



THE TEXAS
STATE
UNIVERSITY
SYSTEM™

Title IX Training

Overview of TSUS's Sexual Misconduct Policies & Procedures

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System Policies Appendix A-6 — Legal Disclaimer

This training is meant to summarize TSUS Sexual Misconduct Policy and Procedures.

- This training should not be a substitute for reading TSUS Sexual Misconduct Policy and Procedures and related material.
- The text of this training does not quote the full language of the TSUS Sexual Misconduct Policy and Procedures, and the language of the Policy and Procedures governs.
- For a complete understanding of the TSUS Title IX policy and grievance process, please refer to TSUS Sexual Misconduct Policy and Procedures and supporting materials.
- TSUS Sexual Misconduct Policy updated August 2022





Agenda

- ✓ **Purpose and scope of TSUS's Policy under the 2020 Title IX regulations**
 - ❑ Important Definitions
 - ❑ Key Provisions
 - ❑ Supportive Measures (3.8)
 - ❑ Informal Resolution (3.9)
 - ❑ Confidentiality (3.15)
 - ❑ Remedies and Sanctions (3.11 & 3.12)



Purpose of Title IX

- 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, *et seq.*



Regulation Reset – 2020 Rules are in Effect

- *Tennessee v. Cardona* – January 9, 2025
 - Struck down 2024 Title IX regulations in their entirety, nationwide
 - 2024 regulations went into effect August 1, 2024
 - Allowed single investigator model; eliminated live hearing requirement
 - Expanded the definition of sex discrimination
 - Extended jurisdiction to off-campus and international incidents
 - **Result:** 2020 regulations control
 - Department of Education confirmed it will return to enforcing the 2020 regulations in DCL



Scope of Title IX – Sex Discrimination

An individual cannot be treated differently on the basis of their sex in regard to:

- Recruitment, admissions, and counseling
- Financial assistance
- Athletics
- Sex-based harassment (including sexual misconduct)
- Treatment of pregnant and parenting students
- Discipline
- Single-sex education
- Employment



Scope of Title IX

- Title IX applies to sexual misconduct that occurs where:
 - Complainant (alleged victim) is enrolled in classes, participating in the institution's activities, employed by the institution, or attempting to participate in the institution's programs or activities; and
 - The alleged conduct occurred in an educational program or activity; and
 - The alleged conduct qualifies as Title IX Sexual Harassment; and
 - The alleged conduct occurred against a person in the United States.

34 C.F.R. § 106.30



Scope of Title IX – Educational Program or Activity

- Any location, event, or circumstance over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs.
- Includes all education programs or activities, whether occurring on or off-campus, and any building owned or controlled by a student organization that is officially recognized by a postsecondary institution (such as a fraternity or sorority house).

34 C.F.R. § 106.44(a); *Sexual Misconduct Policy, Glossary* at page 54



Matters Outside the Scope of Title IX

- Off-campus conduct (where there is lack of substantial control).
- Conduct outside the U.S.
- Examples of matters outside scope:
 - Domestic violence between two employees that occurs at a private residence off campus
 - Sexual assault of student during study abroad
 - Sexual assault of post-doc at conference where respondent from another institution
 - Stalking of faculty member off campus by person not connected to university



Addressing Matters Outside the Scope of Title IX

Other misconduct procedures continue to be available to students and employees for matters that are not required to be addressed by Title IX.

For example:

- Non-Title IX provisions of the Sexual Misconduct Policy
- TSUS Rules and Regulations, *Chapter VI, Paragraph 5*, Student Conduct & Discipline
- Relevant provisions of *Chapter V*, Component Personnel
 - Depends on employee's status (e.g., staff, tenured faculty, administrator)



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Sexual Misconduct

- **Sexual Misconduct** is a broad term encompassing a range of non-consensual sexual activity or unwelcome behavior of a sexual nature.
 - The term includes but is not limited to Sexual Assault, Sexual Exploitation, Sexual Intimidation, Sexual Harassment, Domestic Violence, Dating Violence, and Stalking.
 - Sexual Misconduct can be committed by men or women, strangers or acquaintances, and can occur between or among people of the same or opposite sex.
 - This term also includes Title IX Sexual Harassment.

Sexual Misconduct Policy, Glossary at page 59



Title IX Sexual Harassment

- **Title IX Sexual Harassment** refers to Sexual Misconduct that meets one or more of these three types of behavior:
 - (i) A Component's Employee conditioning provision of an aid, benefit or service of the Component on an individual's participation in unwelcome sexual conduct (“quid pro quo” harassment which may be express or implied and need not be “severe” or “pervasive” as a single incident is inherently “offensive” and jeopardizes equal educational access);
 - (ii) 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 Component's Education Program or Activity; or
 - (iii) “Sexual Assault,” “Dating Violence,” “Domestic Violence,” or “Stalking” as defined in referenced statutes.

Sexual Misconduct Policy, Glossary at page 58



Non-Title IX Sexual Harassment

- **Non-Title IX Sexual Harassment, or sexual harassment under other applicable state and federal laws**, means unwelcome sex-based verbal or physical conduct that:
 - In the employment context, unreasonably interferes with a person's work performance or creates an intimidating, hostile, or offensive work environment; or
 - In the education context, is sufficiently severe, persistent, or pervasive that the conduct interferes with the student's ability to participate in or benefit from Education Programs or Activities at a post-secondary educational institution.

Sexual Misconduct Policy, Glossary at page 58-59



Retaliation

- **Retaliation** means any adverse action threatened or taken against a person because he or she has filed, supported, or provided information in connection with a Formal Complaint of Sexual Misconduct, including, but not limited to, direct and indirect intimidation, threats, and harassment.
 - Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve Sexual Misconduct, but arise out of the same facts or circumstances as a Formal Complaint or Report of Sexual Misconduct, constitute retaliation if filed for the purpose of interfering with any right or privilege secured by Title IX or the Sexual Misconduct Policy.

Sexual Misconduct Policy, Glossary at pages 55-56



Retaliation

- **Formal Complaint** means a document filed by a Complainant or signed by the Title IX Coordinator alleging Title IX Sexual Harassment against a Respondent and requesting that the Component investigate the allegation of Sexual Harassment.
 - “document filed by a Complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the Component) that contains the Complainant’s physical or digital signature, or otherwise indicates that the Complainant is the person filing the Formal Complaint.

Sexual Misconduct Policy, Glossary at page 54



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- ☐ Important Definitions
- ✓ **Key Provisions & Foundational Concepts**
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- ☐ Informal Resolution (3.9)
- ☐ Confidentiality (3.15)
- ☐ Remedies and Sanctions (3.11 & 3.12)



Equitable Treatment

“A Component’s response to an allegation of Sexual Misconduct must treat Complainants and Respondents *equitably* by offering Supportive Measures to Complainants and Respondents, and by following a grievance process as described herein against a Respondent prior to the imposition of any disciplinary sanctions or other actions that are not Supportive Measures.”

- All relevant evidence must be objectively evaluated.
- Credibility determinations cannot be based on a Party’s status as a Complainant or Respondent.
- All Parties and participants must be treated fairly—with dignity, respect, and sensitivity; and without bias, prejudice, or reliance on stereotypes.

Sexual Misconduct Policy, Section 3.1



Standard of Evidence

- The standard of evidence is a preponderance of the evidence.



- The Respondent is presumed not responsible for the alleged conduct until a determination is made at the conclusion of the Grievance Process.

Sexual Misconduct Policy, Section 3.2



Conflict of Interest

A conflict of interest is competing considerations that compromise objectivity.

- Prohibited for Coordinators, Investigators, Decision Makers of any level, Informal Resolution Facilitators, and Campus Administrators

Ways to avoid a conflict of interest:

- Don't prejudge the facts or assume outcomes based on Party status.
 - Respondents wouldn't be accused if they weren't guilty ✗
- No personal relationships with a Party.
 - Decision Maker mentors Respondent ✗
 - Appellate Authority supervises Complainant ✗
- Ensure sufficient separation in roles during the process.
 - Decision Maker facilitated the Informal Resolution ✗

Sexual Misconduct Policy, Section 3.3



Prohibition on False Information

- An individual found who knowingly makes a false Complaint or Report, knowingly provides materially false information to a Component official, or intentionally misleads Component officials during any proceeding under this Policy **shall** be subject to disciplinary action up to and including dismissal or separation from the College.
 - Charging an individual with a code of conduct violation for making a materially false statement is **not** retaliation.
- A determination regarding responsibility alone is not sufficient to conclude that any party or witness made a materially false statement in bad faith.

Sexual Misconduct Policy, Section 3.7





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What Are Supportive Measures?

1. Include non-disciplinary, non-punitive, individualized services offered as appropriate, as reasonably available, and without fee or charge to the Complainant or Respondent to restore or preserve equal access to the Educational Program or Activity to a Party without unreasonably burdening the other Party.
 - May be offered before or after the filing of a Formal Complaint or where no Formal Complaint has been filed.
 2. May include immediate and appropriate corrective action, including measures designed to protect the safety of all Parties or the Component's educational environment, or deter Sexual Harassment.
- Title IX Coordinator is responsible for directing effective implementation and duration.
 - Measures can remain in place even after a Determination is made.



Sexual Misconduct Policy, Glossary at pages 59-60



Types of Supportive Measures

- Some options for Supportive Measures include:
 - Mutual contact restrictions between the Parties
 - Counseling
 - The same counselor should not see both the Complainant and Respondent if possible.
 - Modification of work or class schedules
 - Extensions on deadlines
 - Changes in work or housing locations
 - Campus escorts, increased security, increased monitoring of certain areas

See 34 C.F.R. § 106.30(a) definition of “Supportive Measures”



Supportive Measures – Best Practices

- Offer promptly and equitably.
 - Inform Complainant of availability at first contact verbally and in writing.
 - Contact Respondent once report is made.
- Keep the process interactive throughout grievance process.
- Consider all possible impacts
 - Fact specific; each case is unique.
 - Neither Party can be unreasonably burdened.
- Maintain confidentiality to the extent possible.
 - Obtain prior written approval if outside parties are informed.
- Document outreach efforts, discussions with parties, and measures taken.



Emergency Removals

- Removing Respondents allowed on an emergency basis when:
 - Individualized safety and risk analyses conducted;
 - Allegations raise immediate threat to anyone's physical health or safety;
 - Provided notice and an immediate opportunity to challenge decision;
 - Hearings *not* required for removal challenges
 - Pertinent disability laws considered; and
 - Applicable System Rules and Regulations followed.
- Emergency actions must be the least restrictive under the circumstances.



Sexual Misconduct Policy, Section 3.8.4



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An Overview of Informal Resolution

An alternative to the Grievance Process that may be offered and facilitated by the Component following the filing of a Formal Complaint and upon the *voluntary*, written consent of the parties.

- Not all situations are appropriate for Informal Resolution.
- Both Parties must consent in writing.
- Statements made during Informal Resolution cannot be used for or against either Party if Informal Resolution is unsuccessful.
- The Grievance Process resumes if Informal Resolution is unsuccessful.

Sexual Misconduct Policy, Section 3.9



Informal Resolution– Best Practices

- **Never** appropriate when Complainant-student alleges Respondent-employee sexual harassment.
 - Consider propriety in complaints of violence, stalking, or when a Respondent has prior Informal Resolution Agreements.
- Explain consequences of participation to Parties in a detailed notice.
 - Have the Parties provide signed, written approval before the process.
- Facilitator should be experienced with informal resolution techniques.
 - Trained, preferably certified where applicable (e.g., mediators).



A Final Thought on Informal Resolution....For Now

- Ensure individualized process and resulting Agreements (if any).
 - Consider Party needs, underlying facts, specific allegations.
 - Discipline allowed where appropriate.
- Get another set of eye on Agreement before approving.
 - Have HR review when an employee is a Party.
 - Have the Dean of Students review when a student is a Party.
- Disciplinary action possible if non-compliant with Agreement's terms.
 - Confirm Party understanding before they sign.



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Confidentiality

- Confidential Reports
 - Made to a Confidential Employee.
 - The Complainant's identity can remain secret if requested.
 - Only the **type** of violation is reported to the Title IX and Clery Act Coordinators.
 - Does not initiate a Formal Complaint.
- Formal Complaints
 - Identities of the Parties and participants withheld *to the extent possible*.
 - Disclosed to provide supportive measures, conduct the process, carry out Title IX's purpose.
 - Breaches of confidentiality can result in disciplinary action.
 - Cannot interfere with the gathering or presenting evidence.



Confidentiality

- Maintain Complainant's confidentiality as circumstances and laws permit.
- Complainant's identity will be disclosed to:
 - Component employees necessary to conduct and resolve investigations;
 - Respondents;
 - Witnesses;
 - Healthcare providers in emergency situations; and
 - Law Enforcement (if criminal investigation).
- Either Party's Supportive Measures shall be kept confidential "to the extent allowed by law and that maintaining confidentiality will not impair the ability to provide the measures."



Sexual Harassment Policy, Sections 3.8.3, 3.15



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Remedies & Sanctions

Remedies and Sanctions are measures imposed if Respondent is found Responsible.

