliance with the policy
- Answer process questions
- Track the case to ensure it is moving forward appropriately
- Continue to provide supportive measures, the need for which may change over time
- Facilitate the simultaneous provision of decision to both parties

# Hearings: Role of the Decision-Maker

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- Review the file thoroughly, and stay curious. You won't have all the evidence until the end of the hearing, so don't make up your mind yet!
- Hold pre-hearing conferences
- Conduct hearing
  - Make relevancy determinations
  - Ask questions
- Prepare written decision using the appropriate standard of evidence to determine whether respondent violated the policy as to each charge in the Notice of Allegations
- Assign sanctions using the factors in your policy

# Hearings: Role of the Advisor

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- Support their party
- Attend pre-hearing conference (if part of the process)
- Attend hearing
- Say nothing at the hearing except to ask relevant questions of the other\* party and witnesses from the perspective of your party
  - Help the decision-maker better understand things from your party's perspective
- Maintain decorum standards
- If their party wishes, they may want:
  - Assistance determining which witnesses to call
  - Assistance drafting questions
  - Assisting preparing an opening/closing statement (if permitted by policy)

# Pre-Hearing Conferences

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- Some policies require them and some don't.
- Pre-hearing conferences can help reduce the anxiety of the parties/advisors and prepare better for the hearing.
- Use this time to explain the procedure, what to expect on the day of the hearing, and discuss witnesses they wish to call.
- Answer procedural questions and address procedural disputes.
- Separate vs. Joint pre-hearing conferences?

# Using Zoom for Hearings: Tips

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- When setting up the Zoom link, ensure the waiting room is turned on.
- The parties and advisors will log into the hearing.
- Create breakout rooms: hearing officer, complainant/advisor, respondent/advisor, witness
- Admit each side separately to do a tech check, then assign to the correct breakout room and open the rooms.
- Close the breakout rooms and begin recording to the cloud.
- Make sure closed captioning is available for those who wish to use it.
- Pause recordings on breaks. (Stopping the recording creates multiple files.)
- Evidence can be shared on-screen by the hearing administrator or decision-maker.
- Witnesses should be let in only during their turn to testify, then they log off.
- Messages can be broadcast to the breakout rooms and waiting room if needed.

# Asking Good Questions

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- Hearing officers should try to ensure they have enough information on every element of every charge to make a decision.
- Be careful of rabbit holes. How is this relevant? How will this help evaluate credibility?
- Open-ended questions are helpful to give more context and detail.
- Close-ended questions are helpful to clarify ambiguities.
- Remember: if you don't ask it, no one will. This is the last opportunity to get the best evidence out on the table for consideration.

# Challenging Questions

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- “You told the investigator X, but today you said not X. Can you help me understand this?”
- “You said X, but the witness said Y. Can you help me understand why that might be?”

“Help me understand” is a great way to frame a neutral question that seeks to resolve disputed information.

# Relevancy Determinations

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- Must be made orally after every advisor-posed question.
- Options:
  - “Relevant”
  - “Can you help me understand why that’s relevant?”
  - “Not relevant.” (Give very brief explanation.)

# Mock Hearing: Respondent

# Relevancy Determinations (Cont.)

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- Must be made orally after every advisor-posed question.
- Options:
  - “Relevant”
  - “Can you help me understand why that’s relevant?”
  - “Not relevant.” (Give very brief explanation.)

# Reaching & Writing a Decision

# What Goes Into Credibility?

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- 2001 Revised Sexual Harassment Guidance (withdrawn) – page 9
  - Level of detail and consistency
  - Corroborative evidence is lacking where it should logically exist
  - Evidence that the respondent has been found to have harassed others
  - Evidence that the complainant has been found to have made false allegations against other individuals
  - Reaction after the incident
  - Complainant took steps to report the conduct soon after
  - Complainant writes down the conduct soon after it occurred
  - Complainant tells others about the conduct soon after it occurred

# Boiling It Down

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- **Plausibility** – Is the story possible, accounting for potential effects of trauma?
- **Consistency** – Is the story consistent over multiple retellings?
- **Corroboration** – Can the story be corroborated by other evidence?
- **Reliability** – Was the person in a good position to witness what they are sharing, and to remember it accurately?

Credibility is a determination that can be made statement by statement.  
It is not necessary to call someone a liar to make a credibility determination.

# Plausibility

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- This is foundational. If it's not plausible, it can't be credible.
- Think: laws of physics.
- Consider:
  - Body positions, relative height/weight
  - Distribution of body weight
  - Transition from one position to the other
  - Who was in control of the rhythm and movement
- Does it make sense, accounting for potential trauma? If not, is there anything that would make it make sense?

# Plausibility – Bias Check

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- “It’s not plausible because I wouldn’t have done that in this situation.”
  - You are using your own self as a standard by which you are measuring the evidence. Is this because you are the reasonable person, or is this an effect of bias? Is this even fair?
- Be careful of substituting rape myths for plausibility analysis.
  - E.g. “They were in love, so it couldn’t be rape. That wouldn’t be plausible.”

