



Title IX Formal Grievance Procedure

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What We Will Cover



Title IX Team

Investigators

Decision-Makers

Assessing Credibility

Counteracting Bias

Understanding Relevancy

Appeals Officers



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Content Advisory

Please note that some of the topics and content of this presentation is explicit and may be triggering for some individuals.

Viewer discretion is advised. If at any time you need to step away, please feel free to do so.

Thank you for your understanding and participation in this important conversation.



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What are the Roles in the Title IX Grievance Process?



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Title IX Team

What Roles Can Overlap

- Title IX Coordinator/Investigator
- Title IX Coordinator/Informal Resolution Officer

What Roles Cannot Overlap

- Title IX Coordinator/Decision-Maker
- Title IX Coordinator/Appeals Officer
- Investigator/Decision-Maker
- Investigator/Appeals Officer
- Investigator/Informal Resolution Officer
- Decision-Maker/Appeals Officer
- Decision-Maker/Informal Resolution Officer



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What Can Be Outsourced?

Investigator

Decision-maker

Informal Resolution Officer

Appeals Officer



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Responsibilities of All Employees

- Identify conduct.
- Report conduct.
- This does not relieve an employee of their mandated reporter duties!



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GROUP ACTIVITY - Case Study



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GROUP ACTIVITY – Case Study

On Friday, June 13th, around 11:15 a.m., you are in your office answering some emails, and Casey (a female junior) comes in and shows you a video of Robert (a male junior) rubbing her back and shoulders. Casey said she asked a friend to record the video yesterday during group work in fourth period. She says that Robert has been touching her in this manner all week, but yesterday she was seated, and he squeezed her above the knee to get her attention. She says the first time Robert touched her was when she ran into him over the holiday break at a resort in Mexico, except that time was under her swimsuit.



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GROUP ACTIVITY – Case Study

What actions might you consider taking right away?



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Title IX Coordinator

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Title IX Coordinator's Duties

- Receives and oversees.
- Explains options and process to complainant.*
- Offers supportive measures.*
- Determines dismissal of complaints.
- Evaluates corrective actions.*
- Identifies systemic issues.
- Ensures overall Title IX compliance.

*May be designated to a trained designee



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Title IX Coordinator - Contact the Complainant

Intake Meeting with Complainant

- Gather facts (think about scope & notice).
- Supportive measures.
- Explain Title IX options.
- Discuss the District's policy that prohibits retaliation.



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Supportive Measures

Designed to restore or preserve equal access to the educational program.

Cannot be disciplinary/punitive.

Cannot be retaliatory.

Offered to Complainant and Respondent.*

Determined on a case-by-case basis.



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Do You Have a “Formal” Title IX Complaint?

Document filed by
Complainant.

OR

Signed by Title IX
Coordinator.



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Formal Title IX Complaint – Filed by Title IX Coordinator

Analysis

- Deliberate Indifference
 - Threats
 - Serial predation
 - Violence
 - Weapons

Questions

- Will Complainant participate?
- How do we prioritize agency and autonomy, especially for adult Complainants?



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Does it Meet the Tests?

Definition of Title IX
Sexual Harassment.

AND

Title IX Jurisdiction.



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TEST 1: If the Alleged Conduct is True, Does it Rise to the Level of Sexual Harassment Under Title IX?

Employee Quid Pro Quo;

SPOO (severe, pervasive **and** objectively offensive); OR

Sexual assault, dating violence, domestic violence
or stalking.

***If the answer is
no, you must
dismiss the
complaint or
allegations
therein. If yes,
move to Test 2.**



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TEST 2: Is there Title IX Jurisdiction Over the Conduct?

Substantial control over both

- Respondent; and
- Context.

Within the United States.

Participating/attempting to participate at the time the complaint is filed.

***If the answer is no, you must dismiss the complaint or allegations therein.**



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Corrective Actions



- Staff/student discipline.
- Ensuring no retaliation.
- Additional support for involved parties.
- Generalized training for staff/students in class, school, or district-wide.
- Generalized notification of policies/rules.
- Increased monitoring and check-ins.
- Changes to District practice.