Measure	Recipient	Purpose
Remedies	Complainant	Restores or preserves access to Educational Program or Activity
Sanctions	Responsible Respondents	Disciplinary measures proportionate to misconduct's gravity

- Remedies and Sanctions **can** burden and discipline a Respondent.
- Pause implementation if determination appealed until appeal's conclusion.

Sexual Misconduct Policy, Sections 3.11, 3.12



Remedies

- The Decision Maker must note in the written decision IF remedies will be provided to the Complainant but does not have to identify them.
- The Title IX Coordinator is responsible for implementing Remedies.
 - Works with the Complainant to develop Remedies.
- Appropriate remedies depend on the facts and circumstances of the situation and Complainant's needs.
- There can be overlap with the Supportive Measures.



Sanctions (examples, not exhaustive)

Students

- Expulsion
- Suspension (including deferred)
- Written warning
- Withholding official transcript or degree
- Withdrawal from a course with a grade of W, F, or WF
- No-contact order
- Mandatory counseling
- Relevant training
- Restitution

Employees

- Termination
- Demotion
- Suspension without pay
- Withholding promotion or pay increase
- Reassignment
- No-contact order
- Relevant training
- Future employment bar
- Recommendation to revoke tenure

Sexual Misconduct Policy, Sections 3.12

Questions



Break



Break





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Title IX Training

Sexual Misconduct Grievance Process Under TSUS Policy and Procedures

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Agenda

- Reporting Incidents of Sexual Misconduct
- Classifying Sexual Misconduct
- Title IX Sexual Harassment Grievance Process
- Non-Title IX Grievance Process





Reporting Sexual Misconduct – Complainant Options

- The Component supports, encourages, and will assist an alleged victim of Sexual Misconduct (“Complainant”) to report an incident.
- Complainants can file a report:
 - In person with a:
 - Responsible Employee, Official with Authority, Component Police or Security, Campus Security Authority, or local law enforcement
 - By mail,
 - By e-mail,
 - Through a website provided by the Component,
 - Under a pseudonym in a law enforcement report,
 - Anonymously, although an anonymous report is difficult—if not impossible—to investigate.

Sexual Misconduct Policy, Section 4.2



Complainant Reporting – Who Can Receive a Report

- Responsible Employee: Almost all employees of the TSUS or Component are Responsible Employees when engaged in the scope of employment.
 - Confidential Employees are not Responsible Employees.
- Title IX Coordinator: The official designated by the Component to oversee Title IX compliance.
 - Includes Deputy Title IX Coordinators
- Official with Authority: Anyone who has authority to institute corrective measures on behalf of the Component.
- Campus Security Authority: Individuals responsible for accurately reporting crime information under the Clery Act. This includes the Component Police and Security.
- Local Law Enforcement: A Complainant victim may report an incident to local law enforcement. The Complainant may request assistance from the Component.



Complainant Reporting – Preserving Evidence

- TSUS recognizes importance of Title IX Sexual Misconduct Complainants going to a hospital for treatment and preservation of evidence, if applicable, as soon as practicable after the incident.
 - Obtaining an immediate medical exam, while preferable, is not always practicable.
 - A victim can obtain a Sexual Assault Forensic Exam (SAFE) by a Sexual Assault Nurse Examiner (SANE) within five* days of the incident at the nearest emergency room.

*Tex. Code Crim. Proc. amended in 2021 to change from 96 hours to 120 hours.

Sexual Misconduct Policy, Section 4.3; Tex. Code Crim. Proc. § 56A.303



Complainant Reporting – Preserving Evidence

- TSUS also recognizes a Complainant's right to choose whether to report an incident to law enforcement.
 - The SANE will collect physical evidence for a criminal investigation with the victim's consent; but victim *does not need to contact police or intend to contact police to obtain a SAFE*.
- **Supportive Measures are available even if no Report or Formal Complaint is filed.**

Sexual Misconduct Policy, Section 4.3; Tex. Code Crim. Proc. § 56A.303(c)



Employee Mandatory Reporting

- Prompt reporting to Title IX Coordinator required when a Responsible Employee, acting in the scope of employment, witnesses or receives information about Sexual Misconduct.
- Before Complainant makes a disclosure:
 - Disclose mandatory reporting obligation;
 - Refer to Confidential Employee if anonymity and confidentiality requested.
- Components **must** terminate Responsible Employees who knowingly:
 - Fail to report Sexual Misconduct when required.
 - Make a malicious false report of Sexual Misconduct.



Employee Mandatory Reporting

- Reporting obligation applies for Title IX Sexual Misconduct and less severe forms of sexual harassment.
- Failure to promptly report is a violation of Texas law.
- A knowingly false report is also a violation of Texas law.

Tex. Educ. Code § 51.252





Employee Mandatory Reporting – Scenarios

- While eating dinner at a local restaurant over spring break, a professor overhears another Component employee tell his companion that his supervisor has been making sexual advances and groped him the week prior. Does the eavesdropping professor need to report this to the Title IX Coordinator?
- Does anything change if the professor overheard the other employee's disclosure while attending an out-of-town educational conference?



Employee Mandatory Reporting – Exceptions

- Responsible Employees are not required to make a report of Sexual Misconduct when:
 - Employee was the victim of the conduct; or
 - Employee receives information through disclosure at a public awareness event sponsored by a Component or affiliated student organization.

Sexual Misconduct Policy, Section 4.6



Employee Mandatory Reporting – Confidential Employees

Confidential Employees are employees with occupation-imposed confidentiality requirements.

- *E.g.*, counselors, clergy, healthcare providers
- Sexual Misconduct Policy reporting exemptions only apply when acting in a confidential capacity.
- Confidential Employees provide crisis assistance and resource information:
 - *E.g.*, Counseling, Victim Advocacy, Legal Assistance, Criminal Prosecution, Component Title IX procedures, Supportive Measures
- Each Component must provide Confidential Employee contact information in multiple, easy to find locations.



Confidential Employees – Scenarios

- A student tells their Student Counseling Center counselor that she has been calling her ex multiple times a day and following him around campus since they broke up two weeks ago. Does the counselor need to report the incident to the Title IX coordinator?
- Does anything change if the counselor overhears a coworker telling a friend that the coworker's ex has been following her around campus since they broke up while the counselor is grabbing water from the breakroom?



Classifying Sexual Misconduct

Title IX Coordinator reviews and classifies all allegations.

Title IX

- Meets Title IX Sexual Harassment definition;
- Occurred against a person participating or attempting to participate in an educational program or activity; and
- Occurred against a person located in the United States.

Non-Title IX

- Sexual Misconduct that does not meet requirements of Title IX Sexual Harassment.

Sexual Misconduct Policy, Section 5.2-5.3

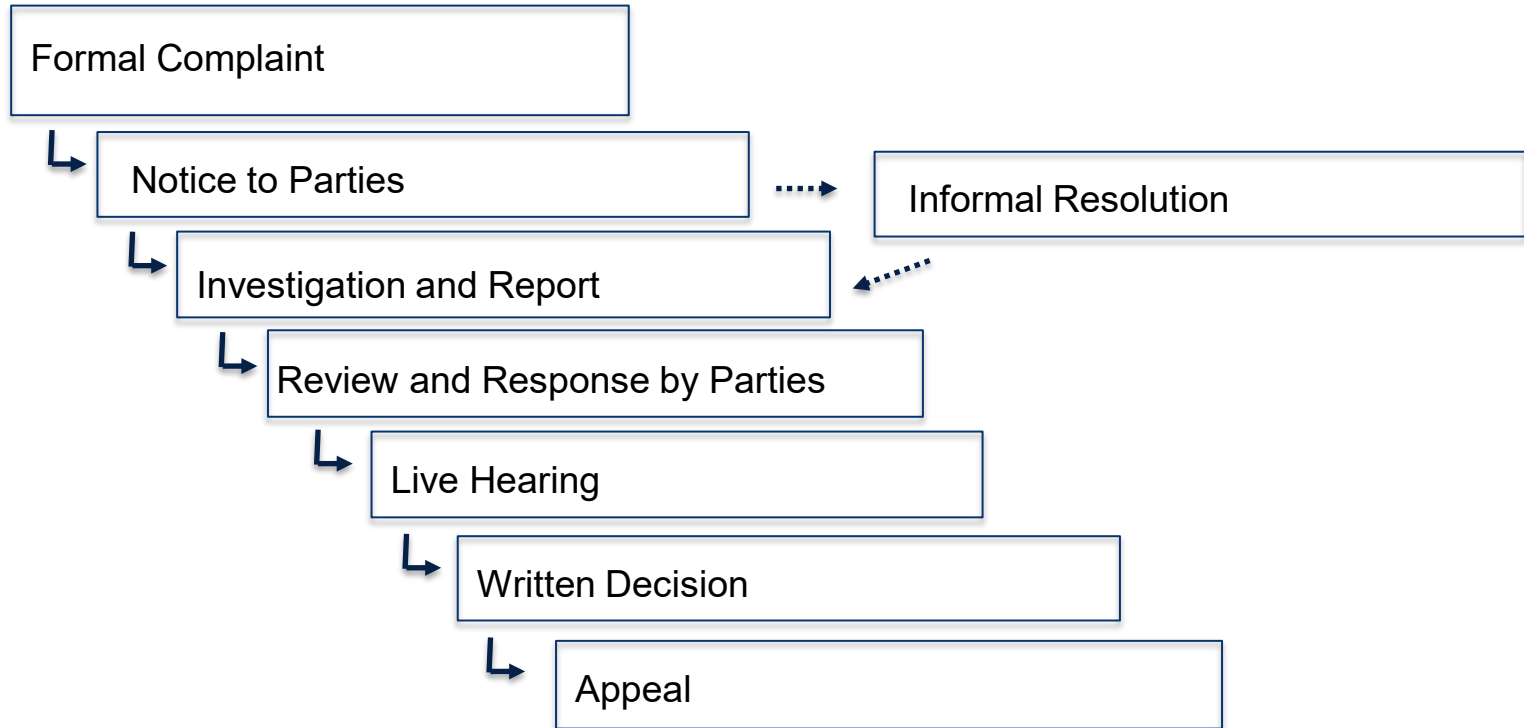


Mandatory and Permissive Dismissals under Title IX

- The Title IX Coordinator must dismiss a Complaint under Title IX if:
 - Described conduct would not constitute Title IX Sexual Misconduct;
 - Unrelated to a Component's Education Program or Activity; or
 - Occurring outside of the United States;
- The Title IX Coordinator may dismiss a Complaint if:
 - A Complainant requests, in writing, to withdraw the Complaint or an allegation
 - The Respondent is no longer enrolled or employed by TSUS;
 - Specific circumstances prevent gathering sufficient evidence to reach a determination.
- Complaints dismissed under Title IX may be pursued under the Non-Title IX Sexual Misconduct Provisions or applicable code of conduct processes.



Title IX Sexual Harassment Grievance Process





Formal Complaint

Formal Complaint initiates the Grievance Process.

Formal Complaints originate with:

- A Report filed in person, by mail, or e-mail to the Title IX Coordinator;
- An additional method designated by the Component;
- A Formal Complaint signed by the Title IX Coordinator.
 - Signing the Formal Complaint does not make the Title IX Coordinator the Complainant or a Party.

Sexual Misconduct Policy, Section 7.1-7.2; 34 C.F.R. § 106.30



Notice of Allegations

Sent to all Parties upon filing of Formal Complaint. Includes:

- Sufficient details known of the allegation at the time:
 - Party identities
 - Description of alleged misconduct
 - Approximate date and location of misconduct
- Information about the grievance process,
- Availability of informal resolution,
- Respondent's presumption of non-responsibility pending Determination,
- Parties' right to an Advisor of their choice,
- Availability of supportive measures to both parties,
- Right to inspect and review evidence, and
- False statements prohibition.
 - Covers verbal and written statements and submission.



The Advisor's Role

- Advisors provide support, guidance, and advice throughout Process.
- Advisors permitted to attend meetings, interviews, and proceedings.
 - Advisor participation prohibited—usually.
 - Participating essential during Live Hearing; Conducts cross examination!
- Advisors can be anyone the Party chooses.
 - Can be an attorney, but not required.
 - Conflicts of interest allowed.
 - Parties can change their advisor.

The Advisor's Role will be discussed in detail during Session 5.



Consolidation of Complaints

If the arising from *the same facts and circumstances*, a Title IX Coordinator may consolidate Formal Complaints:

- against more than one Respondent,
- by more than one Complainant against one or more Respondents, or
- by one party against the other party, **where the allegations of Title IX Misconduct arise out of the same facts or circumstances.**

Sexual Misconduct Policy, Section 7.6; 34 C.F.R. § 106.45(b)(4)





Investigations – Conducting the Investigation

- Component bears burden of proof and gathering sufficient evidence to determine responsibility.
- Investigators gather evidence, interview Parties and witnesses, and conduct site inspections if necessary.
 - Provide Parties equal opportunity to present witnesses and evidence.
 - Privileged information is not evidence unless authorized by privilege-holder.
- Investigator sends written notices with date, time, location, participants, and meeting purpose to invited Parties or Witnesses.
 - Provide enough advanced notice so the Party or Witness can prepare.