# Consistency - Considerations

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- To whom is the telling?
  - Friend
  - Parent
  - Police
  - School authority
- What is the purpose of the telling?
  - To receive sympathy and support
  - To make a formal report
- In what mode is the listener?
  - Supportive
  - Investigating

# Consistency - Concerns

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- Is the telling getting more specific and detailed over time, and if so, why might that be?
- Are details that are inconsistent across retellings important, or are they minor in nature?
- Is the person leaving out information that would be reasonable to include in their retelling?

# Consistency and Outcry Witness(es)

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- Who is the first person that the party told?
- Under what circumstances?
  - Do those circumstances affect credibility? (Motive)
- More witnesses mean more chances to show consistency – or inconsistency.
  - In other words, these witnesses don't tell us whether the allegations are true. They tell us whether the party is credible in their retelling due to consistency.

# Considering Consistency

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- Look at the retellings in the order of earliest to latest.
- Is there a reasonable explanation for any differences?
- Does the story evolve over time into something else?
- 2020 Regulations Preamble: “Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to **trauma**, the effects of **drugs or alcohol**, or **simple fallibility of human memory**.” 85 FR 30026, 30323 (May 19, 2020)

# Corroboration

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- Is there any objective evidence in this case? If so, what does it tell us?
- Are there any eyewitnesses to corroborate an assertion by a party?

# Reliability

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- How much time has passed?
  - Is there any reason this particular occasion might have “stuck out” to someone?
- Was the person intoxicated or high?
- Was the person in a position to observe the conduct?
- Has the person’s story been influenced by another party/witness, or by social situations?
- Does the person have a motive to lie?
- Does the person have special training such that their information might be given more weight on a particular point?

# Reliability – Bias Check

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- Are we assigning a reliability value based on the identity of the party?
  - Complainant vs. respondent
  - Status as a police officer or school administrator
- Are we assigning a reliability value based on a person's:
  - Alcohol/drug problems
  - Mental health issues
  - Cognitive/intellectual disabilities
  - Age
  - And if so – is that supportable under the circumstances?

# Check for Other Bias

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- Switch the race, sex, or other protected characteristic of the parties. Would your decision come out the same? If so, is that appropriate?
  - This is particularly important when allegations go against the “stereotypical norms” for a situation. We know that complainants and respondents can be of any sex, gender, sexual orientation, etc.
- Are you making any assumptions that are not based on the evidence, and if so, are those fair under the circumstances?
  - Compare “They are carrying a wet umbrella so it’s probably raining” with “They look sad today so it’s probably raining”

# Weighing the Evidence

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- What is the most important? What are the rocks upon which you can build a solid foundation?
- What is less important? What can be reasonably explained?

Each fact is found using the standard of evidence your institution has chosen (e.g. preponderance of the evidence).

Each element of a policy violation is analyzed using that same standard.

# Things Not To Consider

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- Impermissible evidence (e.g., medical records without consent)
- Irrelevant evidence
- But what about:
  - Demeanor?
  - Pattern evidence?
  - Character evidence?

# Let It Go

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- You don't have to resolve every factual dispute.
- Consider whether it is important for credibility purposes or necessary to your findings. If not, do we need to go there?
- If you aren't considering something, particularly if the parties thought it was important, explain why.

# Reminders (Cont.)

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- **Show your work. Get credit for your good work.**
- You cannot base a determination of responsibility solely on whether someone declined to participate in the process.
- Do not consider the impact of your determination on the parties when determining whether a policy was violated.
- Do not use sex stereotypes to resolve a case. Base your decision only on the evidence before you.
- “Gut feelings” are a sign you need to ask more questions, not something you put on the scale.

# Written Decision (1 of 2)

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- Allegations potentially constituting sexual harassment
- Description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Findings of fact supporting the determination
- Conclusions regarding the application of the recipient's code of conduct to the facts

# Written Decision (2 of 2)

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- A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
- Recipient's procedures and permissible bases for the parties to appeal

Note: This is provided to both parties simultaneously.

# Sanctions

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- Check policy for factors, but here are some to consider:
  - Prior disciplinary history of respondent
  - How the institution has sanctioned similar incidents in the past
  - Nature and violence of the conduct at issue
  - Impact of the conduct on the complainant
  - Impact of the conduct on the community
  - Whether respondent accepted responsibility for their actions
  - Any other mitigating or aggravating circumstances

# Upcoming Free Webinars

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- All of these are free
- Sign up at [www.brickergraydon.com/events](http://www.brickergraydon.com/events)
  - February 26<sup>th</sup> at 1:00 – Informal Resolution
  - March 26<sup>th</sup> at 1:00 – Transferrable Skills for Title IX and Title VI Investigators
  - April 23<sup>rd</sup> at 1:00 – Legal History of Title IX
  - May 28<sup>th</sup> at 1:00 – Title IX Litigation Update

# Thank You



**Bricker  
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