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Investigators

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Investigator's Duties

- Interviews parties and witnesses.
- Gathers and reviews evidence.
- Allows parties to inspect, review, and respond to all evidence directly related to the complaint.
- Considers all parties' responses.
- Prepares investigation report that summarizes relevant evidence.

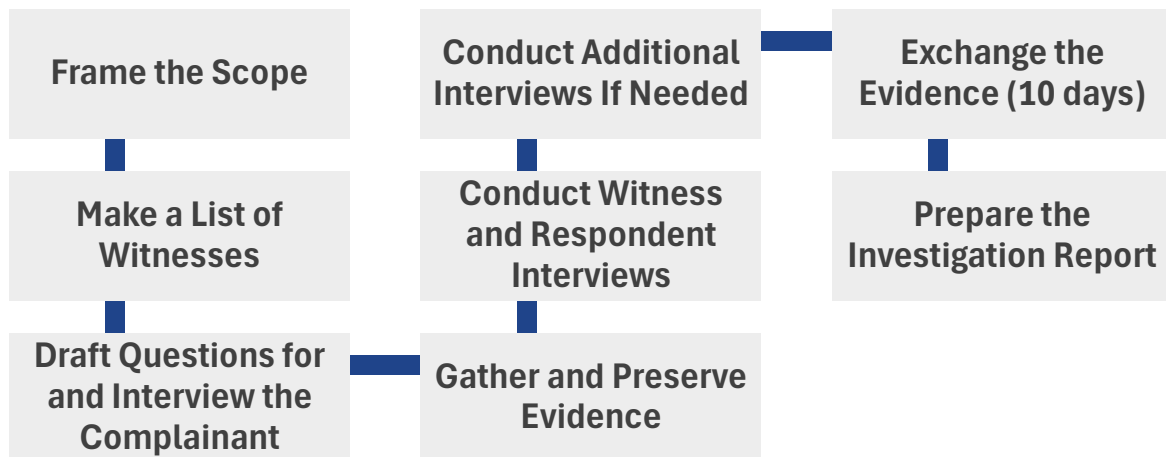


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How to Conduct an Effective Title IX Investigation



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Frame the Scope



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Frame the Scope of the Investigation

What are the allegations?

- Prepare clear and concise “yes or no” questions that the investigation will answer.
- Do not include legal terms such as “discriminated,” “harassed,” or “retaliated.”
- Avoid ambiguous and subjective words such as “inappropriate” and “unfair.”
- Make sure all relevant claims are included in the allegations. (Or, if you excluded something, be prepared to explain why.)

Practice Tip: If you are not sure, have someone from the District Office review your allegations before proceeding. This will save you time in the long run.



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Frame the Scope of the Investigation

- **Problematic:** Did Suzie create a hostile work environment for Joe?
 - *****Break this up into separate allegations focusing on whether or not the alleged conduct occurred.**
- **Best Practice:** On May 15, 2021, did Suzie tell Joe that she wanted to go on a date with him?
- **Best Practice:** On May 17, 2021, did Suzie touch Joe on his thigh?
- **Best Practice:** On May 20, 2021, did Suzie deny Joe’s vacation request?



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Frame the Scope of the Investigation

Factual Findings v. Legal Considerations

- Don't focus allegations for your on whether Respondent committed "sexual harassment" or violated some other law; instead, focus on what it is alleged the Respondent did or did not do.
 - **Example:**
 - **Factual Findings:** *"Mr. Smith caressed Bella's back on one occasion, and the conduct was unwelcome."* vs.
 - **Legal Conclusions:** *"Mr. Smith sexually harassed Bella."*



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GROUP ACTIVITY – Case Study

Write out allegations for this investigation.



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Make a Witness List

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Make a Witness List

Considerations {

- Consider potential conflicts of interest.
- Consider location and timing.

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Make a Witness List

Order of Interviews



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Make a Witness List



Lybarger/Spielbauer Warning/Rights

- Fifth Amendment Protection Against Self-Incrimination.
- Spielbauer/Lybarger Warning – Public employees may be compelled to answer potentially incriminating questions about their job performance as long as they are not required to waive their constitutional protections in a criminal matter.



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GROUP ACTIVITY – Case Study

Who are the people you expect to interview?