Sexual Misconduct Policy, Section 7.7; 34 C.F.R. § 106.45(b)(5)



Investigations – Conducting the Investigation

- Investigator provides Parties and their Advisors opportunity to review and inspect directly related evidence at fact-finding conclusion.
 - “Directly related” encompasses more than “relevant.”
 - Includes evidence Component does not intend to rely on in reaching a determination.
 - Provide even if evidence appears irrelevant.
- Provide for review in electronic format or hard copy.
 - Remind of confidentiality obligations.
- Parties get 10 calendar days to inspect, review, and respond to evidence.
 - Party’s written response must be considered in Investigative Report.

Sexual Misconduct Policy, Section 7.7.6; 34 C.F.R. § 106.45(b)(5)





Investigations – The Investigation Report

- Investigator will prepare a Report that includes:
 - A statement of the allegation(s),
 - Parties involved,
 - Summary of **relevant** evidence reviewed, and
 - Detailed report of related events.



- Investigator submits Report to Title IX Coordinator to ensure all investigation elements complete.

Sexual Misconduct Policy, Section 7.8; 34 C.F.R. § 106.45(b)(5)



What is Relevant?

According to Federal Rule of Evidence 401, evidence is relevant if:

- It has any tendency to make a fact more or less probable than it would be without the evidence; and
- The fact is of consequence in determining the action.

RELEVANCE = PROBATIVE + MATERIAL





Notice of Hearing

- Component distributes Investigative Report and Hearing Notice to Parties and their Advisor.
 - Parties get at least 10 calendar days to review before the Live Hearing.
- At least 3 days before Live Hearing, the Parties provide the following:
 - Written response to Investigative Report;
 - Witnesses appearing on Party's' behalf;
 - Documents or other evidence to be used at the hearing;
 - Direct and cross examination questions for opposing Party and witnesses.

Sexual Misconduct Policy, Section 7.9-7.10





Live Hearing Procedure

- Live Hearings with cross examination required when Formal Complaints not dismissed or resolved through informal resolution.
- Components create audio or audiovisual recording Live Hearing.
 - Parties may review or inspect the Recording or transcript upon request.



Sexual Misconduct Policy, Section 7.19



Live Hearing – Location and Virtual Hearing

- Live hearings may be conducted with all parties physically present in the same geographic location *or virtually*.



- If the hearing is virtual, or with the parties located in separate rooms, TSUS must use technology that enables all participants to see and hear the party or the witness answering questions simultaneously.



Live Hearing – Case Presentation and Questioning Witness

- Each Party may present their case by giving a statement, answering questions, presenting evidence and witnesses, and cross-examining the other Party through their Advisor.
 - If a Party does not have an Advisor, the Component shall provide one for the limited purpose of conducting cross-examination at no cost to the Party.

Sexual Misconduct Policy, Section 7.11, 7.13, 7.14, 7.16



Live Hearing – Relevance Determinations

- A Party or Witness can only be asked relevant questions during the Live Hearing.
- The Decision Maker determines a question's relevance in real time.
 - The question is asked;
 - The Decision Maker issues a determination on relevance;
 - If relevant, the individual being questioned can answer.





Live Hearing – Cross Examination

- 2020 Title IX Regulations initially excluded any statement made by a Party or Witness if that individual would not submit to cross-examination.
 - *i.e.*, Police reports excluded if the reporting officer did not attend the Hearing.



- Department of Education is no longer enforcing this rule after a court determined that the rule wasn't properly promulgated.
 - *Victim Rights Law Center v. Cardona*, (D. Mass. July 28, 2021).



Written Decisions

Following the Live Hearing, the Decision Maker sends both Parties a written Determination that includes:

- identification of the allegations;
- description of procedural steps taken in Grievance Process;
- findings of fact supporting responsibility determination;
- conclusions regarding application of policy to facts;
- a determination and rationale regarding responsibility for each allegation;
- any disciplinary sanctions and whether remedies are appropriate; and
- information concerning parties' ability to appeal.

Sexual Misconduct Policy, Section 7.20; 34 C.F.R. § 106.45(b)(7)(ii)-(iii)



Appeals

Both Parties may appeal a Determination of Responsibility, dismissal of a Formal Complaint, or dismissal of any allegation based on:

1. A procedural irregularity that affected the outcome;
2. New evidence not reasonably available at the time the determination or dismissal was made;
3. A conflict of interest or bias of the Title IX Coordinator, Investigator, or Hearing Panel Members; or
4. The sanction imposed substantially varied from the range of sanctions normally imposed for similar infractions.

Sexual Misconduct Policy, Section 7.21; 34 C.F.R. § 106.45(b)(8)



Non-Title IX Grievance Process

✓ **Focus on key differences**

- ☐ Role of Title IX Coordination in making Findings and Recommended Sanctions to Component Administrator
- ☐ Role of Component Administration in sanctions
- ☐ Disputing Findings or Sanctions
- ☐ Appeals

Sexual Misconduct Policy, Section 8



Key Differences in Non-Title IX Grievance Process

- Title IX Coordinator bases Findings on Investigative Report.
 - *Under Title IX, the Investigative Report has no findings, it only summarizes*
- Component Administrator's sanction decision based on Coordinator's Findings.
 - Under Title IX, Decision Maker determines Sanctions.
- Hearings follows Sanctions only if student-party disputes a Finding or Sanction.
 - Staff and non-tenure faculty disputes resolved by a Decision Maker.
 - Tenured faculty disputes mainly follow TSUS Chapter V, § 4.54 hearing procedures.
 - *Under Title IX, Live Hearings required at post-secondary institutions.*



Findings and Recommended Sanctions in Non-Title IX Grievance Process

- Early Title IX and non-Title IX Grievances processes follow same path.
- Noticeable divergence at the Investigative Report stage.
 - Title IX: only a Decision Maker issues findings.
 - Non-Title IX: Coordinator finds by a preponderance of the evidence either:
 - Respondent violated the Policy and the nature of the violation; or
 - Respondent did not violate the Policy.
- Coordinator provides basis for either finding.
 - Coordinator recommends Sanctions if violation found.

Sexual Misconduct Policy, Section 8.1-8.5



Component Administrator's Role in Sanctions in Non-Title IX Grievance Process

- An appropriate Component Administrator receives Investigative Report, Findings, and recommended Sanctions if violations found.
 - Students: Dean of Students
 - Faculty: Department Chair
 - Staff: Supervisor in the Respondent's chain of command
- Administrator imposes Sanctions and notifies Respondent, Title IX Coordinator, and Respondent's relevant supervisors of the Sanctions.
 - Notifications not sent to supervisors with appellate authority.
- The Complainant is notified of Sanctions that directly relate to Complainant.

Sexual Misconduct Policy, Section 8.6-8.7



Disputing Findings or Sanctions – Procedure

The dispute procedure depends on the status of the moving Party.

	Student	Staff
Written Submission Required?	Yes	Yes
Submitted to:	Title IX Coordinator	Chief Human Resource Officer or designee
Deadline	7 calendar days	5 calendar days
Process	Live or virtual hearing, but parties not compelled to attend.	No hearing; Written submissions to Decision Maker.
Questions / Response	Decision Maker asks pre-submitted questions.	Non-moving Party may submit response within 5 calendar days of receiving materials.
Possible Outcomes	Decision Maker can uphold, reject, modify, or remand the matter.	



Disputing Findings or Sanctions – Procedure

The dispute procedure depends on the status of the moving Party.

	Non-Tenured Faculty	Tenured Faculty
Written Submission Required?	Yes	Yes
Submitted to:	President	Provost
Deadline	30 calendar days	5 calendar days
Sanctions supporting appeal:	Non-reappointment or termination	Full-time salary reduction, demotion, or termination
Process	Meeting between faculty and President-designated Hearing Officer.	Live or virtual hearing, but non-moving party need not attend.
Questions / Response	Hearing Officer asks pre-submitted questions.	
Possible Outcomes	President can uphold, reject, modify, or remand the matter.	President can uphold, reject, or remand the matter.



Appeals

Title IX and Non-Title IX Grievances follow the same grounds for appeal. Only Student or Faculty Parties may appeal a determination in Non-Title IX grievances.

Student	Faculty
No hearing, decision is final .	
Appeals must be in writing and state grounds for appeal, and be filed within:	
5 calendar days of hearing decision	30 calendar days of hearing decision
Submitted to Chief Student Affairs Officers	Submitted to System Administration Office
Response following notice of appeal:	
from non-moving Party within 5 calendar days	from President within 30 calendar days
Appellate Authority approve, reject, modify, or remand	TSUS Board makes final decision

Final written appeal decision issued to Parties.

Questions





THE TEXAS
STATE
UNIVERSITY
SYSTEM™

Title IX Training Investigations

Darren G. Gibson, Partner
Emi M. Passini, Senior Associate
Michael Best & Friedrich LLP

October 29, 2025

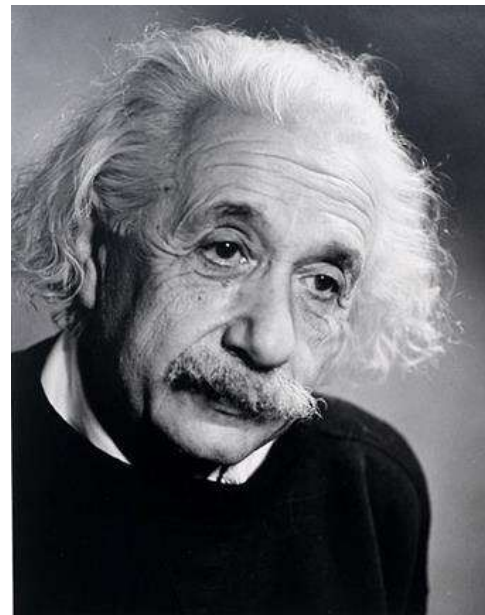




“

Condemnation without investigation is the height of ignorance.

”



Albert Einstein



Agenda

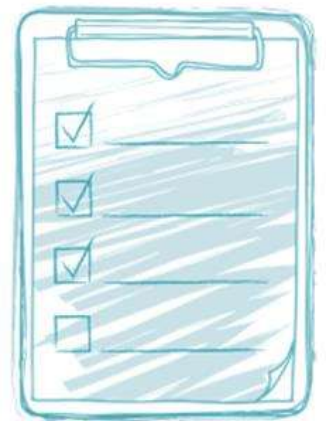
- Strategy for planning an investigation
- Documenting the investigation
- Gathering evidence
- Interviews and interviewing techniques
- Handling Special Situations
 - Delicate Subject Matters
 - Emotional Interviews
 - Hostile Parties and/or Advisors





Agenda

- Trauma-Informed Investigations
- How to handle hostile witnesses or advisors
- Dealing with Consent, Coercion, and Incapacitation
- Chronology
- Drafting the Report





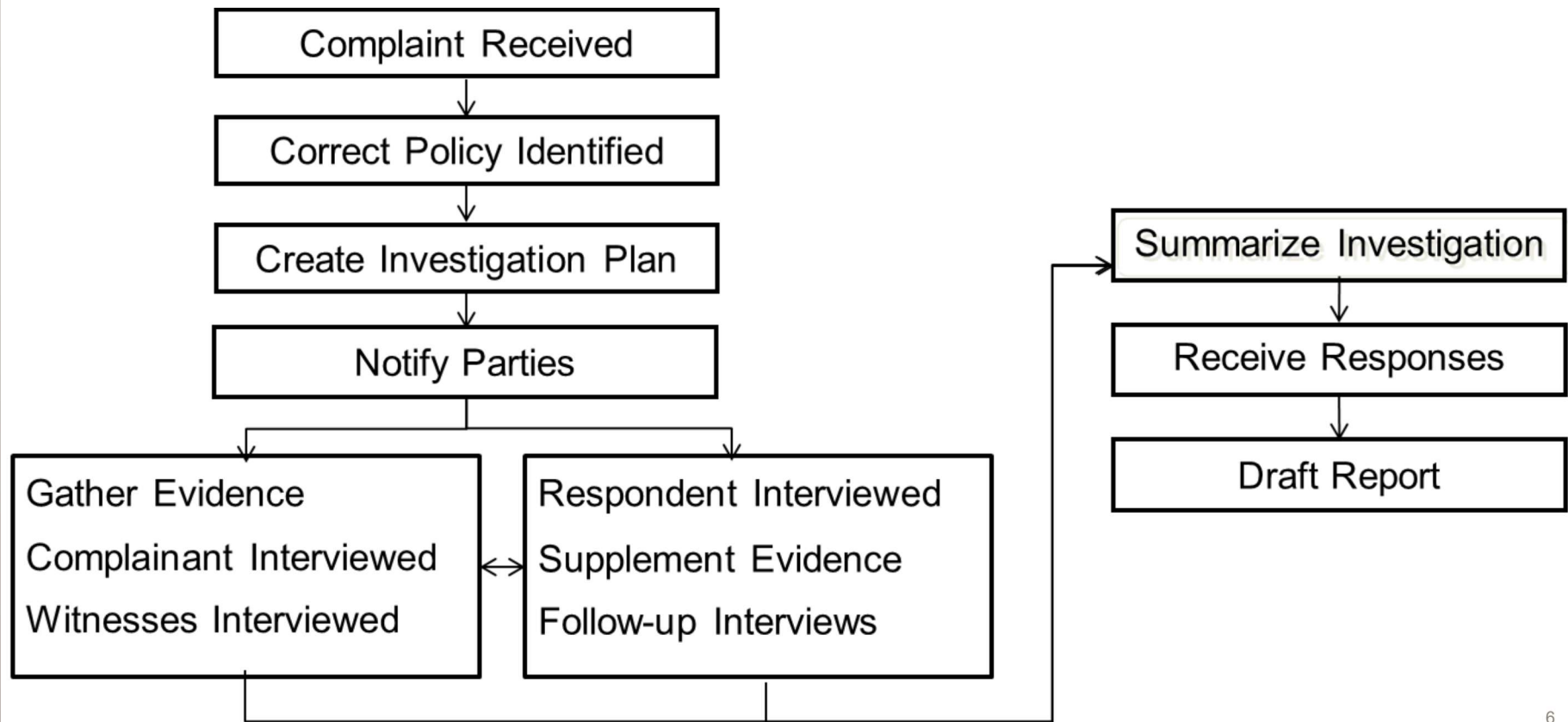
A “Good” Investigation Defined:

