

T9 Mastered Essentials: Online Training on Investigating Title IX Complaints

Course Material
June 14-15, 2022



Presented by T9 Mastered, LLC
a joint venture of Public Interest Investigations, Inc. and
Sue Ann Van Dermynen, Esq. and Eli Makus, Esq.



T9 Mastered Essentials: Online Training on Investigating Title IX Complaints

Resource Materials

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Biographies

Natasha Baker is the Managing Attorney of Novus Law Firm, Inc., a Bay Area law firm that uses legal technology to deliver efficient legal advice on issues of labor, employment and higher education law. Natasha regularly advises and trains institutions of higher education and other employers around the country on conducting an effective response to campus sexual violence and harassment. She also conducts program and policy reviews on implementing sexual harassment laws, including Title IX and VAWA.



Additionally, Natasha is an instructor with several organizations, including the SUNY Student Conduct Institute, where she prepared the modules on California sexual harassment laws as applied to students and employees. She is a frequent speaker for higher education associations, including the National Association of College & University Attorneys (NACUA) and is an instructor in the NACUA course, “Conducting Effective Internal Investigations.” She was a contributor to the SUNY Joint Guidance on the 2020 Title IX Sexual Harassment Regulations, having provided comments to the Department of Education for several organizations during the notice and comment period.

Dr. Brenda Ingram is a licensed clinical social worker who has over 30 years of working in the mental health and education fields specializing in trauma and cultural competence. She is the Director of Relationship and Sexual Violence Prevention and Services at the Student Counseling Center, Department of Psychiatry and Behavioral Sciences, USC Keck School of Medicine, where she is also a Clinical Assistant Professor.



She was formerly the Director of Clinical Services for Peace Over Violence, a non-profit that provides prevention and intervention for survivors of interpersonal violence and the Clinical Consultant/Coordinator for the YWCA Sexual Assault Crisis Services Program. She received her BA in psychology from UCLA, her Master of Social Work from California State University, Sacramento and Doctorate of Education from the University of Phoenix. She has been a consultant and trainer for various social service, mental health, criminal justice, law enforcement, and public health organizations on traumatic stress.

Liz Paris is a Partner with Van Dermyden Maddux. She is licensed to practice law in the State of California, and is certified as a Senior Professional in Human Resources (SPHR).



Prior to joining Van Dermyden Maddux, Liz was employed at UC Davis where she routinely provided policy and contract interpretation to management and staff, responded to grievances and complaints, acted as the University Advocate for administrative hearings, and negotiated contracts with labor unions. Additionally, she conducted investigations and fact-findings and served as a Hearing Officer in student discipline hearings. Prior to law school, Liz worked in Human Resources for various companies, providing advice and assistance with recruitment, hiring, termination, and performance management.

Liz is also an experienced investigator in Title IX sexual misconduct claims. She has investigated cases involving underage Complainants, multiple Respondents, and allegations involving incapacitation and inability to consent. Liz understands best practices in the Title IX arena, and the challenges facing schools and parties when sexual violence allegations surface.

Liz frequently serves as an Appeal Hearing Officer for Title IX cases. In this role, Liz reviews campus responses to Title IX allegations within the framework of the individual school's appeal process. In her deliberations, she considers whether the administration's response to claims of sexual misconduct were compliant with policies meant to provide a safe campus for students. Liz has overseen cases involving dating violence, drug abuse, sexual assault, and incapacitation. She has experience questioning parties using trauma-informed techniques, making admissibility and relevance decisions, and issuing well-reasoned, thorough decisions.

Additionally, Liz has investigated matters at K-12 Districts, including allegations involving discrimination and compliance. Her investigations have included interviews of administration, classified staff, as well as paraeducators.

Liz graduated from McGeorge School of Law in 2012 and earned an undergraduate degree from UC Davis.

Keith Rohman is the founder and president of Public Interest Investigations, Inc., in Los Angeles, a legal investigations firm that has served educational institutions, public-sector employers, corporations, and the legal community since 1984. He has worked as an investigator in both the public and private sectors for more than 30 years.



During his career, Keith has been involved in numerous high-profile cases, including investigations involving the torture of prisoners at Abu Ghraib; the role of Blackwater, Inc., in the mass shooting of Iraqi citizens; the Rodney King case; and the enslavement of dozens of Thai workers in an El Monte, California, sweatshop. Keith has also conducted investigations in death penalty cases in California, Utah, Alaska, Arizona, and Washington.

On campuses, Keith has investigated allegations of rape and other sexual assaults under Title IX at several Southern California campuses. He was the principal investigator for attorneys in landmark litigation filed on behalf of service women and men sexually assaulted in the U.S. military. In the workplace, Keith has conducted third-party investigations into allegations of sexual harassment, sexual assault, discrimination, and retaliation for private- and public-sector employers, including school districts and universities.

Keith is the past President of the Association of Workplace Investigators (AWI), a professional membership association for attorneys, human resource professionals, private investigators, and others who conduct or manage workplace investigations. Additionally, Keith is an Adjunct Professor of Law at Loyola Law School, where he teaches fact investigation. Previously, he was appointed by the L.A. County Board of Supervisors to the Equity Oversight Panel (EOP) of the Los Angeles Sheriff's Department, a civilian oversight board that oversees Internal Affairs investigations.

Keith has appeared as a guest on "CNN" and "Good Morning, America" and has been quoted in *The New Yorker*, *Newsweek*, and the *Los Angeles Times*. His articles have appeared in the *Cardozo Law Review* (Keith Rohman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 2009 *Cardozo L. Rev. de novo* 96), *Los Angeles Daily Journal* and the *Daily News*.

Nora Rohman has been an investigator at Public Interest Investigations, Inc., since 2013. Her cases have focused on campus investigations involving sexual misconduct allegations; workplace investigations into complaints of harassment, discrimination, and/or retaliation; and mitigation investigations for death penalty matters, both at the trial and appellate levels.



An engaging lecturer and trainer, Nora has been part of the faculty of T9 Mastered since 2017. She has also given presentations to numerous groups on conducting effective investigations. These presentations have included the annual conference of the Association of Workplace Investigators (AWI) in 2015 and 2018, and an annual training for the Title IX and Equity investigators for the California State University (CSU) system in 2019.

Nora also has specialized knowledge in the area of sexual assault prevention education. She completed an internship at Peace Over Violence, working on interpersonal violence prevention education, and trained as a Peer Counselor at Concordia University's 2110 Center for Gender Advocacy, including violence prevention and sex education. She also has extensive experience with education and activism in the LGBTQ community.

Nora frequently participates in workshops, conferences, and training programs to stay current on legal developments. She completed the Investigations Training Institute for AWI and has regularly attended the annual Capital Case Defense Seminar, held by California Attorneys for Criminal Justice. She has also received training on conducting interviews using trauma-informed approaches.

Nora earned her bachelor's degree in Interdisciplinary Gender Studies from Concordia University in Montreal. Following this, she pursued a master's degree in Gender Studies at New York University.

Cathleen Watkins is a Senior Investigator who has worked for the past 20 years as part of the investigative team at Public Interest Investigations, Inc. (PII), in Los Angeles. Her caseload has focused on conducting third-party investigations into workplace complaints of sexual harassment, sexual assault, discrimination, and retaliation for a range of employers, including corporations, governmental entities, and educational institutions.



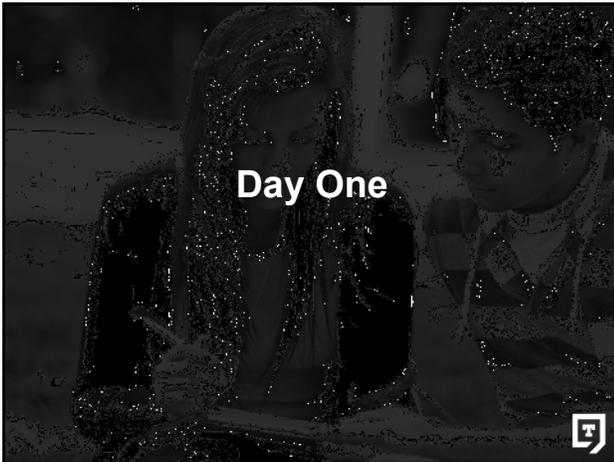
On college campuses, Cathleen has investigated complaints involving faculty and staff regarding allegations of sexual misconduct, racial discrimination, gender bias, and disability claims. Under Title IX, Cathleen has conducted investigations of numerous student complaints of sexual assault. Following such investigations, she has attended hearings on these matters and provided additional information to adjudicators, faculty panels, and Title IX officers.

Additionally, Cathleen has investigated cases involving misuse of public funds, whistler-blower allegations, environmental violations, and matters involving top-level management and boards of directors. Cathleen has trained and supervised staff investigators and managed several large-scale investigative projects, including PII's work, as part of a federal court order, to monitor the treatment of disabled inmates in the Orange County jails. She has also managed an investigative team assigned to conduct investigations of complaints of workplace discrimination and retaliation brought by employees of the County of Los Angeles.

Together with [Keith Rohman](#), Cathleen developed "The Truth Matters"® training, a seminar for in-house investigators. She has also designed and presented customized training for investigators and their managers on addressing allegations of sexual harassment, racial discrimination, gender bias, and other workplace issues. Cathleen is presently the Program Director for T9 Mastered, working on the program's curriculum, marketing, and business development.

Cathleen has a bachelor's degree from the University of Southern California. She is licensed as a private investigator in California.