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Draft Interview Outlines



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Outline Interviews

- Start with an outline of questions but be flexible!
- Use the outline as more of a roadmap for issues you need to touch on with each party or witness.
- If there are a series of incidents, consider a linear roadmap.
- Keep in mind big picture goals.
- **If possible, have a 2nd administrator in the room.**



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Outline Interviews

Tell me what happened. **Explain** why you're upset. **Describe** how it made you feel.

Who? What? Where?
When? How? Why?

Were you__?
Where was__?
Did you__?



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Outline Interviews

Wrap up questions:

- Is there anything else I should know?
- Do you have any documents that I might find helpful/that are related to anything we talked about?
- Who else do you think it would be helpful for me to speak with?



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A photograph of two women sitting at a light-colored wooden table in a modern office setting. The woman on the left, with long brown hair, is wearing a dark blazer and is gesturing with her hands while speaking. The woman on the right, with short dark hair, is wearing a grey t-shirt and is listening attentively, holding a blue folder. On the table are a glass of water, a glass of orange juice, and some papers. The background features light wood paneling and a wooden shelving unit.

Conduct Interviews



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Conduct Interviews – Do Not Promise Confidentiality



Confidentiality cannot be promised.

All evidence will be shared with the parties.

Both parties will have an equal opportunity to inspect, review, and respond to the evidence.



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Conduct Interviews

Common Questions and Issues:

- What if the witness is underage?
- What if the witness is biased or lies?
- Do all witnesses get a union representative or support person?
- What if the witness refuses to be interviewed or wants their identity to remain confidential?
- What if the police are investigating?



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Conduct Interviews – Trauma Informed Approach

Trauma impacts the brain.

Trauma can impact participation and responses.



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Conduct Interviews – Trauma-Informed Approach

- Do NOT Victim-Blame.
- Choose a Comfortable Setting That is Not Triggering.
- Build Rapport.
- Allow the Witness to Freely Speak and Then Ask Follow Up Questions.
- Display compassion and sincerity.
- Listen attentively and actively without interruption.
- Ask Difficult Questions With Care - Explain Why You're Asking the Question.



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Conduct Interviews



- Recognize Trauma-Related Dissociation.
- Some complainants may express fears and concerns.
- Some complainants may exhibit signs of detachment and disconnection. (dissociation)
- Triggering past trauma can result in severe forms of dissociation including losing time, forgetting who/where you are, going blank.



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GROUP ACTIVITY – Case Study

Should you use a trauma-informed approach when interviewing Robert?



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Outline Interviews – Trauma-Informed Approach

Sample Interview Questions:

- “Did you tell anyone about what happened to you?”
- “Tell me how that made you feel.”
- “Did you ever feel like this before?”
- “What was your thought process at that time?”
- “I’m asking you this to try to understand...”



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Conduct Interviews – Trauma-Informed Approach

Don't insert your opinion into the victim's experience.

Don't make assumptions about what the victim needs or wants.

Avoid questions that can be answered with one-word or short responses.

Avoid leading questions.


- “And then you did this...” v. “What happened next?”



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Gather and Preserve Evidence

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Gather and Preserve Evidence



- The Title IX investigator gathers evidence.
 - The Decision-maker makes the findings.
 - The Investigator may be asked to make recommended findings of fact.

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Gather and Preserve Evidence

Emails	Attendance Records
Security Records	Social Media
Complaint	Internet Usage and Websites Visited
Voicemail Messages/ Text Messages	Pictures
Audio/Video	Observing Locations

***Note:** If you receive a document from a witness, make sure you note who provided the document and how it was received.



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Gather and Preserve Evidence

District cannot access or use a party's medical, psychological or other similar records unless they obtain the party's voluntary, written consent.

District cannot restrict parties from discussing allegations or gathering and presenting relevant evidence.

District must provide an opportunity for parties to present fact and expert witnesses and other exculpatory or inculpatory evidence.



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Gather and Preserve Evidence

Child Pornography:

- Call School Resource Officer, Police Department, or Safety & Security Department right away before touching anything.
- Third party witness.
- Track chain of custody.

Warning: It is a state and federal crime to possess and/or distribute child pornography. There's no exception for school administrators or investigators.