- Backed by policy with compliant procedure
- Timely investigation
- Speak with Complainant
- Interview witnesses
- Speak with Respondent
- Documented interviews
- Documents collected and secured
- Thorough report based on objective facts





Visualizing the Investigation Process





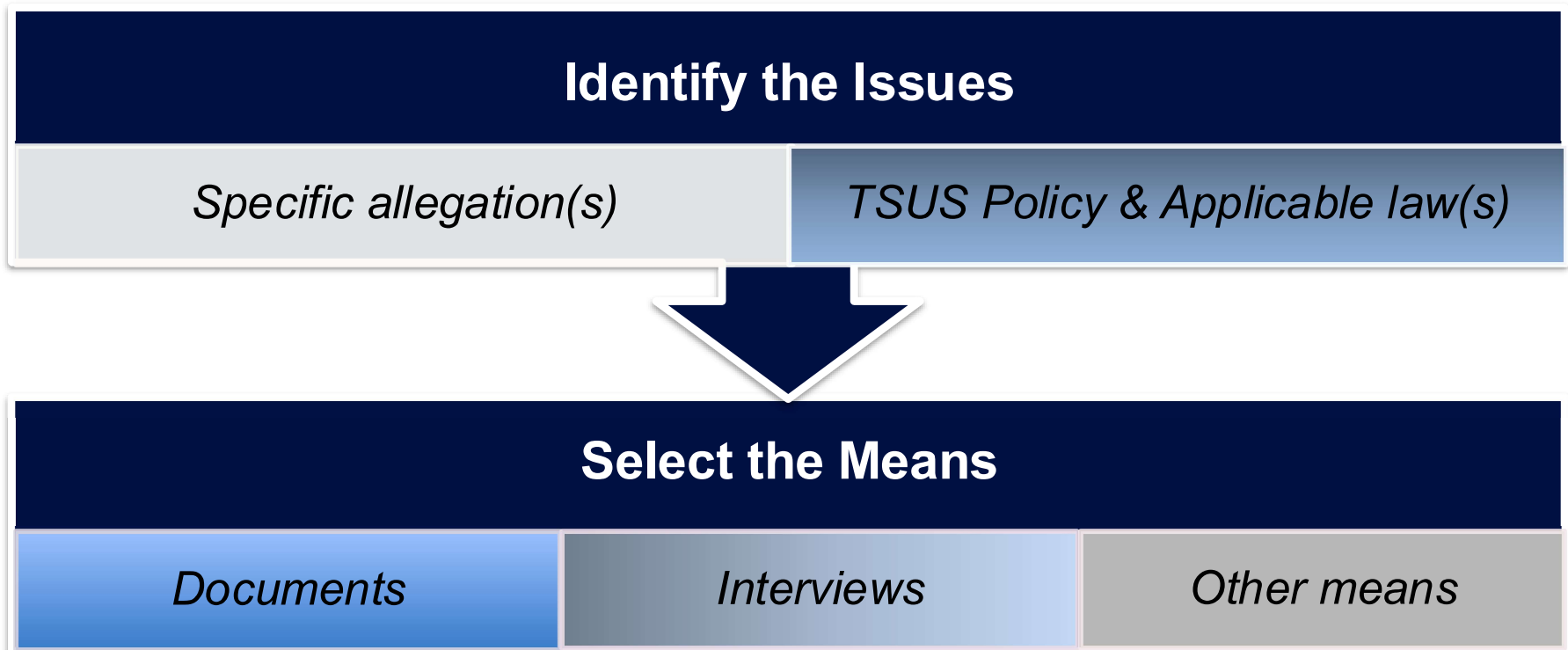
Planning the Investigation: A Written Plan

- Who are the Parties; What is alleged?
 - *E.g.*, Student stalking Student; Teaching Assistant sexually harassed Student; Supervising Faculty retaliates against Staff for opposing Sex Discrimination
- Determine applicable policies and procedures.
 - Is this a Title IX or Non-Title IX Investigation?
- Identify evidence for preservation/collection and relevant custodians.
 - Human Resources, IT Department, Campus Security
- Identify interviewees, set proposed order, and schedule.
 - *E.g.*, Parties, fact witnesses, background witnesses
- Identify required notices, deadlines, and events.





Step 1: Identify the Issues





Step 2: Identify Material Evidence

- Emails on TSUS email system
- Text messages, social media posts, emails, and documents in possession of parties (if material)
- Personnel files
- Student disciplinary records
- Video surveillance of buildings
- Police and medical records (if available)

Materiality depends on the specific allegations.





Step 3: Identify Material Witnesses for Interviews

- Complainant
- Respondent
- Witnesses to actual event
- Witnesses to related events before or after the actual event
- Witnessed identified by parties with *material* knowledge
- Persons outside of Component
 - *E.g.*, Police officers, SANE nurse, family
- Experts in specific area
 - *E.g.*, sexual assault, alcohol induced amnesia



Gathering Evidence

Institution bears burden of gathering adequate evidence to reach a determination.

- Gather records from the appropriate custodian;
- Gather records from the Parties;
 - Confidential treatment records require record holder's consent.
- Gather electronic evidence:

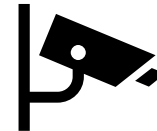


- System e-mail
- Stored email
- Instant/Text Messages
- Phone logs
- Video footage
- Social media
- Internet searches
- Voicemail



Best Practices for Gathering Electronic Evidence

- If TSUS email is important evidence, work with your IT department to preserve and search emails using search terms and date restrictions.
- Preserve and search other material electronic evidence.
 - TSUS document system.
 - TSUS-issued computers and phones.
 - Search history while using TSUS network.
- Work with facilities to determine if relevant video surveillance exists.





Best Practices for Gathering Electronic Evidence

- For text messages, request each party provide the entire text conversation for a given period.
- Establish a protocol with your IT department for best practices to provide texts from iMessage or third-party apps to investigators.
 - Develop clear written instructions you can provide to parties and witnesses.
- Establish similar protocols for social media.





Interviews: Preparing for the Interview

Outline the discussion topics with specific questions on key points.

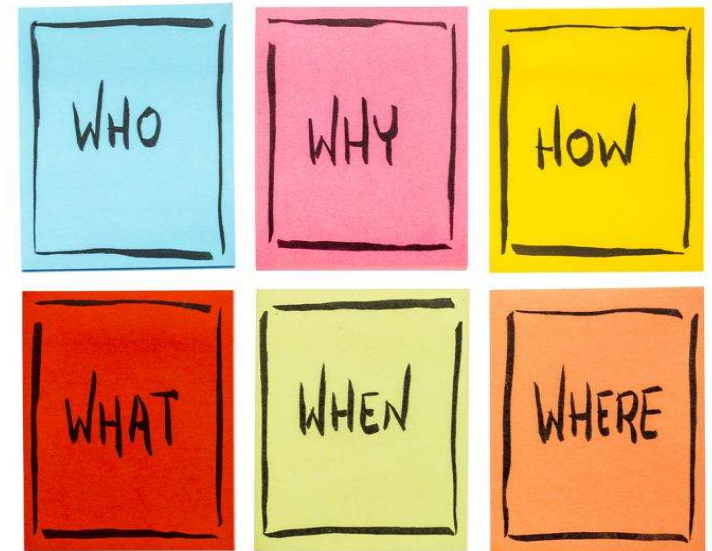
1. Introduction.
 - Context, roles, confidentiality, non-retaliation, recording of interview.
2. Background and connection to parties.
3. General understanding of parties' relationship and history.
4. Timeline and details of specific allegations (and documents)
5. Additional material facts and context.
 - *E.g.*, personal experience with Respondent.
6. Ask if there is anything else?
7. Conclusion.

Identify material documents you need to discuss with the witness and have copies ready.



Documenting the Interview

- Be prepared:
 - Written outline of allegations
 - Written list of basic questions organized by allegation
 - Space for “parking lot” issues
- Prepare interview summary
- Record non-verbal information:
 - Body language
 - Cooperation level
 - Forthcoming or elusive





Documenting the Investigation



DO

- Write objectively
- Summarize knowledge
- Use quotes if possible
- Document specific responses to key questions and evidence
- Document material facts about credibility



DON'T

- Make conclusions about facts and credibility
- Use quotes as shorthand



Key Issues in Interview

Who is in the room?

- Have two persons present for Complainant/Respondent interviews in delicate cases such as sexual assault or serious faculty misconduct.
- Interviewer gender diversity helps in M/F sexual harassment or sexual assault cases, particularly for Complainant and Respondent.

Order

- Complainant, Key Witnesses, Respondent, Additional Witnesses, and Follow-up.

Format

- In-person preferred, particularly for Parties, but video okay if necessary.
- Other witnesses by video or telephone, as needed.



Opening the Interview

Introduction

- Tell interviewee your name, title, and role as a neutral factfinder for Component.
- Provide short statement of meeting' purpose but maintain confidentiality.
- Explain to witness that they are not in trouble.

Address confidentiality

- Address confidentiality in context of investigation and the report.
- Explain witness confidentiality is not guaranteed; Report identifies witnesses.

Address non-retaliation

- Explain witnesses protected from retaliation and reporting process.

Questions

- Ask if there are any questions about the process before you get started.



The Funnel Technique

Use “Funneled” Questioning

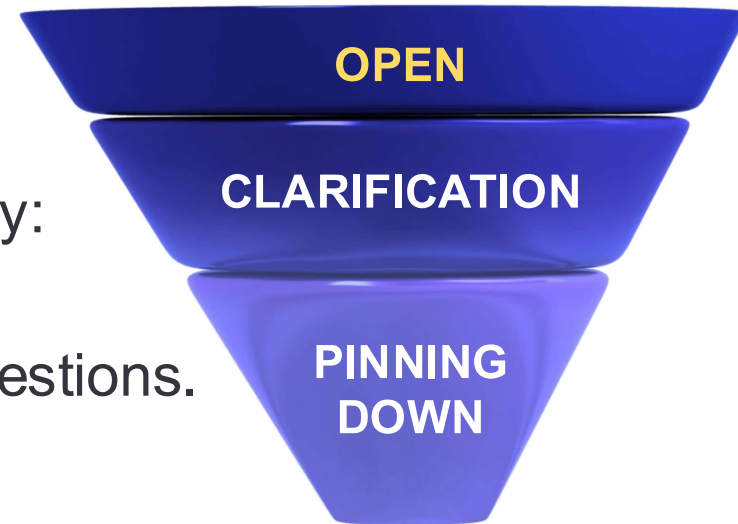
- Open-ended phase
- Clarification phase
- Pinning-down phase
(*i.e.*, closing the door)





Opening Questions

- Ask open-ended questions:
 - “How would you describe your relationship with your supervisor?”
 - “What do you remember about the party?”
- Aim for all ***material*** evidence about allegations.
- Identify ways to refresh witness’ memory:
 - *E.g.*, documents; emails.
- Make sure the witness fully answers questions.