Overview of Essentials Training

Day One	Day Two
<ul style="list-style-type: none"> • <i>Introduction to the hypothetical case study</i> • Title IX Legal Update • Campus Policies • Unconscious Bias in Investigations • <i>Witness statement</i> • Investigative Planning • Consent 	<ul style="list-style-type: none"> • Understanding Trauma and Trauma-informed approaches • <i>Respondent interview</i> • Interviewing • Hearing Process • Wrap up

Legal Update on Responding to Title IX Sexual Harassment

(as of June 14, 2022)



Module Agenda



- Brief recap of legal history
- Overview of current legal requirements
- Anticipated changes to the regulations
- Questions & answers



Module Learning Outcomes



Understand:

- The various sources of legal requirements.
- The basics of the current legal requirements.



Brief Recap of Legal History

- Title IX and implementing regulations
- Sub-regulatory guidance
- Clery Amendments and implementing regulations
- State law and case law
- 2020 Title IX regulations (“Final Rule”)



Title IX Basics



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.



Enforcing Title IX

Department of Education, Office for Civil Rights

- Complaint investigations and compliance reviews resulting in voluntary resolution agreements
- Issues regulations and guidance
- Possible sanction—removal of federal funding

Private Right of Action

- Court cases brought by complainants and respondents
Cannon v. University of Chicago (1979)



Enforcing Title IX, cont.

Private Right of Action

- Institutions are required to address sexual harassment by both the institution's personnel and other students.
- Students who experience harassment can bring actions against the institution for failing to address harassment and pursue corrective steps from the institution along with compensation as a remedy.

Gebser v. Lago Vista Independent School District (1998)

Davis v. Monroe County Board of Education (1999)

These individual cases result in guidance from the courts.



Different Types of OCR Guidance

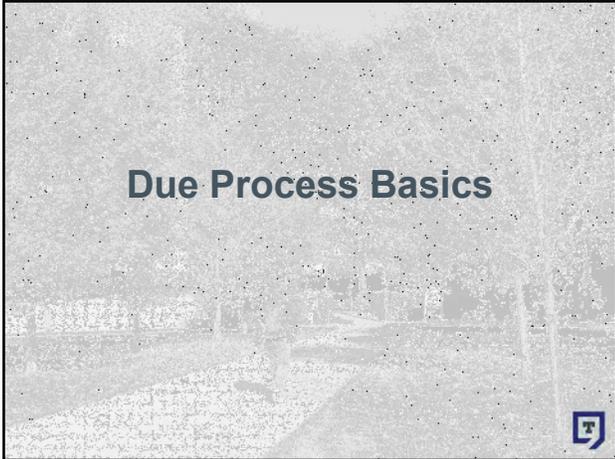
Non-Binding Guidance

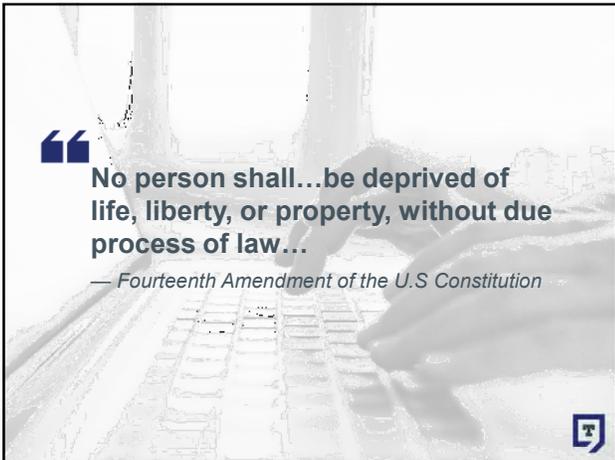
Issued and withdrawn by OCR without a required formal process e.g. Dear Colleague Letters.

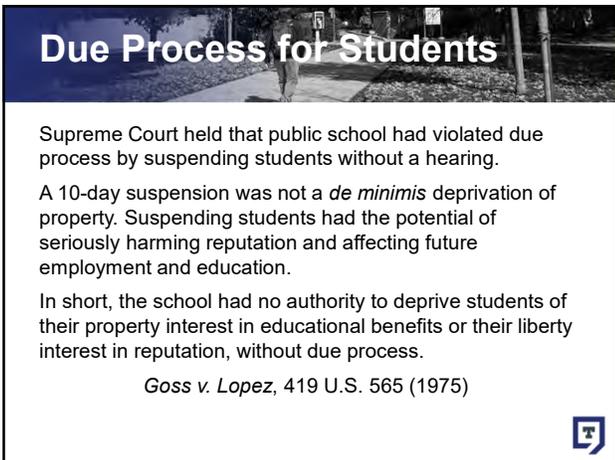
Binding Regulations

Requires formal rulemaking process. e.g. 2020 Regulations









What Process is Due? In Criminal Law:

When life and liberty are at stake the greatest procedural protection is required

Procedural Rights of Criminal Defendants

- Public trial
- To counsel
- To confront witnesses
- Impartial jury



What Process is Due? In Student Conduct Cases:

Due Process—A Flexible Concept that Considers Three Factors:

1. The student's interests that will be affected;
2. The risk of an erroneous deprivation of such interests through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and
3. The university's interests, including the burden that additional procedures would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976)



Boiling it Down: Fundamental Due Process Requirements

Notice

The specific policy/rule at issue

The who, what, where, when and how of the alleged incident

The institution follows policy and procedures in resolving the complaint

An Opportunity to be Heard

Timely access to evidence

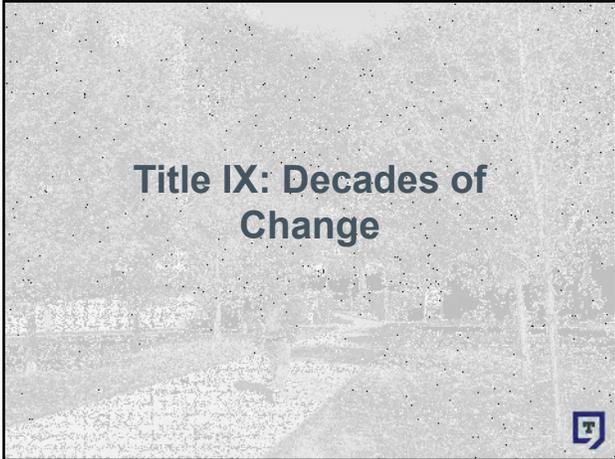
Opportunity to tell their side of the story

Opportunity to challenge witnesses and other evidence

Opportunity to present evidence

Absence of bias and conflicts of interest by the individuals investigating and adjudicating the complaint





1972-1998 Title IX and original implementing regulations

- Required designation of TIXC and publication of grievance procedures.
- Interpreted as prohibiting discrimination, primarily in athletics.



1998-2011

- Confirmed that the prohibition against discrimination included harassment. *Gebser v. Lago Vista Independent School District* (1998); *Davis v. Monroe County Board of Education* (1999)
- 1997 DCL from the Department
- Updated in 2001.



1997 OCR Guidance

- Institutions must have well-publicized and effective grievance procedures in place to handle complaints of sex discrimination, including sexual harassment complaints.
- Determinations regarding harassment should be made based on the “totality of the circumstances.”



2001 OCR Guidance

- Title IX rights must be interpreted consistent with any federally guaranteed due process rights.
- Schools should ensure that steps to afford due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.



Student Conduct Decisions Pre-2011 Dear Colleague Letter

- Most universities handled any sexual assault allegations through student conduct proceedings, some referred them to the police
- Student conduct proceedings were designed to address allegations like academic misconduct.



2011-2022 Expanding Legal Requirements

- 2011-2015: Dear Colleague Letters
- **Development of case law**
- **Updates to the California Education Code and other state initiatives**
- **VAWA Reauthorization Act amends Clery Act to include required responses to sexual assault, dating/domestic violence, stalking**
- **Clery Act implementing regulations**



OCR Guidance to Enhance Campus Response to Sexual Violence

- April 4, 2011, Dear Colleague Letter on Sexual Misconduct.
- April 29, 2014, Questions and Answers on Title IX and Sexual Violence.



Origin of the “single investigator” model

Guidance regarding due process for the investigator:

Before reaching a final conclusion or issuing a final investigation report, the Investigator shall have:

- advised the Parties, or have offered to do so, verbally or in writing, of any evidence upon which the findings will be based; and,
- given the Parties an opportunity to respond to the evidence, including presenting further relevant evidence, information or arguments that could affect the outcome



More guidance for the Investigator

The Investigator will not reach a final conclusion or issue an investigation report until giving careful consideration to any such relevant evidence, information or arguments provided by the Parties.



Criticism from Within Campuses

Twenty-one Law Professors from across the country criticized 2011 DCL and other guidance.

- “As a result, free speech and due process on campus are now imperiled.”

Four female Harvard Law School professors wrote letter in opposition to 2011 DCL:

- “These policies have meant that accused students have, on many occasions, been subjected to a process that really does not give them a fair chance to establish what the real facts of the incident were.”



Respondent Litigation

From 2011-2013, an estimated **32%** of Title IX lawsuits against institutions filed by respondents / accused.

United Educators Report, Confronting Campus Sexual Assault (Jan. 2015).

From 2013-2014, estimated **76%** of Title IX lawsuits filed by respondents / accused.

NACUA Notes, V.1, No. 4 (May 18, 2016).



Notice Insufficient and Respondent Denied Fair Hearing

- The respondent must be given notice of charges —notice charges must match adjudicated charges.
 - Insufficient to offer to let respondent review evidence—must provide evidence.
 - Respondent was not given a sufficient opportunity to rebut the evidence.
- Doe v. USC (April 2016)*



Fair Process Considerations

- Assertion that panel members were school employees insufficient to show bias or conflict of interest (policy had process for bias/conflict objections).
- Student conduct hearing need not include all the safeguards and formalities of a criminal trial.
- Fair process requires a process by which the respondent may question, if even indirectly, the complainant.
- Hearing Officer must explain reasons for omitting or revising questions.
- Lack of interview notes to respondent does not violate due process but is a “concern” to the court.