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During the investigation, Robert submits text messages that he says demonstrate that Casey was flirting with him. Do you need a follow-up interview with Casey?



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Determine if Additional Interviews are Needed.

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Conduct Additional Interviews if Needed

Review your witness summaries and evidence and ask yourself if there are any holes.

Do you have all the information you need to thoroughly address each allegation?

It is OK to conduct follow-up interviews of witnesses if needed.

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Exchange Evidence

- Send the parties **all evidence** directly related to the allegations raised in the formal complaint.
 - Includes evidence the District does not intend to rely on in reaching its decision regarding responsibility.
 - Use of a **draft** investigation report or report of evidence.
- Must be done prior to the completion of the investigation report.
- Parties must be given at least **10 days** to respond to the evidence, which must be considered by the investigator.

Note: The investigator should work with the Title IX Coordinator to securely transmit the evidence to the parties, and to assess whether redactions may be appropriate.

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Investigation Report

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Investigation Report

The final investigation report should be prepared by the investigator and must **summarize relevant evidence**.

Parties must be offered the opportunity to provide a written response to the investigation report.

Must be sent to the parties at least 10 days before a written determination regarding responsibility is issued by the decision-maker.

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Investigation Report – Recommended Content

- Identify the **date** the investigation commenced.
 - Identify the **investigator**.
 - Identify **supportive measures** offered to and accepted by the parties.
 - Summary of the investigation **process**.
 - Identify the **legal standard** of review applied to the review of evidence/ applicable policies.
 - Identify number of/identity of **witnesses**.
 - Summary of **evidence** – documents and witness statements.
- You may be asked to make recommended, non-binding findings of fact and responsibility under District policies and codes of conduct.



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Decision-Makers

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Decision-Maker's Duties (K-12)

- Reviews investigation report.
- Allows parties to submit relevant written questions.
- Asks questions they deem relevant or provides an explanation as to why when a question is deemed irrelevant.
- Makes determination about responsibility.
- Prepares written determination.



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Submission of Written Questions (K-12)

- The decision-maker must allow parties **10 days** to submit written, **relevant** questions that they want to ask any other party or witness.
- Once the parties are provided with the answers, the decision-maker must allow for additional, limited follow-up questions from each party.
- Decision-maker determines relevancy or explains why questions were deemed irrelevant.



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Decision-Maker's Duties (Higher Education)

- Reviews investigation report.
- Conducts hearing.
- Reviews questions for relevancy (indirect questioning).
 - Explains if irrelevant.
- Makes determination about responsibility.
- Prepares written determination.



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Live Hearing (Higher Education)



- Written notice
- Live hearing required
- In-person or virtual
- Recorded or transcribed
- Advisors
- Cross-examination*

*SB 493 prohibits direct cross-examination by a party or their advisor.



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Live Hearing (Higher Education)



- Decision-Maker:
 - Determines relevancy of questions,
 - Can ask own questions, and
 - Objectively evaluates evidence.
- Hearing Officer vs. Decision-Maker



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Written Determination

Identification of the allegations potentially constituting sexual harassment.

A description of the procedural steps taken from formal complaint through the determination of responsibility.

Findings of Fact supporting the determination.

Conclusions regarding the application of the recipient's code of conduct to the facts.



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Written Determination



- **Rationale** for each finding and conclusion, including a **determination of responsibility** for each allegation.
- Statement of **potential disciplinary sanctions**.
- **Appeal rights**.



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Written Determination

- Focus on whether the alleged conduct occurred.
- Avoid legal conclusions.
- **Examples:**
 - **PROBLEMATIC:** Sustained. “Cathy harassed Holly.”
 - **BEST PRACTICE:** Sustained. Cathy told Holly “If you going on a date with me, I will promote you next month.”



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Legal Framework

Preponderance of the Evidence.



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Writing the Analysis

- Topic sentence.
- Summarize Complainant's version of events (address credibility).
- Summarize Respondent's version of events (address credibility).
- Summarize independent evidence (witness statements, documents, etc.) and explain how it corroborates or contradicts the parties' version of events.
- Factual Finding (i.e., sustained, not sustained, partially sustained).