Clarification Questions

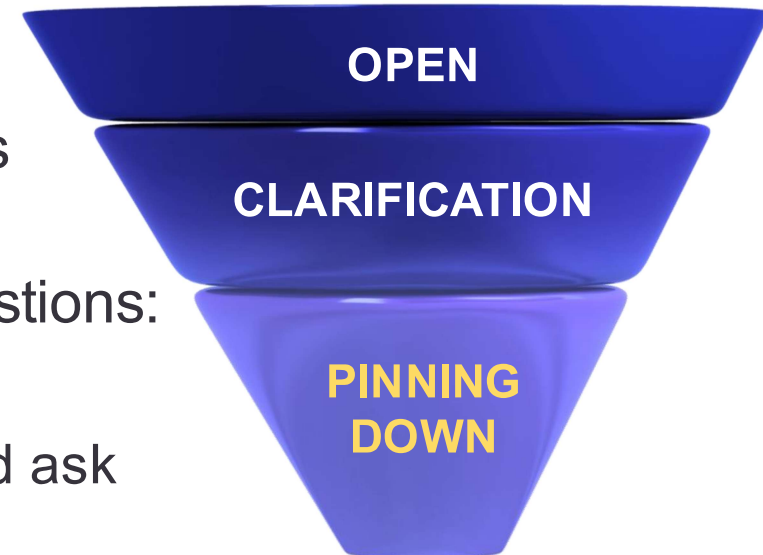
- What? Who? Where? When?
- Don't disrupt a train of thought.
- Use active listening:
 - Don't be wed to your outline.
 - Listen for subtle changes to answers and clarify.
- Follow up on cues:
 - Watch for eye contact and body language.
- Summarize so witness can offer facts that were left out.





Pinning Down the Interviewee's Statements

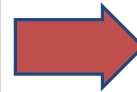
- Close the door and exhaust subject.
- Get final answers.
- Ask whether there are any documents supporting witness's testimony.
- Encircle knowledge with wrap-up questions:
 - “Is there anything else?”
 - “Is there anything you thought I would ask you about that we haven't covered?”





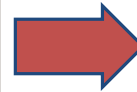
Useful Questions

QUESTION



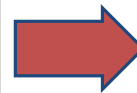
PURPOSE

“Let me give you this information so that you can respond.”



Refreshes recollection and provides a chance to respond.

“Is there anything else that you would like to add to this?”



Gather full story, including context and background.



Useful Questions

QUESTION

PURPOSE

“Is there any other evidence that would support what you’ve told me?”

Uncover documents and seals off “universe of facts”

“Is there anyone else we should speak with about this?”

Chance to provide response and create witness list



Closing the Interview

- **Thank the Interviewee**
 - Thank you for your time in this serious and important process.
 - Your participation helps support Component's compliance in this area and ensures we address serious allegations promptly and fairly.
- **Keep Communication Open**
 - Please feel free to contact me if you recall any other details or information.
- **Preserve Evidence**
 - Please remember you are not to destroy or alter documents or information.
- **Confidentiality and Retaliation Reminder**
 - You are also protected by Component's non-retaliation policy. Do not hesitate to contact me if you have any concerns in that regard.
 - Reminder of Component confidentiality policy.



Interviewing Best Practices

- Avoid confrontational or accusatory questions.
- Maintain objectivity: Do not admonish or reprimand even if troubling conduct is revealed.
- Don't agree or disagree with what you're hearing.
 - Instead, use a non-binding, non-committal clause such as "I understand."
- Don't lead witnesses.
 - E.g., ". . . And then you heard Bud say . . ."
- Use silence after a question as a technique to encourage reticent witnesses to start talking; People often feel a need to "fill" silence.



Interview Minefields, Curveballs, and Delicate Situations





Personal Topics, Emotional Interviews, Hostility

- Stay levelheaded and rework your strategy.
- When an Interviewee does not answer a question, ask more:
 - Would you like me to phrase the question another way?
 - What do you think I am asking you?
 - Will you tell me why you do not wish to answer?
 - Do you need a moment to gather your thoughts?
- Remember effects of trauma can impact the interview or the interviewee may be embarrassed.
- Remind disruptive Advisors of their role in the proceedings. End the interview if disruptions persist.



Trauma Informed Investigations

What is a trauma-informed investigation?

- Considers the potential neurobiological effects of trauma.
- Goal: Objective and impartial investigation that minimizes reliance on sex stereotypes and generalizations.

Why follow trauma-informed practices?

- Safety:
 - Avoid re-traumatization and perpetuating a hostile environment.
- Accountability: Conduct better investigations
- Required by state law for university peace officers.
 - *Texas Education Code § 51.288 (HB 1735).*





DOE Statements on Trauma-Informed Practices

- “While the final regulations do not use the term ‘trauma-informed,’ nothing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.”
 - Preamble p. 591
- “While trauma-informed approaches that are grounded in science benefit sexual violence investigations, trauma-informed techniques should be undertaken contemporaneously with a rigorous commitment to a fair process for all parties.”
 - Candice Jackson, Fmr. Deputy Ass’t. Sec., DOE, *NACUA Briefing* (Sept. 28, 2017)



What Is Trauma

Psychological trauma is the unique individual experience of an event or enduring conditions, in which:

- The individual's ability to integrate his/her emotional experience is overwhelmed, or
- The individual experiences (subjectively) a threat to life, bodily integrity, or sanity.

“[T]rauma is defined by the *experience of the survivor*. Two people could undergo the same noxious event and one person might be traumatized while the other person remained relatively unscathed.”

– Esther Giller, [*What is Psychological Trauma?*](#), Sidran Institute (1999)



Trauma Informed Investigations

- Campus investigators and adjudicators need not determine precise effects of trauma in a particular case.
 - They need to understand the potential effects of trauma and check personal biases regarding potential impact.
- Avoid assuming individuals are “lying” if unable to recall every detail in chronological manner.
 - However, if investigation shows behaviors that may be related to trauma, that doesn’t equate to policy violation.



Behavior During Interviews

- Some interviewees' behavior during interviews may appear odd.
 - Remember that they may continue to be affected by trauma when recalling a traumatic event
 - Various “normal” responses include:
 - Emotional, crying, hysterical
 - Flat affect – seeming numb
 - Laughing, light-heartedness, inappropriate
 - Cycling of emotions





Trauma-Informed Interview Tips

- Think about presentation and atmosphere.
- Be mindful of first impressions.
 - How do you present yourself?
 - Where is the interview occurring?
 - Consider privacy, light, noise, accessibility, etc.
- Allow for variety of reactions to trauma.





Trauma Informed Investigations

- DO allow for trauma as possible explanation of Complainant's behavior.
- DO NOT accept everything Complainant recalls as absolutely "true."
- DO examine inconsistencies.
- Avoid assigning truthfulness or responsibility based on conventions of "victim" and "perpetrator."





Dealing with Consent, Coercion, and Incapacitation

- More than 90% of sexual assault victims on college campuses do not report the assault.
 - Cullen, F., Fisher, B., & Turner, M., 2000
- About 1 in 3 women and 1 in 6 men have been the victim of a contact sexual assault.
 - CDC NIPSVS, 2011
- In 8 out of 10 cases of rape, the victim knew the perpetrator.
 - Miller, T. R., Cohen, M. A., & Wiersema, B., 1996





Sexual Assault in College

- Many victims do not characterize their experience as a crime due to:
 - Embarrassment;
 - Lack of understanding of the legal definition of rape;
 - Sympathy for the rapist; and
 - Self-blame.
- The most common reason for not reporting incidents of sexual assault and sexual misconduct was that it was not considered serious enough.
 - Other reasons included because they were “**embarrassed, ashamed or that it would be too emotionally difficult;**” and because they “**did not think anything would be done about it.**”



What is Consent?

Consent is an informed and freely and affirmatively communicated willingness to participate in particular sexual activity. Consent can be expressed either by words or by clear and unambiguous actions, as long as those words or actions create mutually understandable permission regarding the conditions of each instance of sexual activity. It is the responsibility of the person who wants to engage in the sexual activity to ensure that s/he has the consent of the other to engage in each instance of sexual activity.

Sexual Misconduct Policy, Glossary at page 52



Component-Considered Consent Factors

- Consent is a voluntary agreement/assent to engage in sexual activity;
- Someone who is incapacitated cannot consent;
- Consent can be withdrawn at any time;
- Past consent does not imply future consent;
- Silence or absence of resistance does not imply consent;
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another.
- Coercion, force, or threat invalidates consent; and
- Being intoxicated or under the influence is never an excuse for engaging in Sexual Misconduct.

Sexual Misconduct Policy, Glossary at pages 52-53



Indications of a Lack of Consent

- Physical force is used or there is a reasonable belief of the threat of physical force;
- When duress is present;
- When one person overcomes the physical limitations of another person; and
- When a person is incapable of making an intentional decision to participate in a sexual act, which could include instances of incapacitation.





Incapacity

- The state when a person cannot rationally decide whether to engage in sexual activity because he or she lacks ability to give knowing Consent.
 - *E.g.*, understanding the “who, what, when, where, why, or how” of the sexual interaction.
- The temporary or permanent inability to give Consent because drug or alcohol consumption, voluntary or involuntary, renders the individual mentally and/or physically helpless, unconscious, asleep, or otherwise unaware that sexual activity is occurring.
 - Incapacitation is determined through consideration of all relevant indicators of an individual’s state.
 - **NOT** synonymous with intoxication, impairment, blackout, or being drunk.
 - Incapacitation is a step beyond drunkenness or intoxication.



The Chronology

Chronologies are extremely useful in investigations.

- Excellent way to:
 - Distill information;
 - Identify critical evidence; and
 - Spot inconsistencies in testimony.
- Simple chart listing date, event, and evidentiary source
- Helps avoid bias by presenting all information on equal footing.
- Helps in drafting report, as the story is in the chronology.



The Investigative Report

Purpose:

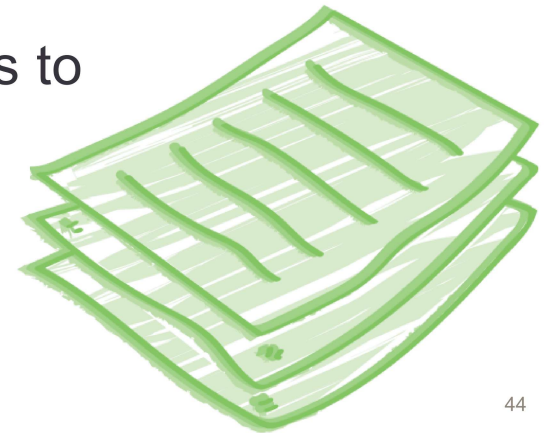
- Record of investigation steps and evidence collected.
- Writing process can clarify analysis and uncover additional questions.
- Likely used to justify action based on findings.
 - *E.g.*, dismissal, reprimand, etc.
- May be cited in legal proceeding, OCR investigation, or other related proceeding.
- Must consider a Party's response to evidence.





Critical Tasks of an Investigative Report

- Third parties must be able to understand full picture without outside explanation.
- Discuss all allegations raises and applicable policies.
- Document evidence objectively and accurately.
- Avoid unnecessarily controversial commentary.
- Provide enough information for Decision Makers to make a determination.





Proposed Report Outline

- I. Executive Summary
- II. Summary of Allegations and Applicable Policies
- III. Timeline of Investigation
- IV. List of Witnesses and Evidence
- V. Summary of Witness Interviews and Evidence
 - Includes any credibility assessments
 - Chronology may be part of summary of evidence
- VI. Parties' Response to Evidentiary Record
- VII. Exhibits (documents, photographs, videos, texts)





Drafting the Investigative Report

Basics

- Document investigation timeline: Note interviews conducted, documents reviewed, and evidence examined.

Summary of Evidence

- State facts, not conclusions.
 - Avoid opinions, rumors, hearsay.
 - Give concrete examples.
- Attach key evidence as exhibits; acknowledge conflicting evidence.
- Acknowledge when credibility assessment is required; explain basis.

Conclusions

- None. That is the Decision Maker's job.



Drafting the Report



DO

- Use objective language.
- Be as detailed as possible.
- Group together logically.



DON'T

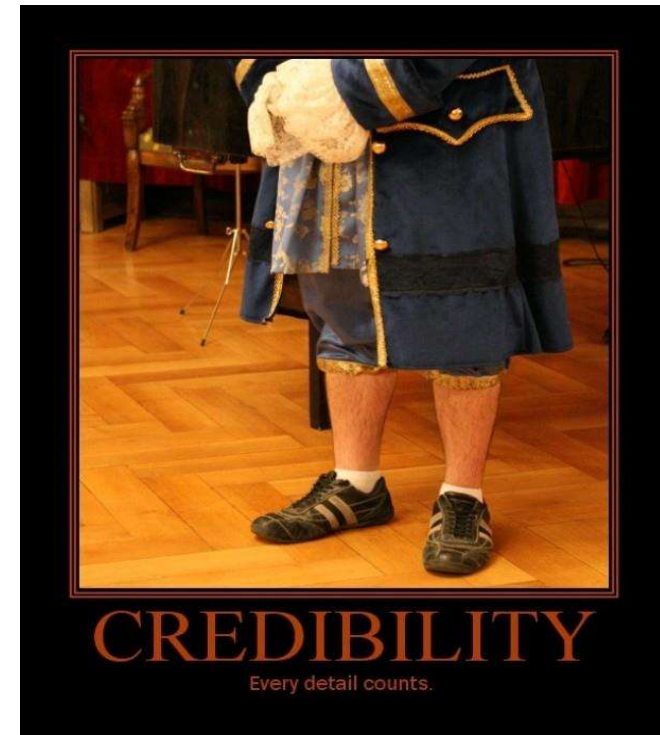
- Reach conclusions.
- Put words in a Party's mouth.
- Rely on stereotypes.