2011-2022: Summary of Expanding Requirements

- 2017: Change in administration
- 2017: New Dear Colleague Letters
- 2019: *Doe vs. Allee* (California); 6th Circuit developments



Sept. 2017 OCR Interim Guidance

- OCR issued DCL withdrawing 2011 DCL and 2014 Q&A. *Cited concerns that these led to “deprivation of rights” for students and that the Department had not followed a formal public notice and comment process before issuing.*
- OCR issued interim guidance and expressed intent to initiate rulemaking process leading to new Title IX regulations.



Hearing and Cross-Examination Required *John Doe v. Allee (January 2019)*

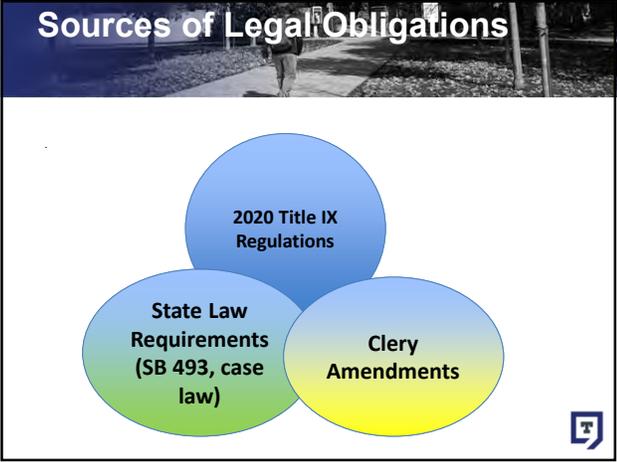
- A hearing and cross examination required when a **student** accused of **sexual misconduct** faces **severe disciplinary sanctions**, and the **credibility** of witnesses, whether the accusing student, other witnesses, or both is central to the adjudication of the allegation.
- The accused may cross-examine witnesses, directly or indirectly.
- Hearing must be before a neutral adjudicator with the power to independently find facts and make credibility assessments.
- The factfinder cannot be a single individual with divided and inconsistent roles.



2011-2022: Summary of Expanding Legal Requirements

- **2020: New Title IX Regulations effective (August 14)**
- **2021: Change in administration**
- **2021: *VRLC vs. Cardona*; updated guidance from the Department;**
- **2022: California SB 493 requirements effective (January 1)**
- **2022: Revised Title IX Regulations anticipated...April, May, June...**





Clery Amendments

Clery Amendments require institutions to respond to reports of dating violence, domestic violence, stalking and sexual assault.

- Resources & information required to be provided
- Jurisdiction is different
- Some procedural requirements:
 - Equal opportunity to participate in disciplinary proceedings
 - Advisor of choice
 - Simultaneous notice of outcome



Selected California Obligations (Pre-2020)

Education Code section 67386:

- Affirmative consent
- Preponderance of the evidence
- Victim-centered response
- Specific procedural requirements



Selected California Obligations (Pre-2020)

Doe v. Allee and subsequent cases in California require hearing with indirect or direct questioning in cases of student sexual misconduct where credibility is an issue and serious disciplinary sanctions are possible.



The 2020 Regulations



2020 Regulations Current Application

- Effective: August 14, 2020
- Applicable to **conduct** occurring on/after August 14, 2020
- Applicable to students, staff, and faculty



What changed?

- Mandatory hearings
- Advisor involvement (active)
- Definition of Sexual Harassment
- School jurisdiction over conduct
- Direct questioning of the parties



What has not changed?

- Duty to provide a fair process
- Duty to provide a safe environment
- School determines the definition of consent
- Impact on the involved parties

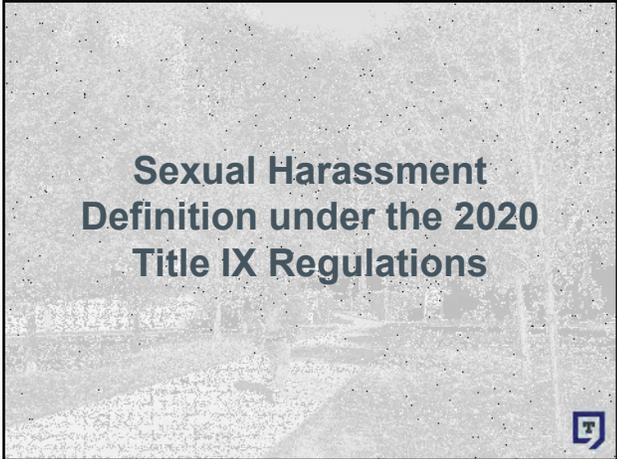


Key Changes Overview

- “Sexual Harassment” definition under 2020 Title IX Regulations
- Jurisdiction
- Required Elements of the Grievance Process

Intersection of Title IX and Code of Conduct





Sexual Harassment per the 2020 Regulations

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

- Quid pro quo (employee Respondents only);
- Unwelcome conduct (full definition follows); or
- Specific defined acts (full definition follows)



Sexual Harassment (2020 Regs): Unwelcome Conduct

Conduct on the **basis of sex** that is determined by a **reasonable person** to be so:

- Severe;
- Pervasive; **and**
- Objectively offensive
- That it effectively denies a person equal access



Sexual Harassment: Specific Acts

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

- Sexual Assault**, as defined by Clery Act;
- Dating Violence**, as defined by VAWA*;
- Domestic Violence**, as defined by VAWA*; or
- Stalking**, as defined by VAWA*



Contrast: Sexual Harassment Definition Under SB 493 and FEHA



SB 493 Requires Use of Education Code 212.5

“Sexual harassment” means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

- (a) Submission to the conduct is explicitly or implicitly made a term or a condition of an individual’s employment, academic status, or progress.
- (b) Submission to, or rejection of, the conduct by the individual is used as the basis of employment or academic decisions affecting the individual.



SB 493 Requires Use of Education Code 212.5

“Sexual harassment” means unwelcome sexual advances, requests for sexual favors, and other verbal, visual, or physical conduct of a sexual nature, made by someone from or in the work or educational setting, under any of the following conditions:

(c) The conduct has the **purpose or effect** of having a negative impact upon the individual’s work or academic performance, or of creating an intimidating, hostile, or offensive work or educational environment.

(d) Submission to, or rejection of, the conduct by the individual is used as the basis for any decision affecting the individual regarding benefits and services, honors, programs, or activities available at or through the educational institution.



Other SB 493 Definitions

“Sexual violence” means physical sexual acts perpetrated against a person without the person’s affirmative consent ...Physical sexual acts include both of the following:

(A) Rape, defined as penetration, no matter how slight, of the vagina or anus with any part or object, or oral copulation of a sex organ by another person, without the consent of the victim.

(B) Sexual battery, as defined in paragraph (2).



Other SB 493 Definitions

(2) “Sexual battery” means the intentional touching of another person’s intimate parts without consent, intentionally causing a person to touch the intimate parts of another without consent, or using a person’s own intimate part to intentionally touch another person’s body without consent.



Other SB 493 Definitions

(3) "Sexual exploitation" means a person taking sexual advantage of another person for the benefit of anyone other than that person without that person's consent, including, but not limited to, any of the following acts:

- (A) The prostituting of another person.
- (B) The trafficking of another person, defined as the inducement of a person to perform a commercial sex act, or labor or services, through force, fraud, or coercion.



Other SB 493 Definitions

(C) The recording of images, including video or photograph, or audio of another person's sexual activity or intimate parts, without that person's consent.

(D) The distribution of images, including video or photograph, or audio of another person's sexual activity or intimate parts, if the individual distributing the images or audio knows or should have known that the person depicted in the images or audio did not consent to the disclosure.

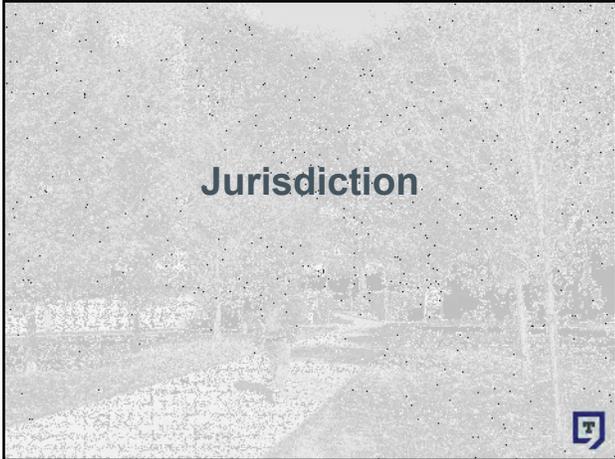
(E) The viewing of another person's sexual activity or intimate parts, in a place where that other person would have a reasonable expectation of privacy, without that person's consent, for the purpose of arousing or gratifying sexual desire.



Fair Employment and Housing Act

- Broader definition of harassment than Title IX OR SB 493 (Education Code 212.5)
- Protects employees, volunteers, interns, student-employees, etc.
- May require action even where Title IX or Education Code would not.





When does the Title IX process apply?

- Locations, events, or circumstances;
- Over which the school exercised **substantial control** over both the Respondent and the context in which the Sexual Harassment occurs.

Includes: any buildings owned or controlled by a student organization officially recognized by the school.



NOTE

The Clery Amendments and the California Education Code (SB 493) expand the required jurisdiction, using slightly different definitions of prohibited conduct.