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GROUP ACTIVITY – Case Study

Before the Decision Maker makes a determination about responsibility, Robert leaves the District to do an independent homeschooling program.

What should the District do?



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Assessing Credibility

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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 (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?



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Credibility Factors

- **Past record:** Did the alleged harasser have a history of similar behavior in the past?
- **Opportunity and capacity to observe/actual knowledge:** Did the person see it themselves, or are they recounting what someone else told them?
- **Consistent or inconsistent statements:** Is the person changing their story? Did the person say the same thing to three other witnesses?
- **Reputation for veracity or deceit:** Does this person have a reputation of lying, cheating, etc.?
- **Bias:** Is this person the Complainant's best friend? Does the person have their own complaint against Respondent?



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Common Challenges to Complainant's Credibility



Incomplete, inconsistent and untrue statements

Lack of physical resistance

Delayed reporting



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Credibility Challenge: Incomplete, Inconsistent and Untrue Statements

- Common neurobiological effects of trauma: perceptual narrowing, loss of cognitive and motor skills.
- Discomfort providing sexual or other personal details during interview.
- Having to describe sexual assault to many different people.
- Fear of being blamed and/or doubted.
- Fear of punishment for illegal behavior e.g. underage drinking, drug use.



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Credibility Challenge: Lack of Physical Resistance

Majority of sexual assaults are committed by someone known to the complainant.

Most common response is not physical resistance but often feelings of betrayal, confusion, disorientation, shame and self-blame.

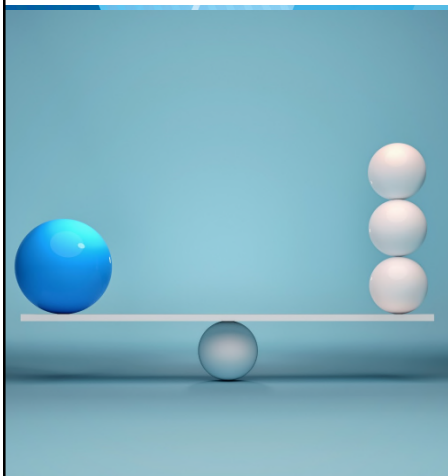


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Credibility Challenge: Delayed Reporting



Victims need time to process what has happened to them.

Perpetrators of sexual assault are often known to victims.

Fear.

Self-blame.



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GROUP ACTIVITY – Case Study

Robert tells you during his interview that Casey has asked him every day to rub her back and shoulders during fourth period. What would you consider when weighing the credibility of his statement?



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Counteracting Bias

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Implicit Bias

- Our unconscious mind makes shortcuts based on culture, backgrounds, and experiences.
- These shortcuts can sometimes be perceived as instinct.
- Those shortcuts can be fallible and based on biases.
- Fallible shortcuts can lead to fallible judgements of people based on irrelevant markers.



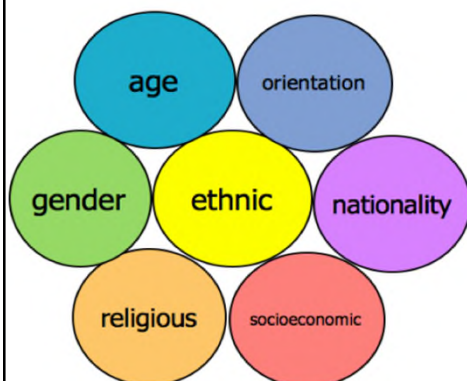
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Implicit Bias

Rings of Culture



(Hollie, 2015)

- Culture, background, and experiences shape our perception & socialization.
- Socialization starts at birth and continues throughout life.
- It is often based on social stereotypes that have led to an association between a group and a trait.
- Numerous studies have demonstrated that certain traditionally disadvantaged groups are treated differently, to their detriment.
- Many (if not most) of the people treating others differently are unaware of doing so.



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Affinity Bias

- Tendency to favor people who share similar interests, backgrounds, and experiences with us.
 - Impact your interaction with parties and witnesses.
 - Impact your credibility analysis.
 - Impact the weight you give their statement.