Credibility Assessments

- Investigative report may contain Investigator's credibility assessments
 - Go through applicable credibility factors in report when making credibility assessments.

Inherent Plausibility	Demeanor
Motive to Falsify	Corroboration
 - Apply factors to specific statements and/or witnesses.
 - Clearly explain why one party or witness appears more credible than another.
- Decision Maker not bound by Investigator's assessments.





Common Issues with Investigative Reports

Insufficient Structure

- Use sections and headings to help guide readers and your own writing.
- Delineate between applicable policies, investigation process, outcome of interviews, and factual findings.

Lack of citations to evidence

- Cite only to key documents that tell the story; attach as exhibits.

Failure to clearly delineate the claims and conclusions

- Identify each specific claim, definition, and relevant facts.

Doesn't show policy was followed in conducting investigation

- Go through process and show compliance with all notice and investigation requirements (with accompanying policy citations).



Common Issues with Investigative Reports

Failure to recognize both sides

- If there is a dispute in the facts, recognize it and address it.

Credibility determinations are not explained

- Recognize and discuss credibility assessment factors when credibility matters.
 - Citing jury instructions in footnotes provides reliability to credibility assessments.

No narrative or chronology of events

- Reports often merely repeat evidence gathered then make determination.



Recommended Final Steps

Maintain a separate investigative file, to include:

- Copy of the complaint, notices, correspondence with parties / witnesses
- Interview notes
- Relevant policies
- Documentation gathered during the investigation
- Physical and Electronic Evidence
- Investigation report
- Hearing Recording
- Final Written Determination
- Appeal Decisions



Drafting Written Decisions

- Decision Makers issue written Determinations after Live Hearings.
 - No set time in Policy.
 - Should be prompt to comply with Title IX regulations and Policy.
- Independent written determination required.
 - Decision Makers can utilize Investigative Reports, but must draw independent conclusions based on available, relevant evidence and the events of the Live Hearing.



Drafting Written Decisions

Decision Maker issues written determinations that:

- Identify all allegations;
- Describe procedural steps in Complaint Process;
- Discuss factual findings supporting determination;
- Reaches conclusions by applying the Sexual Misconduct Policy to facts;
- Provide a responsibility determination and rationale for each allegation;
- Determines appropriate disciplinary sanctions or other remedies; and
- Explains right and process for appeal.

Sexual Misconduct Policy, Section 7.20



Proposed Determination Outline

- I. Executive Summary
- II. Summary of Allegations and Applicable Policies
- III. Description of all Procedural Steps
- IV. Finding of Facts Supporting Determination
- V. Conclusions Applying Facts to the Policy
- VI. Determination Regarding Responsibility for Each Allegation and Rationale
- VII. Sanctions and Remedies and Rationale
- VIII. Appeal Information



Policy section 7.20



Drafting the Written Decision – Focus on Facts

- ✓ Maintain an objective tone.
- ✓ Based on evidence presented to the Decision Maker in the record and at the Live Hearing.
- ✓ Clearly state the Who, What, Where, When, and Why.
 - Cite to evidence as much as possible; use exhibits.
 - Recognize both inculpatory and exculpatory evidence.
- ✓ Explain evidentiary determinations.
 - Especially if Party disputes relevance determinations for certain evidence.
- ✓ No need to discuss all available evidence or immaterial facts.



Drafting the Written Decision – Concentrate on Credibility

- Investigator credibility assessments do not bind Decision Makers.
- Assessments:
 - Apply credibility factors to specific statements and witnesses.
 - Be clear about why one Party deemed more/less credible.
- Credibility Factors:
 - Inherent plausibility: Is the testimony believable on its face? Does it make sense?
 - Demeanor: Did the person seem to be telling the truth or lying?
 - Motive to falsify: Did the person have a reason to lie?
 - Corroboration: Is there witness testimony (e.g., eye-witnesses, people who saw person soon after, or people who discussed incident with him/her at the time) or physical evidence (such as written documentation) that corroborates the party's testimony?
 - **Past record: Did the alleged harasser have a history of similar behavior in the past?**



Drafting the Written Decision – Delve into Determinations

- Use clear, direct, statements.
- Based on the appropriate evidentiary standard.
 - Preponderance of the evidence.
- Explain the elements in light of the evidentiary standard.
 - Justify with the record.
- Assume the Written Decision could end up as evidence in further proceedings, such as:
 - Exhibit in a faculty termination proceeding
 - Document produced to the Department of Education OCR
 - Exhibit in a lawsuit



Drafting the Written Decision – Sanctions & Remedies

Possible Sanctions, dependent on gravity and nature and of misconduct and role of parties (student vs. employee), including, for example:

- No-contact orders
- Mandated counseling
- Academic or disciplinary probation
- Suspension or expulsion
- Relevant training
- Expulsion from campus housing (stdnt.)
- Termination (employee)
- Sanctions may not be imposed until after appeal deadline. If appealed, Sanctions stayed until appeal concludes (if upheld).
- When discussing Sanctions, Decision Makers must also note whether Complainant receives Component-provided remedies designed to restore and preserve equal access to Educational Programs or Activities.

Sexual Misconduct Policy, Sections 3.12, 7.20, 7.22-7.23



Factors for Sanctions

- Severity of conduct
 - Did it involve violence? Repeated acts? Multiple complainants?
- Did Respondent accept responsibility, express remorse?
- Would continued presence of Respondent on campus be a threat to Complainant or University community?
- Respondent's history of other conduct violations.
- History of sanctions in prior similar cases.

Questions



Lunch Break





THE TEXAS
STATE
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SYSTEM™

Title IX Training

Live Hearings

Darren G. Gibson, Partner
Emi M. Passini, Senior Associate
Michael Best & Friedrich LLP

October 29, 2025





Purpose of Live Hearings (per the DOE)

“

The Department agrees that a live hearing gives both parties the most meaningful, transparent opportunity to present their views of the case to the decision-maker, reducing the likelihood of biased decisions, improving the accuracy of outcomes, and increasing party and public confidence in the fairness and reliability of outcomes of Title IX adjudications.

”

Preamble to the 2020 Regulations



Agenda

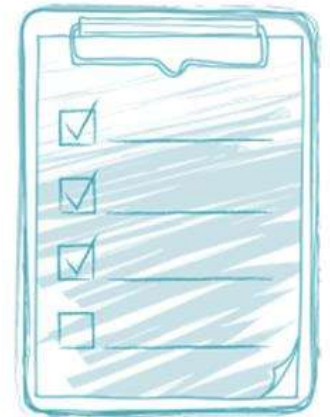
- Role of Decision Maker, Parties, Advisors, & Witnesses
- Prehearing Matters
- Conducting the Live Hearing
- Hearing Location
- Recording the Hearing
- Rules of Decorum and Enforcement





Agenda – continued

- Party Statements
- Relevancy Determinations
- Objections
- Hearsay
- Fair & Equitable Treatment of All Parties
- Drafting the Written Decision





Role of Participants

- Parties:
 - Opening/closing statements
 - Present evidence and witnesses
 - Testify and be subject to cross-examination
- Advisors:
 - Conduct cross-examination
 - Provide support, guidance, and/or advice
- Witnesses, including investigator and expert:
 - Testify and be subject to cross examination
- Investigator:
 - Summarizes evidence
 - May answer questions about the investigation



Sexual Misconduct Policy, Section 7.11



Role of Participants – continued

- Decision Maker
 - Manage process of hearing
 - Enforce rules of decorum
 - Can ask questions of any Party or Witness
 - Determine relevancy of questions
 - Issues the Written Determination
- Title IX Coordinator
 - No clear role in the Live Hearing
 - Not prohibited from attending/observing
 - Must remain impartial and neutral towards both parties through the entirety of the grievance process.



Sexual Misconduct Policy, Section 7.11



Pre-Hearing Matters – Required Notice

- The Title IX Coordinator sends a copy of the Investigative Report to each Party and their Advisor along with the Notice of Hearing at least 10 calendar days before the Live Hearing.
- The Notice must contain:
 - Date, time, and location, participants, and purpose of the Hearing
 - Pre-Hearing Instructions and deadlines
 - Rules of Decorum
 - Hearing Procedures
 - Date of the Pre-Hearing Conference

Sexual Misconduct Policy, Sections 7.9-7.10; 34 C.F.R § 106.45(b)(5)(v)



Pre-Hearing Matters – Pre-Hearing Deadlines

- At least 3 calendar days before Live Hearing, Parties must provide Decision Maker the following:
 - Written response to Investigative Report;
 - Documents and evidence to be used at hearing;
 - Must have already been provided to the Investigator, absent good cause
 - Names of Party's witnesses;
 - New witnesses may be allowed at the Decision Maker's discretion
 - Initial questions and cross-examination questions for opposing Party and designated witnesses.



Sexual Misconduct Policy, Sections 7.10, 7.13





Conducting the Live Hearing

The Decision Maker administers the Live Hearing:

- Overseeing the proceeding, including order of parties and witnesses.
- Enforces the Rules of Decorum, including any time limits
- Issues relevancy determinations
- Asks questions of the Parties and Witnesses
- Evaluates evidence





Possible Hearing Schedule

- Decision Maker opens the Hearing
 - Explains purpose
 - Affirms Rules of Decorum
 - Addresses Standard or Evidence
 - Answers questions about Hearing Procedure
- Opening statements by parties
- Party Questioning
 - Questioning by Decision Maker
 - Cross Examination by Opposing Party's Advisor
- Witness Questioning and Cross Examination
- Closing statements by Parties
- Decision Maker statements regarding process and next steps



Hearing Location

The Live Hearing can be conducted:

- In a single geographic location, with everyone in one room; or
- Virtually

Virtual hearings require technology that enables all participants to simultaneously see and hear the Party or witness speaking.

- Decision Makers must be trained on Hearing technology prior to Hearing.
 - Unremedied technological glitches during a virtual Title IX hearing that led to Plaintiff's expulsion provided the basis for Plaintiff to survive a Motion to Dismiss in his Erroneous Outcome claim.
 - *Doe v. N.Y. Univ.* (S.D.N.Y. Mar. 31, 2021)

Sexual Misconduct Policy, Section 7.18; 34 C.F.R. § 106.45(b)(6)(i)



Recording the Hearing

- The Live Hearing will be recorded.
 - The recording may be audio or audiovisual.
- The Component will make the recording or a transcript available to the Parties for inspection or review upon request.



- Any post-hearing deliberation or discussion is not recorded and will not be part of a transcript.

Sexual Misconduct Policy, Section 7.19; 34 C.F.R. § 106.45(b)(6)(i)



Rules of Decorum

- The System or Component, not Title IX regulations, establish rules of decorum.
 - Rules must apply equally and equitably; Must not impair a Party's rights
- Rules should require all participants act to:
 - Demonstrate professional conduct
 - Preserve the dignity of all Participants
 - Treat others with respect
 - Not disrupt the Live Hearing
- Rule violations may result in exclusion and/or disciplinary action.
 - Component obtains new Advisors when present Advisor removed.



Party Statements

- The Complainant and the Respondent may make opening and closing statements if they wish and will have the opportunity to present evidence, answer questions, and conduct cross-examination through their Advisor.
 - Decision Maker determines the sequence of events for the Hearing.
 - Decision Maker sets time for Parties' opening and closing statements.
 - Statement time must be equitable between the Parties.

Sexual Misconduct Policy, Section 7.11.2





Decision Maker's Questions

The Decision Maker may ask questions of any Party or Witness

- Questioning allows Decision Makers to determine relevancy, understand facts, and assess credibility.
- Questioning Techniques:
 - Open-ended questions generate more information.
 - Provide each witness an opportunity to speak directly to the Decision Maker regarding the alleged incidents.
 - Address inconsistencies:
 - “Earlier I thought you said X, help me understand. . .”





Credibility Questions – Examples

- The other witnesses from the party reported Complainant was very drunk, except for you. Do you have an explanation for these different accounts?
- You initially reported to Title IX that Respondent only kissed you without your consent. During the investigation, you also alleged he groped your breasts. Can you explain why you didn't report the groping originally?
- How long have you known Respondent? Are you close friends?
- You stated that Complainant was sober that night, but you left the party early, correct? You don't have first-hand knowledge of her state when she left with Respondent, do you?
- You reported that you never heard your supervisor and mentor make sexual comments to his secretary. Do you sit near them? Are you able to hear their conversations? Do they ever meet without you present? Thus, you don't necessarily have first-hand knowledge of all of their communications, do you?



Cross Examination

“Essential function of cross-examination is not to embarrass, blame, humiliate, or emotionally berate a party, but rather to ask questions that probe a party’s narrative in order to give the decision-maker the fullest view possible of the evidence relevant to the allegations at issue.”

- Conducted directly, orally, and in real time by Party’s Advisor and never by Party personally.