Required Elements of a Title IX Grievance Process for Sexual Harassment

Grievance Process per the 2020 Regulations

Basic Requirements

- Treat parties equitably
- Objective evaluation of **all** evidence
- No credibility determinations based solely on a person's status
- No one involved in the process may have a conflict of interest or bias

Grievance Process per the 2020 Regulations (cont'd)

- Training required for all involved staff and/or outside contractors
- Investigator and decision-maker cannot be:
 - The Title IX Coordinator
 - The same person
- Live Hearings required

Grievance Process per the 2020 Regulations (cont'd)

- Presumption that Respondent is not responsible
- Establish a reasonably prompt timeframe for resolution
- Range of possible disciplinary sanctions and remedies
- Standard of Evidence
- Appeal Procedures



Grievance Process: Hearings per the 2020 Regulations

- Live Hearings required
- Can be conducted remotely and/or with parties in separate rooms
- Parties must be able to see and hear anyone testifying
- Advisors must be permitted
- School must provide advisor for the hearing if student comes alone



Grievance Process: Hearings per the 2020 Regulations (cont'd)

Questioning

- Hearing Officer permitted to question
- Advisors **must** be permitted to question the other party and all witnesses:
Questioning conducted directly, orally, and in real time.
- Must be relevant questions—up to the Hearing Officer to decide



Grievance Process: Hearings per the 2020 Regulations (cont'd)

- Permitted to exclude parties misbehaving
- Written decision must include:
 - Allegations;
 - Procedural steps;
 - Factual Findings;
 - Policy Findings;
 - Analysis for each;
 - Sanctions;
 - Appeal process.



Grievance Process: Appeals per the 2020 Regulations

- Must be offered to both parties
- Bases for appeal:
 - Procedural irregularity;
 - New evidence not reasonably available at the time of determination; or
 - Bias or conflict of interest.

****All bases include requirement that the outcome was affected****



Required Elements of an SB 493 Grievance Process for Sexual Violence



SB 493 Added Ed Code 66281.8

- Review Education Code 66281.8
- Protects students.
 - Different standard for no-contact orders
 - Different definition of responsible employees
 - Different procedural requirements
 - If a conflict between Title IX and SB 493 – Title IX prevails.





Other Updates



2021 Administration Review

- March 8, 2021, Executive Order to review the 2020 regulations.
- April 6, 2021, ED Press Release outlining review in response to EO.
- Fall 2021 Unified Agenda and Regulatory Plan to issue a notice of proposed rule-making in April 2022; May announcement that June likely.



OCR July 2021 Q&A

- Encourages institutions to address conduct outside of the 2020 regulations' definition of sexual harassment with their own conduct policy
- Emphasizes the timeline of when 2020 regulations apply



2021 Case Interpretations

- Section 106.45(b)(6)(i)'s prohibition on all statements not subject to cross-examination is arbitrary and capricious. *Victim Rights Law Center et al. v. Cardona* (2021)
- August 24, 2021, OCR issued Letter stating it will no longer enforce the section.



2022 Case Interpretations

Institutions may be liable for deliberate indifference to known sexual harassment committed by a guest. *Hall v. Millersville University* (2022)

BUT

Institutions might not be liable for emotional distress damages under *Cummings v. Premier Rehab Keller*, a 2022 case under Section 504 (disability).





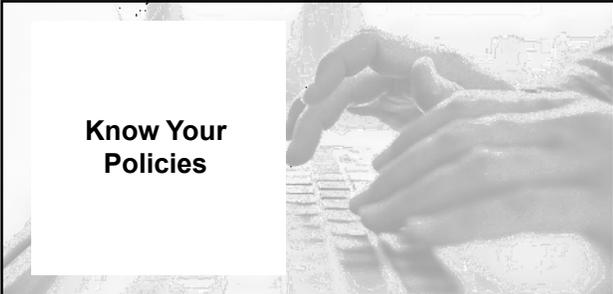
2022(?) Title IX Regulations

- Listening tour
- Draft regulations
- Notice and comment period
- Response and finalization

It is not likely necessary to change policy or procedures until these are FINAL.

KEY: Always follow the procedures that your institution has in place at the time of the process.





Know Your Policies

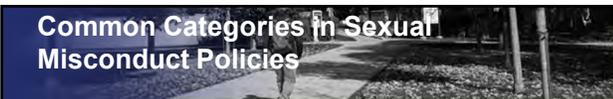




Goals

- Review your policies...
 - So you understand the elements of a claim
 - So you have time to seek guidance if unclear
 - So you conduct thorough interviews
 - So it is easier to eventually make factual findings and determinations





Common Categories in Sexual Misconduct Policies

- Sexual Violence
- Relationship Violence
- Sexual Harassment
- Stalking
- Sexual Privacy
- Retaliation



Categories in Title IX Sexual Harassment Policies

- Sexual Harassment: Quid Pro Quo
- Sexual Harassment: Hostile Environment
- Sexual Assault
 - Rape
 - Fondling
 - Incest
 - Statutory Rape
- Dating Violence
- Domestic Violence
- Stalking



Deep Dive Into The Elements



What type of claim has Cynthia raised?

Cynthia complains that a fellow classmate, Marie, sits outside her Tuesday and Thursday biology courses and waits for her. Marie follows her to her car. Marie sits outside until Cynthia finishes her soccer practice, and then follows Cynthia to the locker room. At the cafeteria, Marie sits across from Cynthia and stares at her. Sometimes when Cynthia looks up, Marie makes a kissing gesture towards her. This has been going on after every class for several weeks, and Cynthia reports feeling fearful on campus.



What type of claim has Tammy raised?

Tammy alleges that Karl, who she studied with during the last quarter, started sending her sexually explicit texts after she told him she did not want to date him. He sent her twenty texts in the course of one night. The texts included statements that he wanted to spread her legs and touch her p—y, and that he had dreamed of having sex many times with her, as examples.



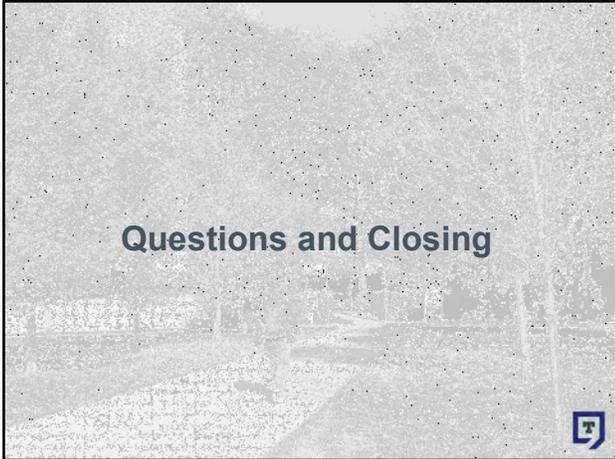
What type of claim has Kurt raised?

Kurt met Katie at a fraternity party. The two danced all night and “hooked up.” Later, Kurt told Katie he did not have enough time for her because of his studies. Kurt complains to the campus that Katie slashed the wheels of his car, almost resulting in a car accident.

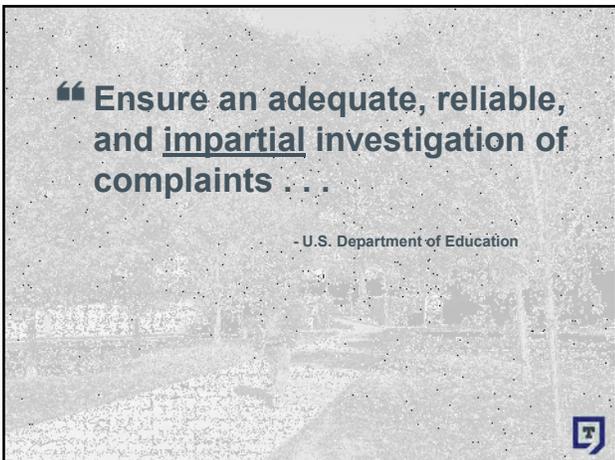


What type of claim has Jessica raised?



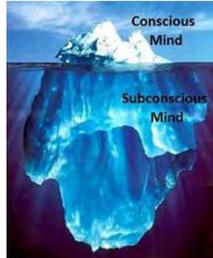






How Our Unconscious Affects Investigation

- Unconscious beliefs and feelings can affect our investigations



Bias: A particular...feeling, or opinion, especially one that is **preconceived** or **unreasoned**.

“ I think, therefore I am (biased).

- Dave Pell, Next Draft



Substitute “investigator” for the word “judge”

To be impartial does not mean a judge does not [have] many existing sympathies, antipathies or attitudes.

There is no human being who is not the product of every social experience, every process of education, and every human contact.

The wisdom of a judge is to recognize, consciously allow for, and perhaps to question, all the baggage of [their] past attitudes and sympathies.

-Supreme Court of Canada, R. v. S. (R.D.), [1997] 3 S.C.R. 484



“Traditional” Biases

- Race
- Gender
- Sexual orientation
- Gender identity
- Religion
- Class
- National origin
- The list goes on and on and on and on...



Studies of Bias: Symphony Orchestra



- As recently as 1980, orchestras had only 10% women, while top music schools included 45% women.
- Blind orchestra auditions, with musicians behind a curtain, increased the number of female musicians hired by 25% percent.

Goldin & Rouse (2000) The American Economic Review, 90(4), 715-741. Unconscious Bias in Hiring



Racial Inequities in School Disciplinary Processes

A 2018 US Government Accountability Office (GAO) concluded:

- Starting in prekindergarten, Black children were disciplined at school far more than their white peers. (In 2013-2014)
- Black children were 15.5 percent of public school students, but accounted for 39 percent of students suspended from school.

“Implicit bias — stereotypes or unconscious association about people — on the part of teachers and staff may cause them to judge students’ behaviors differently based on the students’ race and sex.”