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Confirmation Bias

Confirmation bias, or the selective collection of evidence, is our subconscious tendency to seek and interpret information and other evidence in ways that affirm our existing beliefs, ideas, expectations, and/or hypotheses.

Implicit/Affinity Bias



Confirmation Bias



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Intersectionality

- Intersectionality is the complex, cumulative way in which the effects of multiple forms of discrimination (such as racism, sexism, and classism) combine, overlap, or intersect, especially in the experience of marginalized individuals or groups.
- Many cases involve complainant's word against respondent's word.
- Intersectionality of categories to which complainant, respondent and witnesses belong may inadvertently affect Investigator's/Decision-maker's credibility assessments.
- **Bias check:** Has the race/ethnicity/sexual orientation of complainant, respondent and/or witnesses influenced your assessment of credibility.



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Suggestions to Counteracting Bias



- Actively consider an alternative hypothesis or why a favored hypothesis could be wrong.
- The process of writing might challenge the investigator to assess a decision more carefully.
- Have findings peer-reviewed.
- Good investigative skills and practices.
- Open-ended and non-leading questions.



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GROUP ACTIVITY – Case Study

How should an investigator respond if Robert says, “You are biased against me and working to protect the District.”



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GROUP ACTIVITY – Case Study



Discuss whether the following facts impact your assessment of Casey's credibility in this matter:

- Casey's teacher shares that Casey previously fabricated a story to get out of turning in an assignment.
- The District is aware that Casey's father has been in and out of rehab, and that Casey was subjected to abuse as a young child.
- Casey's friend shares that Casey recently broke up with Robert's friend. When Casey broke up with Robert's friend, there was a lot of animosity between them.



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Understanding Relevancy

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Relevant Evidence

Relevant evidence includes evidence that is “inculpatory” or “exculpatory”

Inculpatory Evidence:
Evidence that shows or tends to show, a person’s involvement in an act

Exculpatory Evidence:
Evidence tending to excuse, justify, or absolve an alleged act or guilt

Relevant evidence must be **objectively evaluated** by investigators and decision-makers.



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Limitations on Relevance

Information protected by any legally recognized privilege cannot be used; no party's treatment records may be used without that party's voluntary, written consent.

When evidence is duplicative of other evidence, it may be deemed not relevant.

A complainant's sexual predisposition or prior sexual behavior are not relevant.



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Limitations on Relevance

A complainant's prior sexual behavior is irrelevant unless used:

To prove that someone other than the respondent committed the conduct alleged by the complainant, or

To prove consent, if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent.



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GROUP ACTIVITY – Case Study

Robert tells you during his interview that, yes, he touched Casey, but only because she had asked him in Mexico to touch her under her bathing suit. Is this relevant, if it happened outside of the United States?



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GROUP ACTIVITY – Case Study

Discuss whether the following facts are relevant to the investigation:

- Robert's teacher shares that Robert is known for being a very kind and helpful student to everyone in class.
- A student reports that there is a rumor that Casey and Robert "made out" during a school dance earlier in the year.
- Casey and Robert were seated next to each other in class and there was approximately 2 feet between their seats.



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Appeals Officers

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Responsibilities of the Appeals Officer:

- Evaluates any appeal request made by the complainant or respondent.
- Makes a decision on the appeal and issues a written decision.



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Appeal Rights for Both Parties at the District

Parties may appeal the written determination on the following bases:

1. Procedural irregularity;
 2. New evidence that was not reasonably available earlier;
 3. Title IX personnel had a conflict of interest or bias.
- ❖ Students/employees may also be afforded the right to file a complaint or an appeal with federal and/or state agencies (e.g. OCR, CDE, DFEH, EEOC).



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GROUP ACTIVITY – Case Study

Robert is found responsible for inappropriate touching that constitutes sexual harassment under Title IX. He appeals the determination. Which of the following can serve as the appeals officer?


- Title IX Coordinator
- Investigator
- Decision-maker



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Takeaways

- Be aware of the responsibilities of your role on the Title IX team.
- Work with the Title IX Coordinator to assess complaint procedure.
- Offer supportive measures as appropriate.
- Use a trauma-informed approach.
- Consider potential biases.
- Ask for help! Don't go at it alone, seek help from your Title IX response team.

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Questions?

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