Sexual Misconduct Policy, Section 7.16; 34 C.F.R. § 106.45(b)(6)(i); Preamble to Title IX Regulations



Cross Examination – Protecting the Witness and Process

- Consider reasonable time limits for total Cross Examination, including per witness limits.
 - Include such limitations in the Rules of Decorum.
 - Empower Decision Makers to enforce such limits.
- Do not tolerate courtroom style cross – “You can’t handle the truth!”
 - Enforce rule against duplicative questioning, which can be abusive.
 - Make it clear that witnesses can take breaks during questioning, if needed.
- Only relevant questions may be asked of Parties or Witnesses.
 - Remember relevancy rules regarding prior sexual history.





Relevance

Remember:

RELEVANCE = PROBATIVE + MATERIAL

- Probative means may make a fact more or less probable than it would be without the answer.
- Material means the fact is significant in determining the outcome.
- Decision Makers determine if questions are relevant.





Determining Relevancy of Questions

Relevancy determinations occur in real time during Live Hearings.

- The question is asked;
- Decision Makers state whether the question is relevant;
 - Not relevant questions are excluded, and Decision Makers explain exclusion rationale.
 - Only relevant questions answered by Party or Witness.



Sexual Misconduct Policy, Sections 7.15-7.16; 34 C.F.R. § 106.45(b)(6)(i)



Tips for Making Fair and Impartial Relevancy Determinations

- Take your time to consider the applicable rules.
- Ask clarifying questions of the parties / advisors to determine relevance.
- If complex issues arise around documents, consider redactions of irrelevant or prohibited material.
- State on the record the relevancy ruling and why.
 - For example, “I am not allowing the question, as it goes to the Complainant’s prior sexual history and is not offered for one of the two exceptions.”
- Make sure to apply the same rule to both sides. If one side can’t ask questions about a particular issue, the same rule applies to the other.
- Focus on the probative and materiality prongs of relevancy to avoid irrelevant and harassing questions, such as:
 - Do you think your parents would be proud of your behavior? [Not probative or material.]
 - Isn’t it true that you failed out of your first university? [Not material.]
- Enforce presumption of non-responsibility during Live Hearing. Address responsibility only in written decision.



Handling Objections and Inquiries from Advisors

- A Decision Maker's Live Hearing determinations are final.
 - A Decision Maker's relevancy and evidentiary exclusions can only be challenged as a procedural defect during appeal.

But

- Advisors can ask clarifying questions.
- Objections not pertaining to a question's relevance cannot be made by the Advisor.
 - An Advisor is a potted plant unless conducting cross-examination.

Sexual Misconduct Policy, Section 7.15



Evidence of Prior Bad Acts

- “A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.”
 - Where a cross-examination question or piece of evidence is relevant, but concerns a party’s character or prior bad acts, Decision Makers cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility.

Preamble to Title IX Regulations



Questions or Evidence about Complainant's Sexual Predisposition

- Questions and evidence about Complainant's sexual predisposition are **never** relevant, and questions and evidence about Complainant's prior sexual behavior are not relevant unless such questions and evidence are offered to:
 - (1) prove someone other than the Respondent committed alleged conduct; or
 - (2) prove consent if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent.



This rule only applies to Complainants: “[E]vidence of a pattern of inappropriate behavior by an alleged harasser must be judged for relevance as any other evidence must be.”

Sexual Misconduct Policy, Section 7.15.1; 34 C.F.R § 106.45(b)(6)(i); Preamble to Title IX Regulations



Scenario: Making Relevancy Determinations

Emma accused her then-boyfriend Malik of Sexual Misconduct after they had sex on a night Emma got intoxicated at a frat party and came back to Malik's apartment. Malik asserts it was consensual and Emma asked him to. Emma asserts there is no way it was consensual because she is saving herself for marriage to show her commitment to God. Malik's Advisor wants to ask Emma:

- Did you talk to your roommate about the incident? Your parents?
- Has Malik ever tried to pressure you for sex in the past?
- Were you actually a virgin before the night of the allegation?
- Is it true that you didn't break up with Malik until your sorority sisters found out you slept together?

What is allowed and what is excluded? Why?



Hearsay Rule and Reminder of Developments in 2021

What is Hearsay?

- Statements made outside of the hearing, offered for the truth of the matter at issue.

Before	Now
Statements made outside of hearing were excluded <u>unless</u> the person who made the statement appeared at Live Hearing and submitted to cross examination. Applied to almost any statement. Even: • Party Statements • Text Messages • Police Reports • Healthcare treatment records	This provision of 2020 regs struck down in <i>Victim Rights Law Center v. Cardona et al.</i>, (D. Mass. July 28, 2021) • Held provision invalid due to arbitrary and capricious implementation • Applied country-wide Dept. of Ed no longer enforcing provision. See revisions to TSUS Policy §§ 7.13, 7.17.



Fair and Equitable Treatment of All Parties

- Both Parties must have an Advisor for cross-examination during Hearing's Cross Examination portion.
- Enforce rules of decorum fairly and evenly.
 - ✓ – Rules of Decorum require participants to remain five feet apart; prohibit yelling.
 - ✗ – Rules of Decorum prohibit Respondent from making Complainant “uncomfortable”.
- Determinations must be objective.
 - Cannot be based on Party status or anything other than evaluation of relevant evidence.
- Enforce presumption of non-responsibility until written determination issued.



Drafting the Written Decision

- Decision Makers issue written Determinations after Live Hearings.
 - No set time in Policy.
 - Should be prompt to comply with Title IX regulations and Policy.
- Independent written determination required.
 - Decision Makers can utilize Investigative Reports, but must draw independent conclusions based on available, relevant evidence and the events of the Live Hearing.





Drafting the Written Decision

Decision Maker issues written determinations that:

- Identify all allegations;
- Describe procedural steps in Complaint Process;
- Discuss factual findings supporting determination;
- Reaches conclusions by applying the Sexual Misconduct Policy to facts;
- Provide a responsibility determination and rationale for each allegation;
- Determines appropriate disciplinary sanctions or other remedies; and
- Explains right and process for appeal.

Sexual Misconduct Policy, Section 7.20; 34 C.F.R. § 106.45(b)(7)(ii)



Proposed Determination Outline

- I. Executive Summary
- II. Summary of Allegations and Applicable Policies
- III. Description of all Procedural Steps
- IV. Summary of Relevant Evidence
 - A. Witness statements and testimony
 - B. Witness Credibility Determinations
 - C. Other evidence (e.g., documents, videos)
- V. Finding of Facts Supporting Determination
- VI. Determination Applying Facts to the Policy
- VII. Recommendation/Rationale for Sanctions; Remedy Recommendation
- VIII. Appeal Information





Drafting the Written Decision – Focus on Facts

- ✓ Maintain an objective tone.
- ✓ Based on evidence presented to the Decision Maker in the record and at the Live Hearing.
- ✓ Clearly state the Who, What, Where, When, and Why.
 - Cite to evidence as much as possible; use exhibits.
 - Recognize both inculpatory and exculpatory evidence.
- ✓ Explain evidentiary determinations.
 - Especially if Party disputes relevance determinations for certain evidence.
- ✓ No need to discuss all available evidence or all contradictory, but immaterial facts.



Drafting the Written Decision – Concentrate on Credibility

- Investigator credibility assessments do not bind Decision Makers.
- Assessments:
 - Apply credibility factors to specific statements and witnesses.
 - Be clear about why one Party deemed more/less credible.
- Credibility Factors:
 - Inherent plausibility: Is the testimony believable on its face? Does it make sense?
 - Demeanor: Did the person seem to be telling the truth or lying?
 - Motive to falsify: Did the person have a reason to lie?
 - Corroboration: Is there witness testimony (*e.g.*, eye-witnesses, people who saw person soon after, or people who discussed incident with him/her at the time) or physical evidence (such as written documentation) that corroborates the party's testimony?
 - **Past record: Did the alleged harasser have a history of similar behavior in the past?**



Drafting the Written Decision – Delve into Determinations

- Use clear, direct, statements.
- Based on the appropriate evidentiary standard.
 - Preponderance of the evidence.
- Explain the elements in light of the evidentiary standard.
 - Justify with the record.
- Assume the Written Decision could end up as evidence in further proceedings, such as:
 - Exhibit in a faculty termination proceeding
 - Document produced to the Department of Education OCR
 - Exhibit in a lawsuit



Reminder of the Appropriate Evidentiary Standard

Preponderance of the Evidence means the greater weight and degree of credible evidence. Preponderance of the evidence is the standard for determining allegations of Sexual Misconduct under this Policy. Preponderance of the evidence is satisfied if the Sexual Misconduct is more likely to have occurred than not.

Sexual Misconduct Policy Glossary, pg. 55



Scenario: Evaluate the Determination

All relevant evidence was reviewed under a “preponderance of the evidence” standard to determine if it is more likely than not that Ms. Roe violated the Title IX Sexual Misconduct Policy occurred by engaging in Title IX Sexual Harassment of Mr. Smith.

I find that sending 45 unwelcome text messages to Mr. Smith in three weeks violates the Title IX Sexual Misconduct Policy. The 45 messages were all sent during a shared Chemistry I Lab. The messages’ content escalated from comments about Mr. Smith’s physical appearance and attractiveness to name-calling and threats. Ms. Roe increased the frequency and aggression of the messages after Mr. Smith requested the messages stop. The content of the messages was based on Mr. Smith’s sex, unwelcome, and of such a nature and frequency that a reasonable person would find them objectively severe, pervasive, and objectively unreasonable. Mr. Smith was also denied access to the class because he stopped attending as the messages escalated and did not return until interim measures were put in place.

I find Ms. Roe responsible for the violation. Ms. Roe denies sending the messages and claims it must have been her roommate sending them from Ms. Roe’s iPad that she left at home during the lab. I determined Ms. Roe’s statement was not credible because a) Ms. Roe’s lab partner testified to watching Ms. Roe send the messages, 2) video surveillance footage from the Chemistry lab shows Ms. Doe on her phone at the times the messages were sent to Mr. Roe, and 3) Ms. Doe’s roommate denied sending the messages.



Drafting the Written Decision – Sanctions & Remedies

Possible Sanctions, dependent on gravity and nature and of misconduct and role of parties (student vs. employee), including, for example:

- No-contact orders
- Mandated counseling
- Academic or disciplinary probation
- Suspension or expulsion
- Relevant training
- Expulsion from campus housing (student)
- Termination (employee)
- Sanctions may not be imposed until after appeal deadline. If appealed, Sanctions stayed until appeal concludes (if upheld).
- When discussing Sanctions, Decision Makers must also note whether Complainant receives Component-provided remedies designed to restore and preserve equal access to Educational Programs or Activities.

Sexual Misconduct Policy, Sections 3.12, 7.20, 7.22-7.23

Questions





THE TEXAS
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Title IX Training

Role of Advisors in Investigation and Adjudication of Sexual Misconduct Cases

Darren G. Gibson, Partner
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Michael Best & Friedrich LLP

October 29, 2025





Introduction

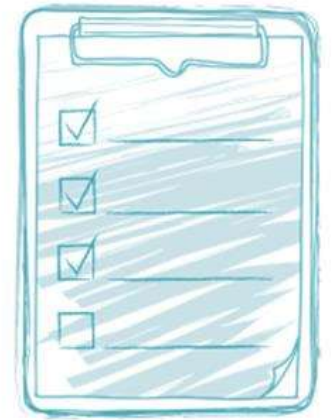
Purpose of today's presentation

- Prepare Advisors to assist Parties in Investigation and Adjudication of Sexual Misconduct Cases
- Training on TSUS's Sexual Misconduct Policy.
- Training on Trauma-Informed Best Practices



Agenda

- Role of Advisors
- Preparing Parties for Interviews
- The Potted Plant Rule
- Inspection and review of evidence and meaningful opportunity to respond
- Live hearings and cross examination
- Avoid Bias
- Trauma Informed Investigations





Role of Advisors

- Parties may choose an Advisor at any point and are free to change Advisors.
- Advisors do not need to be attorneys; however, attorneys may serve as Advisors.



System Wide Sexual Misconduct Policy, Section 7.4



Role of Advisors

- Parties must have an Advisor for a Hearing.
- Parties without Advisors will receive a Component-provided Advisor at no cost to conduct Cross Examination during the Live Hearing.
- Each Advisor must discuss hearing protocols with the Title IX Coordinator prior to the Live Hearing.

Sexual Misconduct Policy, Section 7.4



Title IX and Speech Considerations

- Parties cannot be restricted from discussing allegations or gathering and presenting evidence.
- Parties can be required to maintain confidentiality, especially when dealing with an opposing Party's treatment record.
- Prohibiting witness manipulation and intimidation is not a restriction on speech.
 - Punishing retaliation or other Code of Conduct violations permitted.



Prehearing Investigation

- Parties provided equal opportunity to present witnesses, including fact and expert witnesses, and evidence.
- Advisors cannot directly participate in the investigative interview.
 - Permitted to attend as a support person
 - Can assist Party with generating a list of possible witnesses or evidence before interview
 - Can help Party review Policy to understand rights and responsibilities
- While attorneys may be Advisors, the role of Advisor is quite different. Objections and other litigation devices are not allowed.
 - In fact, they can be disruptive and lead to Investigators to end an interview.