<https://www.washingtonpost.com/news/answer-sheet/wp/2018/04/05/implicit-racial-bias-causes-black-boys-to-be-disciplined-at-school-more-than-white-federal-report-finds/>
AG Bobrow, Restoring Honor, Ending Racial Disparities in University Honor Systems - Virginia Law Review, Va. L. Rev. Online, 2020
Trachtenberg, Ben, How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students, 18 Nev. L.J. 107 (2017)



Investigator-Specific Biases

Not unique to our field

- Scientific research
- Law enforcement
- Historians
- Journalism



Investigator's Instincts – How Reliable About Credibility?

As investigators, we all have instincts, hunches, senses, but...

How good are our instincts?

- College Students
- Psychiatrists
- Judges
- Robbery Detectives
- Federal Polygraphers
- Secret Service agents



Priming

A memory effect in which exposure to a stimulus influences a response to a later stimulus.



Priming

Two groups watching flatworms told to count “head turns” and “body contractions.”

- Group A: told to expect a lot of turning and contracting. Group B: told to expect only a small amount of turning and contracting.
- Group A recorded almost **five times** as many head turns and **twenty times** as many body contractions as Group B.

Lucien Cordaro and James R. Ison, *The Psychology of the Scientist: X. Observer Bias in Classical Conditioning of the Planarian*, 13 Psychol. Rep. 787 (1963).



Confirmation Bias

Definition:

- A psychological phenomenon that explains why people tend to seek out information that...
 - Confirms their existing opinions
 - Overlooks or ignores information that refutes their beliefs



Possible Scenarios for Confirmation Bias

Your first interview with Dylan, the reporting party, was *very* tough.

- He told a searing account of being violently sexually assaulted by his former boyfriend, James.
- He broke down in tears and the interview had to halted more than once.
- You believe him.

How might Confirmation Bias affect your investigation?



Two Possible Scenarios for Confirmation Bias

It is 4:30 pm on Friday and your report is due Monday. Your conclusion is written. All that is left is to give it a final read over the weekend.

- There was one important witness you could not reach.
- You get an email from the witness, and they are willing to talk to you.

How might Confirmation Bias affect your next steps?



General Campus Investigator Biases



Campus Investigator-Specific

What one bias do we all have?

A bias towards *anything* that makes our job *easier*.





Questions Can Shape Answers

- Do you get headaches **occasionally**, and if so, how frequently?
Average response:
• **0.7 headaches per week**
- Do you get headaches **often**, and if so, how frequently?
Average response:
• **2.2 headaches per week**



Different Verbs, Different Answers

- What speed were the cars going when they _____ each other?

• "Contacted"	= 31.8 mph
• "Hit"	= 34.0 mph
• "Bumped"	= 38.1 mph
• "Collided"	= 39.3 mph
• "Smashed"	= 40.8 mph



Different Verbs, Different Answers

What were you doing when she _____ you ?

- “Reached for”
- “Touched”
- “Put her hand on”
- “Groped”
- “Grabbed”



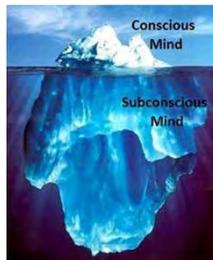
Title IX Specific Biases

Involves conduct you may have had intimate personal experiences with.



Title IX-Specific Issues

- Conscious beliefs and unconscious feelings
- Requires higher level of self-awareness



Title IX-Specific Issues

Knowledge and Comfort with Different Sex & Relationship Practices:

- Oral sex
- Anal sex
- Polyamory
- Sex toys
- BDSM
- Rough sex
- Group sex
- Pornography
- Multiple sex partners
- Etc., etc., etc.



Title IX-Specific Issues

- Views about Alcohol use
- Views about Drug use
- Views about personal responsibility



Secondary Trauma

Trauma is contagious.

- This influences how we react to evidence.
- Can impact our functioning and judgment as investigators



Combat Conditions in Title IX:

- High emotion on both sides
- Increased conflict/polarization
- Title IX Coordinator turn-over
- Increased use of attorneys



Other Potential Bias Issues

- Student athletes
- Views about fraternities and sororities
- College age children
- Friends in college or grad school
- Prior experiences with Title IX



The Toughest Bias in Title IX:

Fear of *The Feather*

- Preponderance of the evidence
- “50 percent plus a feather.”



Techniques for Eliminating Managing Unconscious Bias

- Remember: **“I think, therefore I am (biased).”**
- Have compassion and understanding for yourself
- There is no perfect investigation and no perfect investigator



Techniques for Managing Unconscious Bias

Acknowledge your feelings

- **Key point:** *Be aware and pay attention to your biases!*
- Moving from unconscious reaction to conscious awareness
- Sit with your feelings



Techniques for Managing Unconscious Bias

Monitor your feelings

- Emotional inventory at each step
- Do these facts or players trigger emotions?
- Understand secondary trauma



Techniques for Managing Unconscious Bias

Express your feelings

- Talking with colleagues
- Co-workers
 - Small office/small campus problem
- Therapy
- Prayer
- Other ideas?



Thank you.

Keith Rohman
Pronouns: He/him
rohman@piila.com

Nora Rohman
Pronouns: They/She
nrohman@piila.com



Witness statement





**What's Next?
Developing a
Plan**





Investigative Plan

A frequently updated document to track an investigation. IP might include:

- List of allegations
- Witness list, dates interviewed
- Documents, videos, physical evidence
- Relevant policies; jurisdiction issues
- Other info (i.e., change in scope, unsuccessful attempts to contact witnesses, etc.)





Investigative Plan

Helps with:

- Keeping track of details for interviews and collecting other evidence
- Report writing
- Managing large caseloads
- Re-assigning cases. A roadmap if the case needs to be transferred to a different investigator
- Preparing for hearing or deposition





Initial Steps

- Review Complaint/Intake forms
- Review campus policies/procedures
 - Jurisdiction
 - Anticipated timeline for completion
- Possible witnesses (how to prioritize?)
- Think broadly about other evidence
 - Video evidence –Police report –Photos/texts
 - Social media –Incident report –Floor plan
 - Uber receipts –Key card swipes –journal/diary



Campus Title IX Policy

Based on Jessica’s complaint, what are the relevant sections of the Meadows College Title IX policy?



The Investigative Steps

INTERVIEWS

Who should the investigator interview to understand Jessica's allegations?



Drafting the Allegations

Capture the basic facts:

Who is complainant?

Who is respondent?

What is alleged misconduct?

When? Where? Other information?

Consider both policy language and how Complainant described what happened



Drafting the Allegations

How would you write the allegation that Jessica has brought forward?



The Investigative Steps

Things to consider when planning interviews

- Trauma-informed approach on zoom and/or in-person
- Wording of emails to parties and witnesses
- Role of the advisor
- Note-taking methods



The Investigative Steps

Sequence of Interviews

- Start with complainant
- Issues with witness availability, willingness to participate
- When do you interview Respondent?
 - Are police involved?
- Circling back to parties



The Investigative Steps

Documents/Social Media

What documents or social media posts may be relevant in investigating Jessica's complaint?



Possible Sources of Evidence

Documents

- Emails/Texts
- Performance Evals
- Journals
- Incident reports
- Relevant statistics

Physical evidence

- Hand-written notes
- Receipts

Visual

- Photos/videos
- Diagrams
- Security camera footage

Electronic

- Computers, phones, tablets
- Social media posts/messages, on-line chats
- Key card access



Working with Campus Police or other law enforcement agencies

Campus investigations may overlap with criminal

- Sexual Assault
- Workplace violence, stalking
- Theft, fraud, bribery
- Narcotic sales

Relevant Sources of Information

- Police report
- Transcript or summary of pretext call
- Computer forensics of laptop, tablet, phone



Medical Records

DOE's Final Rule

- Protects the privacy of medical, psychological and similar treatment records.
- Requires schools to obtain party's voluntary, written consent to access or use these records



May Become Part of the Investigation

Other considerations

- Additional complainants or respondents
- Different versions of Title IX policy
- Cross-complaints
- Respondent's exposure to criminal charges; Get familiar with *Lybarger Admonition*
- Chain of custody/Storing physical evidence



Scope Creep

Beware of Scope Creep

Consult with Title IX coordinator before adding allegations

Impacts your timeframe and ability to complete the investigation

Conduct may extend beyond Title IX



When do you have enough information?

Is the fact-gathering done?

Have you collected – and given the parties had an opportunity to review – all the relevant evidence?



Consent: Gathering the Essential Facts



Always start with the policy definition

Affirmative Consent: Affirmative, conscious, and voluntary agreement to engage in sexual activity. Consent to sexual activity requires of both persons an affirmative, conscious, and voluntary agreement to engage in sexual activity.



Biggest Challenges in Discussing Consent

- Inherent nature of most sexual interactions
- Understanding escalation
- Ongoing consensual relationships
- Incapacitation



What does consent look like?

**It varies in every circumstance.
There is no bright-line rule.**

- Verbal: “Yes,” “I like this,” “Can we...”
- Non-verbal: taking off own clothing, movements (hands, hips, etc.), nodding



Some Consensual Sexual Activity and Escalation

- What specifically was consensual v. non-consensual?
- At what moment did things become non-consensual?
- When and how did things escalate? And what were the parties communicating through words and actions?



Some Consensual Sexual Activity and Escalation

- How was consent communicated?
- Did either of you say anything?
- Non-verbal communication?

Remember policy language:

It is not anyone’s burden to say “No” or “Stop” or “I don’t want to do that.”

The burden is to **establish consent before acting.**



Incapacitation Due to Drugs and Alcohol



**INTOXICATION
≠
INCAPACITATION**



Incapacitation Due to Drugs and Alcohol

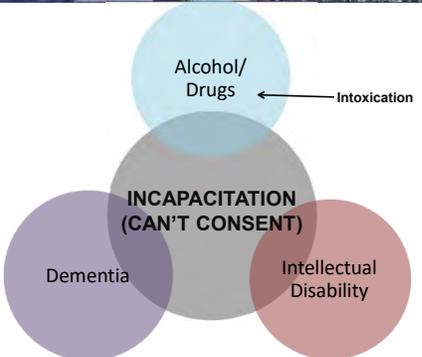


Alcohol/
Drugs ← Intoxication

**INCAPACITATION
(CAN'T CONSENT)**

Dementia

Intellectual
Disability



Incapacitation



• **Incapacitation** is a high bar.



• You can be very intoxicated, and still not be incapacitated.

• Investigator must collect sufficient facts to support a finding of capacity or incapacity.



Always start with the policy

Sample Policy

- **Incapacitation:** A person is unable to consent to sexual activity because of incapacitation, if:
 - The person was asleep or unconscious;
 - The person was incapacitated due to the influence of drugs, alcohol, or medication so that the person **could not understand the fact, nature, or extent of the sexual activity.**
 - Whether an intoxicated person (as a result of using alcohol or other drugs) is incapacitated depends on the extent to which the alcohol or other drugs **impact the person's decision-making ability, awareness of consequences, and ability to make informed judgments.**



Three Steps in Incapacitation Analysis

1. What is the evidence that the complainant was under the influence of alcohol or drugs?
2. Did the alcohol or drugs render the complainant incapacitated? If so, what is the evidence showing the incapacitation?
3. Did respondent know or should have known that complainant was incapacitated?



Incapacitation Questions

- Food in stomach is the key factor affecting rate of absorption.
–Ask: *What did they eat and when?*
- Peak BACs generally within 30 – 60 minutes of the cessation of drinking.
–Ask: *Timing of drinking relative to sex?*
- Size matters
–Ask: *Height and weight?*

These questions can help provide context to the investigator. But they are not the determiner in assessing incapacitation.



Signs on Intoxication

- We are not chemists or physicians or police officers.
- *Strong caution:*
 - » *Avoid discussing rates of intoxication or anything related to human biology*
 - » *Focus on behaviors and actions.*



Signs of Intoxication

- Decreased inhibitions
- Psychomotor impairment
- Cognitive impairment

All of these items can be used in questioning.



Signs of Intoxication

- | Decreased inhibitions | Psychomotor impairment | Cognitive impairment |
|--|---|---|
| <ul style="list-style-type: none">• Doing or saying things not normally done when sober• Boisterousness or bravado• Argumentative or confrontational• Obnoxious• Hanging on to people or intruding on their personal space• Animated or exaggerated actions• Rapid drinking• Acting silly or “cutesy” | <ul style="list-style-type: none">• Slurred, mumbled, or slow speech• Swaying while sitting, standing, or walking• Staggering, stumbling, holding onto objects for balance• Difficulty reaching for and picking up objects• Inability to maintain eye contact• Spilling food or drinks• Falling down or loss of balance | <ul style="list-style-type: none">• Loss of concentration or train of thought• Delayed response to questions• Illogical comments• Impaired short- or long-term memory• Lighting the wrong end of a cigarette• Excessively quiet, sullen• Trouble counting money or doing basic math• Difficulty following directions |



Understanding the who/what/when/where why or how?

- Thoughts about what they did or did not want to do
- Thoughts about the consequences of the sexual activity
- Stops to use or request birth control
- Stops to do things to prepare for sexual activity
 - Brushes teeth, going to restroom, removing tampon



Decision-Making Abilities?

- **Not oriented to time, place and actions**
- **Unable to carry on a conversation?**
 - Delayed answers or illogical comments
 - Can't communicate
- **Unable to handle simple cognitive or motor tasks**
 - Counting out change
 - Unlocking a door
- **Risky or unusual behaviors**
 - Walking along edge of roof on a dare
- **Confused about where they are, or who they are with**



Always remember this final step in an incapacitation analysis:

If the complainant was incapacitated, investigator must also evaluate **respondent's knowledge** of the level of incapacitation.



Respondent's Knowledge

Potential evidence that respondent **knew**:

- Saw complainant ingest alcohol or drugs
- Saw complainant's physical and verbal behaviors
- Told about amount of alcohol or drugs used by complainant
- Respondent's actions, like assisting the complainant after she threw up
- Respondent's comments to others about the complainant's intoxication



Respondent's Knowledge

Was there a **failure by respondent to take reasonable steps** to determine the complainant was unable to consent due to complainant's incapacitation?

- Respondent's **own intoxication or recklessness** does not act as a valid excuse.

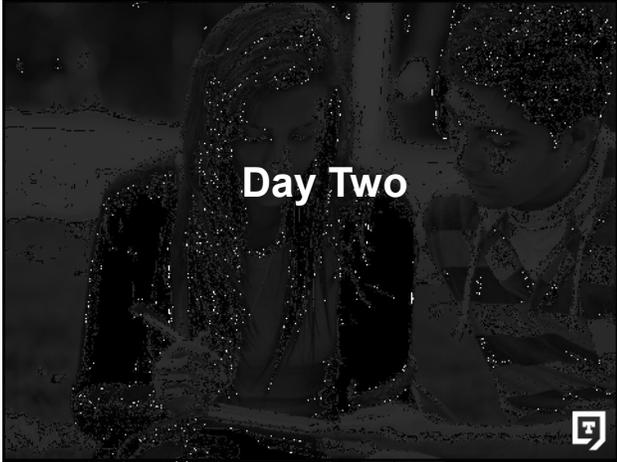


Review: Three steps in Incapacitation Analysis

1. What is the evidence that the complainant was under the influence of alcohol or drugs?
2. Did the alcohol or drugs render the complainant incapacitated? If so, what is the evidence showing the incapacitation?
3. What did the respondent know, or should have known, about the complainant's level of intoxication and/or incapacitation?

APPLY THE FACTS TO YOUR POLICY!





Understanding Trauma and Trauma-Informed Approaches



Brenda Ingram, EdD, LCSW
Clinical Asst. Prof, USC Keck School of Medicine, Dept. of Psychiatry



Learning Objectives

- Define Trauma and Traumatic Stress
- Articulate the impact of trauma on memory process and systems
- Define Trauma-Informed Care Paradigm
- Formulate Trauma-Informed Interviewing Questions
- Recognize and develop strategies to address Secondary Trauma and Vicarious Traumatization



Trauma

- Understanding trauma is not just about acquiring knowledge:
 - Changes the way you view the world
 - Changes the helping paradigm from:
 - “What is wrong with you?” to
 - “What happened to you?”
- Sandra Bloom (2007)



What is Trauma?

Trauma is defined using eight general dimensions:

- Threat to life or limb;
- severe physical harm or injury, including sexual assault;
- receipt of intentional injury or harm;
- exposure to the grotesque;



What Is Trauma?

- Violent, sudden loss of a loved one;
 - Witnessing or learning of violence to a loved one;
 - Learning of exposure to a noxious agent; and
 - Causing death or severe harm to another
- (Wilson & Sigman, 2000)



Types of Trauma

- Physical trauma
- Medical trauma
- Psychological trauma
- Social or Collective trauma
- Historical or Intergenerational trauma
- Racial trauma or Identity-based trauma



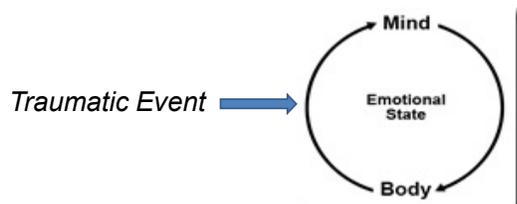
Types of Trauma

- Immigration trauma
- Developmental trauma
- Ongoing, chronic, and enduring trauma
- Vicarious or secondary trauma or “compassion fatigue”



Trauma

Traumatic events are external, but they quickly become incorporated into the mind (Terr, 1990) and the body (Van Der Kolk, 1991).



Trauma

- **Psychological trauma is characterized by feelings of:**

- Intense fear
- Helplessness
- Loss of control
- Threat of annihilation

Judith Herman, *Trauma and Recovery* (1992)



Prevalence of Trauma

It is estimated that at least half of all adults in the United States have experienced one incident that was caused by a major traumatizing event (Briere & Scott, 2006)

Almost 70% of Kaiser adult patients (n=17,000) reported at least one traumatic experience before the age of 18. And about half reported 1-3 adverse experiences (ACE Study, 2010)



Prevalence of Trauma

- For **children**, the prevalence is felt to be **even higher** than that experienced in adulthood.
- Studies have found up to 60-70% of **urban youth** have experienced a traumatizing event in their lives. Exposure to traumatizing events is occurring at an epidemic rate.

Geffen, Griffin & Lewis, 2008

- One study found that 85% of **college students** (n=234) reported one or more traumatic experiences in their lifetime.

Fraiser, et al, 2009

- About 15-20% of **college females** report being sexually assaulted or raped.

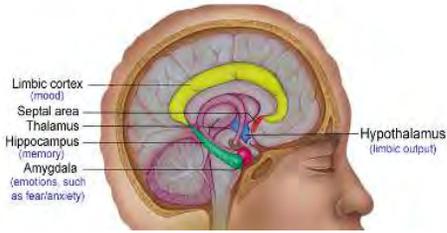
CalCASA, 2016



The Stress Response

• The Brain

Limbic System



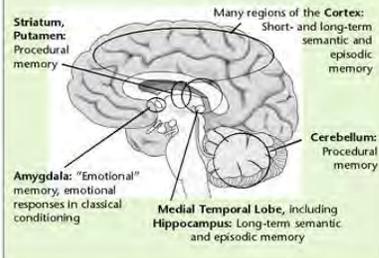
Traumatic Stress

- The reactions someone may develop after a traumatic event due to experiencing extreme stress.
- Reactions vary considerably.
- Some people experience anxiety, fear, shock and upset or even numbness.
- Some report disturbances in sleep, with nightmares.
- These reactions can interfere with activities of daily living.