“Potted Plants”

- Advisors may attend interviews or meetings during investigation; however, **they may not actively participate in those meetings.**
- The Advisor acts as a “potted plant” during most proceedings and do not have an active role.
 - Except that Advisors conduct cross examination during Live Hearing.

Sexual Misconduct Policy, Glossary at page 51.





Inspecting & Reviewing Evidence with a Meaningful Chance to Respond

- Prior to issuing Investigative Report, Parties must have opportunity to review and inspect evidence directly related to allegations.
 - Evidence subject to inspection shall be sent to each Party and their advisor.
 - Advisor should carefully review Report to respond and prepare for Hearing.
- Parties entitled to at least 10 calendar days to submit a written response to evidence.
- Evidence may be redacted as necessary to comply with applicable state or federal confidentiality laws (e.g., HIPAA, FERPA).



Sexual Misconduct Policy, Section 7.7.6; 34 C.F.R. § 106.45(b)(5)(vi)





Preparing for the Live Hearing

Reviewing and Responding to Investigative Reports

- Each Party and their Advisor will review the Investigative Report and can submit a response to anything within the Report to the Decision Maker.
 - Opportunity to challenge relevancy of evidence.

Pre-Hearing Submissions

- At least 3 calendar days before the Hearing, Decision Makers need:
 - Any written response to Report
 - Documents and evidence to be used at the Hearing
 - The name of witnesses appearing on a Party's behalf
 - Decision Maker decides whether to allow witnesses not interviewed by the Investigator
 - Initial questions and cross-examination questions for opposing Party and witnesses.



Separate Rooms

- Virtual Live Hearings must utilize technology enabling the Decision Maker and participants to see and hear the proceedings in real time.
- Parties or witnesses may also appear remotely, so long as it is in real time.



Sexual Misconduct Policy, Section 7.18; 34 C.F.R. § 106.45(b)(6)(i)



Cross Examination

- Cross examination are questions posed to opposing Party or witness to:
 - Advance Party's allegations and/or defenses.
 - Assess credibility of opposing Party.
- Advisors conducts cross-examination of opposing Party or Witness.
 - Parties are not allowed to conduct their own cross-examination.
- Cross-examination must adhere to the Rules of Decorum and not disrespect or violate the dignity of the participant questioned.



Cross Examination

- Cross examination occurs live and in real time, but Decision Makers determine if a question is relevant before it can be answered.
- Cross examination question procedure:
 - The question is asked;
 - Decision Makers state whether the question is relevant;
 - Not relevant are excluded, and Decision Makers explain why.
 - Relevant questions answered by Party or witness.
- Advisors may not object to determinations but may request clarification.

Sexual Misconduct Policy, Sections 7.15-7.16





Written Determination and Appeal

- Decision Makers issue written determination that includes findings of fact, findings as to alleged policy violations, and sanctions, if any.
- Parties may appeal Determinations or dismissals based on:
 - Procedural irregularity affecting outcome;
 - New evidence not previously available;
 - A conflict of interest or bias of Title IX Coordinator, Investigator, Hearing Officer, or Decision-Maker; or
 - Sanctions disproportionate to written decision.

Sexual Misconduct Policy, Section 7.20; 7.21



The Need for Training on a Trauma-Informed Approach





What is a Trauma Informed Investigation?

- Considers the potential neurobiological effects of trauma
- Goal: objective and impartial investigation that minimizes reliance on sex stereotypes and generalizations



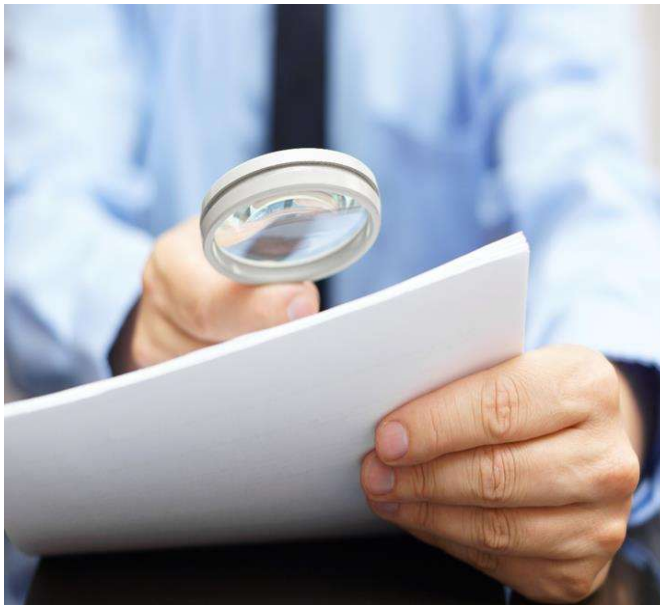


DOE Statement of Trauma-Informed Practices

- “While the final regulations do not use the term ‘trauma-informed,’ nothing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.”
 - Preamble to Title IX Regulations, at page 591
- “While trauma-informed approaches that are grounded in science benefit sexual violence investigations, trauma-informed techniques should be undertaken contemporaneously with a rigorous commitment to a fair process for all parties.”
 - Candice Jackson, Deputy Asst. Sec., DOE, NACUA Briefing (Sept. 28, 2017)



Why Follow Trauma-Informed Practices?



- Safety: Avoid re-traumatizing interviewees and perpetuating a hostile environment
- Accountability: Conduct better investigations
- Required by state law for university peace officers.
 - Tex. Educ. Code § 51.288 (H.B. 1735)



What is Trauma?

Psychological trauma is the unique individual experience of an event or enduring conditions, in which:

- The individual's ability to integrate his/her emotional experience is overwhelmed, or
- The individual experiences (subjectively) a threat to life, bodily integrity, or sanity.

“[T]rauma is defined by the experience of the survivor. Two people could undergo the same noxious event and one person might be traumatized while the other person remained relatively unscathed.”

– *Esther Giller, What is Psychological Trauma?, Sidran Institute (1999)*





Potential Effects of Trauma

- Scientists have proposed that neurobiological effects of trauma result in brain chemistry interfering with the brain function in encoding of memory.
- Theory is that individuals who experience trauma may be unable to recall events in chronological order; may not recall some details at all; ability to recall details may improve over time; and affect may initially seem evasive or counterintuitive.
- Response to trauma may include fighting, fleeing, or freezing.

See, e.g., Rebecca Campbell, Ph.D., “*The Neurobiology of Sexual Assault*”, Nat’l Inst. for Justice Research for the Real World Seminar (Dec. 3, 2012); Harvey Simon, M.D., “*Stress & Anxiety – The Body’s Response*”, N.Y. Times (Jan. 30, 2013); James W. Hopper., “*Why Many Rape Victims Don’t Fight or Yell*”, Wash. Post (June 23, 2015).



The Impact of Trauma

Factors that tend to increase the traumatic impact of an event:

- Severity
- If it is interpersonal (as opposed to non-interpersonal, such as accidents and natural disasters)
 - Interpersonal traumas may impact interviewee's views regarding safety, intimacy, and trustworthiness of others.
- When it is chronic or repeated
 - Persistent traumas may leave the survivor feeling overwhelmed, helpless, and with a sense that the trauma is inescapable.



Critique of Trauma-Informed Theory

- September 2017, “The Bad Science Behind Campus Response to Sexual Assault,” The Atlantic.
- Argues trauma-informed, neurobiology-focused approach is based on “bad science.”
- Presents alternative views by scientists that “[h]igh levels of emotional stress enhance explicit, declarative memory for the trauma itself; they do not impair it.”
- Article elicited response from yet other scientists arguing in favor of psychological effects on trauma.

See Emily Yoffe, “The Bad Science Behind Campus Response to Sexual Assault,” The Atlantic (Sept. 8, 2017); Jim Hopper, “Sexual Assault and Neuroscience: Alarmist Claims vs. Facts,” Psychology Today (posted January 22, 2018).



Trauma-Informed Grievance Procedures

- Investigators and adjudicators need not determine precise effects of trauma to the case.
 - They need to understand the potential effects of trauma and check personal biases regarding potential impact.
- Avoid assuming individuals are “lying” if unable to recall every detail in chronological manner.
- Also do not accept everything Complainant recalls as absolutely “true,” but also do not avoid examining inconsistencies.
- Avoid assumptions of truthfulness or responsibility based on status as “victim” and “perpetrator”.
- Anticipate range of behavior during interview and allow for breaks.





Trauma Informed Tips

- Recognize parties may be processing traumatic events during the grievance process.
- Think about the surroundings and atmosphere during interviews / meetings to avoid possible re-traumatization.
- Avoid victim-blaming/shaming language.
- Expect and allow for a variety of reactions.
- Be mindful of first impressions with your advisee.
- Be willing to refer your advisee to available resources (e.g., counseling).



Resources for Advisors

- Today's Presentation.
- TSUS System Wide Sexual Misconduct Policy.
- Related TSUS Policies regarding Sexual Misconduct (Non-Title IX) and Discrimination and Harassment.
- Federal Regulations, 34 C.F.R. 106.30, 106.44, 106.45.

Questions



Break





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Title IX Training

Mock Live Hearing

Darren G. Gibson, Partner
Emi M. Passini, Senior Associate
Michael Best & Friedrich LLP

October 29, 2025





Mock Live Hearing

- Template Hearing Script
- Introductions by Decision Maker / Hearing Officer
- Opening statements by parties
- Questioning of parties and relevancy determinations
- Handling aggressive advisor and objections
- Testimony by the investigator
- Closing statements by parties
- Template Written Decision
- Template Appeal Decision



Template Hearing Script

Texas State University System Title IX Sexual Misconduct Hearing Script

Parties Who May be Present at the Hearing:

- Complainant
- Complainant's Advisor
- Respondent
- Respondent's Advisor
- Decision Maker
- Title IX Coordinator
- Investigator
- Witnesses, as needed

Introduction of the Participants and Hearing Policies:

After everyone is seated and the recorder is turned on, the Decision Maker will facilitate introductions of the Complainant, Respondent, advisors, and others present for the Hearing.

Introduction of Participants

Decision Maker: This is a Title IX Sexual Misconduct Panel Hearing at (Component) University for (Respondent's full name) on (date) at (time). The Complainant is (Complainant's full name). I am (Decision Maker's full name), and I will serve as the Decision Maker for today's hearing. At this time, will all those present introduce themselves?

Go around room and have all those present introduce themselves and their role.

Educational Purpose of Hearing

Chairperson: The Hearing will be conducted in accordance with the procedures outlined in the section 7 of the Texas State University System Sexual Misconduct Policy and



Handling Topics That May Come Up

- Other pending or prior complaints against Respondent
- Other pending or prior complaints made by Complainant
- Prior sexual history between Complainant and Respondent
- Complainant's prior sexual history with others
- Respondent's prior sexual history with others
- Respondent's overall student misconduct history, which may be relevant to sanctions
- Employee's failure to report under SB 212



How to Ask Questions in Live Hearings

- By the Live Hearing, evidence has been presented in report and questions should focus on disputed key facts and relevant issues to be decided, not a full restatement of undisputed facts.
 - E.g., in a sexual assault case, questions may focus solely on consent.
- Decision maker should ask impartial questions that go directly to key issues of responsibility and/or credibility.
- Party's own advisors should provide party opportunity to explain key facts and events and potential gaps or conflicts in the evidentiary record.
- Opposite advisor should *respectfully* ask targeted questions to highlight conflicting evidence, inconsistencies, and/or credibility issues.
- Questions should be in chronological order. Don't start with consent and then go back to how much alcohol was consumed beforehand.



Tips for Questions – Predicate Question, Follow-Up, and Close the Loop

- Ask simple, direct questions, one question at a time, not complex, compound questions.
- First, ask the predicate question to establish a fact. Then ask the follow-up and close the loop.
 - Good question: Did Complainant express consent to sex, either by words or actions, at any time during the night in question?
 - How did Complainant express consent?
 - Did Complaint do anything else to express consent that night?
 - Bad question: So you stated in your interview that Complainant consented but you didn't say how. Can you tell us how Complainant consented? It could have been either by her words or actions. In summary, did the Complainant say anything or do anything that made you think she was consenting to sex?



Tips for Questions – Short Questions in Chronological Order

- Ask short, simple questions in chronological order to describe an event.
- Take separate incidents one-by-one, if possible.
 - Good question: When was the first time that Respondent touched you during your Voice Studio lessons?
 - Can you describe what happened that first time?
 - How did you respond?
 - Did Respondent offer any explanation for his conduct?
 - Is there anything else we should know about this incident?
 - Bad question: So you allege that Respondent touched you during Voice Studio. Please tell us everything that happened, including where he touched you, how many times, and whether you objected each time.



Tips for Questions – Cross Examination

- Ask short, simple questions. Leading questions okay. Treat parties respectfully.
 - Good questions:
 - Isn't it true that you didn't file your complaint until three months after the alleged assault, after Respondent broke up with you?
 - You initially told investigators you didn't attend the party where Complainant was drinking and only admitted to being shown pictures of you being there, right?
 - Bad questions:
 - Since you didn't file your complaint until Respondent broke up with, it seems like you're just mad at him. Isn't that what's happening here?
 - Why should anyone believe you when you lied to the investigator about being at the party?