Trauma and Memory

Different Structures in the Brain Handle Different Kinds of Memory



Trauma and Memory

- Individuals who may have traumatic experiences often undergo a process many people do not commonly understand.
- The **body** and **brain** react to and record trauma in a **different** way than we have **traditionally** been led to believe.

Strand, 2013



Trauma and Memory

- Most people impacted by trauma are not able to accurately provide detailed information.
- Stress and trauma routinely interrupt the memory process

Strand, 2013



Trauma and Memory

- One of the mantras within the criminal justice system is – “Inconsistent statements equal a lie.”
- Nothing could be further from the truth when stress and trauma impact memory, research shows.
- In fact, good solid neurobiological science routinely demonstrates that, when a person is stressed or traumatized, inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma.

Strand (2013)



The Impact of Trauma on Behavior

- The impact of trauma is highly associated with “counterintuitive behaviors”
- The **effects** of trauma can **influence behavior** during an interview.
- People are often **reluctant** to recall experiences that evoke negative feelings and emotions such as anger, fear, humiliation, or sadness.

Strand, 2013



Trauma-Informed Care (TIC)

- An organizational structure and treatment framework that involves **understanding, recognizing, and responding** to the effects of all types of trauma on the well-being and behavior of survivors.
- TIC **emphasizes** physical, psychological, social and **moral safety** for both consumers and providers.
- TIC helps those impacted by trauma **rebuild** a sense of control and empowerment.



Essentials of Trauma-Informed Care

- **Connect** – focus on relationships
- **Protect** – promote safety and trustworthiness
- **Respect** – engage in choice and collaboration
- **Redirect** (teach and reinforce) – encourage skill-building and competence

Hummer, Crosland, & Dollard, 2009



Addressing The Impact of Trauma on Interviewee Behaviors

- Interviewers should be familiar with the signs of trauma and not assume the interviewee is evading the truth.
- Memory loss, lack of focus, emotional reactivity, and multiple versions of a story can all be signs of trauma exhibited during interviews.
- For example, lack of linear memory is often a sign of trauma, so it may be helpful during initial interviews to ask “What else happened?” instead of “What happened next?”

Strand, 2013



Addressing The Impact of Trauma on Interviewee Behavior

- Environmental barriers such as the layout of the room, the length of the interview, and the comfort of the interview room are also factors to consider.
- Privacy and security may be a large concern for people who have just experienced something traumatic; therefore, the interview room should be a quiet area.

Strand, 2013



Addressing The Impact of Trauma on Interviewee Behavior

- Cultural and language needs must be ascertained and reasonably accommodated to avoid shutdown due to culturally offensive or inappropriate approaches.
- Be aware of cultural considerations of gender, subject matter, and narrative style.
- Some cultures reveal a story in a circular rather than linear manner.

Strand, 2013



The Science of Forensic Interviewing

- The goals of a forensic interview are to minimize any potential trauma to the interviewee, **maximize information** obtained from interviewees, reduce contamination of the memory process of the alleged event(s), and **maintain the integrity** of the investigative process.

- The **Forensic Experiential Trauma Interviews (FETI)** is a trauma-informed interviewing approach.

Strand, 2013



The Forensic Experiential Trauma Interview

- **FETI** is highly effective technique for interviews.
- This concept and approach of this technique can be described as a *forensic psychophysiological investigation* - an opportunity for to describe the experience of the sexual assault or other traumatic and/or fear producing event, physically and emotionally.

Strand, 2013



FETI Process

Interviewees need to **feel safe at all times.**

- Make sure the environment is comfortable, quiet, private
- Ask questions about how the person is feeling about the process so far. Acknowledge how difficult this can be to go through this process.
- Explain your role and what you will be asking in general.
- Use empathy to build a relationship with the interviewee.



FETI Process

• Develop a motivational statement that connects the benefits of participating in the interview with the wanted outcomes for the interviewee.

–For example: *“I know how difficult this is to talk about. I am sure you would rather be anyplace than here answering these questions. I want you to know how much I appreciate you participating in this interview. Your answers will help me to better understand what happened so that we can accurately document it in our report.”*



FETI Process

Ask what is the person able to tell you about their experience.

“tell me more about that...”
“what do you remember about that...”

Ask the person if they remember any smells, sounds, tastes, or sights. This triggers the memories of the event

“Do you remember any smells?”
“Do you remember if he/she had a particular smell?”
“Do you remember any sounds in the room or outside?”

“What was the most difficult part of this experience for you?”
“Is there anything about this experience that you can’t forget?”



FETI Process: Behaviors/Statements You Might See/Hear During the Interview

- Ask interviewees how they were feeling during the incident. Consensual sex vs coerced/forced sex are different:
 - Embarrassment
 - Fear
 - Shame
 - Humiliation



FETI Process: Behaviors/Statements You Might See/Hear During the Interview

- Here are some statements that you might hear:
 - “I thought I was going to die”; “I tried to move but my arms or legs did not work”; “I couldn’t stop him/her”—not said during consensual sex
- Argumentative with interviewer
 - Don’t personalize
- Difficulty focusing or concentrating on questions
- Flat affect, mood swings, anger
- Allow the interviewee to control the narrative; interviewer is a facilitator



FETI Process—Reframing the Questions

These are some of the typical questions asked during a sexual assault investigation:

Typical framing

- How tall was the man?
- What was the woman wearing?
- Why didn’t you scream or fight back?
- Did he penetrate you?



FETI Process—Reframing the Questions (cont’d)

Typical framing

- Was there anyone else?
- Why did you wait so long to report it?
- Why did you take a shower?
- Did he ejaculate?



FETI Process—Reframing the Questions (cont'd)

Typical questions asked

- Where did this happen?
- How long did this last?
- Did you get hurt?
- How drunk were you?



Self Care When Working with Trauma Survivors

- Trauma is contagious.
- Like the interviewee, an interviewer may experience a variety of emotional reactions that manifest itself as secondary or vicarious traumatization or compassion fatigue.
- An interviewer could experience PTSD reactions, relive a personally traumatic experience, or suffer from witness guilt.



Self Care When Working with Trauma Survivors

- Because forensic interviewers may experience a wide array of emotional reactions after an intense interviewing session, they must implement various **safeguards** to ensure a supportive and safe work environment.
 - Before an interview, an interviewer should anticipate vicarious trauma reactions, and after an interview, the interviewer should debrief after hearing a traumatic story.



Self Care When Working with Trauma Survivors

- In a work environment where personnel frequently interview persons impacted by trauma:
 - The organization must anticipate and normalize reactions by directly discussing the risk of vicarious traumatization.
 - Developing an organizational plan to support staff and providing personnel with the opportunity to discuss how work is affecting their life.



Self-Care Activities

- Practice deep breathing
- Progressive muscle relaxation
- Guided imagery
- Taking mini-vacations
- Mental health days
- Gardening
- Exercise, yoga, dancing
- Meditation, spiritual, religious activities
- Having fun



Contact Information

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A YouTube video about interviewing sexual assault victims:
Sexual Assault: A Trauma-Informed Approach to Law Enforcement First Response
<http://youtu.be/gtWD1XJrhNo>







Trauma-Informed Interviews

The interview is where it all happens; it is ground zero in the investigation.

Strong interview skills:

- Increase the amount of detail collected
- Reduce the risk of re-traumatizing
- Result in a better understanding of the events

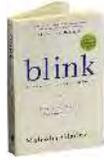


First Impressions

"There can be as much value in the blink of an eye as in months of rational analysis."

– Malcom Gladwell

Do not underestimate the first 90 seconds



The First 90 Seconds



Beginnings Matter

Greet the witness (and support person)

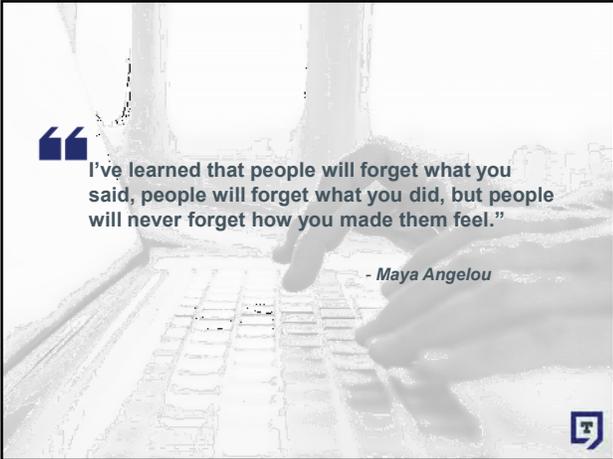
Be organized and ready to start

Project the appropriate manner

- Warm yet professional
- Ready to listen

Remember: Talking to an investigator is nerve-wracking.





“
I've learned that people will forget what you said, people will forget what you did, but people will never forget how you made them feel.”
”

- Maya Angelou

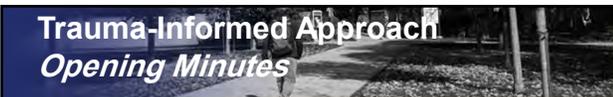




Trauma-Informed Approach
Opening Minutes

- **In-person interviews**
 - Comfortable room
 - Allow Complainant/Respondent to choose where to sit
 - Offer water
 - Have tissues and fidget objects nearby
 - Do your best to put them at ease





Trauma-Informed Approach
Opening Minutes

On Zoom or other remote platforms:

- Optimize your lighting; Think about what background screen to use
- Discuss a plan if either of you are interrupted or need a break
- Address how you'll handle technical problems
- Have documents you plan to screen share queued up
- Do your best to put the person at ease



Trauma-Informed Approach

Opening minutes

For every interview

- Prepare some introductory comments about who you are and the process. Discuss your neutral role.
- Be transparent
- Address issues of retaliation, privacy, recording, notetaking, amnesty for drinking/drugs, etc.
- Allow time for questions from witness or advisor



The Title IX Interview

Different from other interviews

- College-aged witnesses
- May have experienced trauma
- Parent, attorney, or other advisor may be present
- Covering intimate and sensitive topics



College-aged Witnesses

- Age, gender and power dynamic
 - Investigator may be much older than witness
 - Male investigator interviewing female witness, or vice versa
 - Established professional vs. college student
- Unfamiliar expressions or jargon that lead to miscommunications
- Lack of Sophistication: Understanding *process* is important



Complainant Not Be forthcoming For Several Reasons

Fearful of the process

Traumatized

Shy or cautious

Embarrassed to say what took place

Fractured memories

Angry with campus



Reluctant Complainant

Listen for why she/he is reluctant

- Respond to the issues if you can
- Check if supportive measures were made available

Acknowledge difficulty of the process

- Offer to take breaks as needed
- Check in with support person

If needed, suggest rescheduling interview



Reluctant Witnesses

- Explain the process/policy
- Be transparent
- Encourage participation by explaining why their help is important
- What leverage does the campus use if student declines to participate?



Respondent Interview

- Treat Respondent the same as you do Complainant
- Manage the Respondent's stress
- Interview is Respondent's chance to understand the allegations and respond
- Respondent may bring forth new evidence

Useful statement: "Before you leave here today, you'll fully understand the allegations."



Create a Trauma-Informed Atmosphere During Interview

- **Show Empathy**
 - Acknowledge difficulty of addressing questions
- **Be Aware**
 - Moderate pace of the interview based on demeanor of the interviewee
 - Watch for stress or fatigue and offer a break
- **Dignity:**
 - Display appropriate level of seriousness



Challenges to Trauma-Informed Interviewing

- Investigator **can't** tell the Complainant:
 - “I am so sorry this happened to you.”
 - “What they did to you was wrong.”
- **Alternative statements:**
 - “I'm sorry you're going through this.”
 - “I can see it's hard for you to talk about this.”
 - “It sounds like this was a very difficult experience.”
 - “I know this process is hard.”



Parent or Other Non-Legal Advisor

- Be prepared for:
 - Mom, Dad, other close relative
- You will need to read the situation.
 - Some parents/advisors are disruptive; some never speak.
- Know the school's policies and plan how you will respond if parent/advisor interrupts.

Practice tip: *At the outset, give parent/advisor opportunity to ask you questions.*



Trauma-Informed Questions

Possible Questions:

- Start where you feel comfortable.
- What else do you remember?
- What was the most difficult part of the experience?
- Questions about sensory details



Attorney Advisor

- Attorney has the same role as advisor/support person.
- Again, know the policy and what attorneys are told about their role in interviews.
- Remind the attorney that their role is to offer support.
- Politely cite from the policy, if needed
- If problems develop:
 - **Keep your cool**
 - Discuss consequences of refusing to answer
 - Be pleasant and patient, but firm and persistent
 - Be prepared to shut down the interview



Anonymous Witnesses



- Be prepared for this and know campus policies.
- Find out why the witness wants to be anonymous.
- Discuss fear of retaliation or other reasons for anonymity
- Explain that weight of evidence is weakened if the parties don't know who made the statement



Collect policy-based information

Areas that you need information on:

- Jurisdiction—Where did events take place?
- Affirmative consent and factors that would invalidate consent
 - Incapacitation from sleep/alcohol, force and/or coercion
- Other allegations that violate policy
 - Sexual images, stalking, retaliation
- Specific impacts of the incident



Potential minefields

Be mindful of:

- Leading questions
- Asking about information you don't really need
 - Not every detail is necessary
- Questions that suggest you have made a judgment
- Large reactions to witness statements



Strategies for Interviewing

- The funnel method
 - Start broad and keep narrowing
- Ask witness to quantify: “Sometimes” or “lots.”
- **No need to fill the silences.** Let witness answer.
- Be careful to clarify speculation vs. facts

Be prepared for witnesses with secondary trauma



Strategies for Interviewing

Dealing with answers that are unexpected

- Guard your reactions, remain neutral
- Ask follow-up questions to clarify
- Consider possible reasons for why the witness said this
- Provide more transparency and reframe the question, if that approach makes sense
- Circle back later and rephrase the question



Strategies for Interviewing

Other challenges

- Witness gives one or two-word answers
- Witness dodges the question
- Witness is defensive, mistrusting of the process
- Response is jumbled, ill-logical, or off-topic



Closing the Interview ...

- Wrap up questions, always ask:
 - Is there anything else I should know or be aware of?
 - Is there anyone else you think I should talk to?
- Possible end-of-interview revelations
- Find out best method of contact for follow-up and availability



The Hearing

What To Expect and How to Prepare



Hearing Foundations

- When do we have a hearing?
 - Nationwide: when a case meets the criteria under the new regulations
 - California: anytime a student accused of sexual misconduct is facing severe disciplinary actions and credibility is central
- Who makes the final decision?
 - Neutral Panel
 - Neutral Adjudicator



The Adjudicator's Role in the Hearing

- Sets hearing scope and witness list
- Makes all procedural determinations
 - Requests to admit new evidence
 - Order of witness testimony
- Manages questioning
 - Generates their own questions
 - Oversees advisor questioning
- Ensures the hearing is conducted in a fair and respectful manner

Makes final factual and policy findings



The Investigator's Role in the Hearing

- Explains investigative process
- Presents information related to the following:
 - Both parties were given the chance to present evidence and witnesses; and
 - Both parties were given the opportunity to respond to allegations and evidence gathered.

IN SHORT: That you conducted a thorough, fair and impartial investigation.



If you are testifying

- Explain
 - Refresh your memory
- Defend
 - You thoughtfully evaluated what steps to take and why: remember that!
- Maintain Composure
 - Do not take it personally (easier said than done)



Remember: Hearings Differ From Investigations

- Witnessed by the other party
- Already have Report or at least some information gathered
- Areas in dispute may be narrowed
- Timing: less opportunity for narratives
- Rapport more difficult to build
- Questioning by the other person's advisor live and in real time



Hearing Scope: How is it determined?

- Complaint
- Any written statements
- Notice to the Parties
- Investigative Report/Summary
- Recommended Findings (if applicable)



Setting the Hearing Up for Success

- Clearly outline the investigation scope
- Bullet **material** undisputed facts
- Bullet **material** disputed facts
- Write witness summaries in chronological order of the events, not in order of investigative interviews
- Clearly articulate why you did not gather suggested evidence



Hearing Day Logistics

- Testimony order
- Breakout rooms
- Visual and/or physical separation
 - What about with the witnesses?
- Recording
- Copies of the record to all parties
- Technology: computers, tablets, phones
- Arrivals and departures



Challenges That Arise

- Proposed document list from the parties
- Proposed witness list from the parties (and securing witness participation)
- Late requests for additional document and witness consideration
- Challenges to the process and the appointment of the Hearing Officer
- Accommodation requests
- Managing technology snafus



Let's see a hearing in action...



HOW UNIVERSITY TITLE IX ENFORCEMENT AND OTHER DISCIPLINE PROCESSES (PROBABLY) DISCRIMINATE AGAINST MINORITY STUDENTS

By Ben Trachtenberg*

This Article argues that university discipline procedures likely discriminate against minority students and that increasingly muscular Title IX enforcement—launched with the best of intentions in response to real problems—almost certainly exacerbates yet another systemic barrier to racial justice and equal access to educational opportunities. Unlike elementary and secondary schools, universities do not keep publicly available data on the demographics of students subjected to institutional discipline, which prevents evaluation of possible disparate racial impact in higher education. Further, several aspects of the university disciplinary apparatus—including broad and vague definitions of offenses, limited access to legal counsel, and irregular procedures—increase the risk that minority students will suffer disproportionate suspensions and other punishment.

This Article brings needed attention to an understudied aspect of Title IX enforcement and raises concerns about the potential effects of implicit bias. While many commentators and courts have addressed whether university disciplinary procedures mistreat men—or, instead, even now provide inadequate protection for college women—few observers have discussed possible racial implications, which may explain (and be explained by) the current lack of data. Outside the context of sex-discrimination cases, university discipline procedures for quotidian matters such as plagiarism and alcohol abuse likely exhibit similar racial biases.

This Article argues that the U.S. Department of Education should use its authority under Title VI of the Civil Rights Act of 1964 to require that colleges and universities immediately begin collecting and publishing the sort of data already reported by elementary and secondary schools, thereby allowing observers to assess the scope of disparate impact in campus discipline processes.

* Associate Professor of Law, University of Missouri School of Law. I would like to thank everyone who has read earlier drafts and provided comments, including candid confidential responses from university presidents and other officials dedicated to promoting equal opportunity on campus. Among others, I appreciate feedback from Anne Alexander, Tina Bloom, Sam Halabi, Kevin McDonald, Allen Sessoms, Tommy Tobin, Mark Yudof, various Trachtenbergs, and the Drake Law School faculty who attended my August 2017 presentation in Des Moines.