

Title IX Investigator Training

September 13-14, 2023

SUNY Student Conduct Institute

Meet your facilitator



Rebecca Leitman Veidlinger is an attorney specializing in Title IX and the institutional response to complaints of gender-based discrimination, sexual harassment, and sexual violence. Rebecca has conducted and supervised hundreds of Title IX investigations, and she regularly serves as a Title IX hearing officer for institutions across the country.

Rebecca teaches and trains on school-related sexual misconduct nationwide. As an adjunct professor at the University of Michigan Law School, she teaches a seminar on Title IX, and she frequently provides sexual misconduct prevention and response training to higher education administrators, Title IX implementers, and K-12 personnel. Rebecca was recently appointed as the external co-chair of the University of Michigan's Coordinated Community Response Team, a group that examines the University's prevention and response efforts, identifies areas for growth, and makes policy recommendations to the University's leadership.

Before entering private practice, Rebecca worked at the University of Michigan as a Title IX investigator. She also served as Michigan State University's interim deputy Title IX coordinator, overseeing MSU's creation of a free-standing civil rights investigation unit in 2015. Rebecca is the former sex crimes prosecutor in Monroe County, Indiana (home of Indiana University), where she prosecuted hundreds of cases of domestic and sexual violence involving children and adults.

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Our agenda for today



What the regulations say about investigations



Understanding the goals of an investigation



Preparing to investigate



Conducting comprehensive interviews of parties and witnesses

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Our agenda for Thursday

- Collecting other evidence
- How to do evidence review
- Summarizing interviews
- Writing investigation reports
- Addressing bias

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Poll: Title IX investigations

- A window will pop up on your screen
- Read the question and the answer options
- Pick the one answer that best fits you
- Sit back and enjoy seeing how your colleagues responded

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Title IX of the 1972 Education Amendments

Title IX Regulations, Effective Aug. 2020

"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."

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Before the investigation . . .

- Title IX jurisdiction determined by Title IX Coordinator
- Allegations fall within definition of Title IX sexual harassment
- Title IX Coordinator offered supportive measures to both parties
- Notice letters have been issued to both parties

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Investigation process under the regulations

- Notice
- Collection of evidence
- Share evidence directly related to allegations with parties
  - Parties have 10 days to review and provide written feedback
- Consider the parties' written responses
- Create investigative report that summarizes relevant evidence
  - Parties have 10 days to review and provide written feedback prior to hearing

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A bit more from the Regulations about investigations and the grievance process . . .

- Treat complainants and respondents equitably
- Require an objective evaluation of all relevant evidence
- No conflict of interest or bias in any Title IX implementer
- Include a presumption of nonresponsibility
- Include reasonably prompt time frames for conclusion of the grievance process

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And still more. Investigators should:

- Provide equal opportunity for the parties to present witnesses and other evidence
- Provide the parties the same opportunities to have an advisor at all meetings/proceedings
- Provide written notice of date, time and location of all meetings, with sufficient time for party to prepare
- Be adequately trained

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And investigators should NOT

- Restrict the ability of either party to discuss the allegations or to gather and present evidence
- Limit the choice or presence of an advisor
- Be biased in favor of one party or the other, or in favor/against complainants generally or respondents generally

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Q & A:
What the Regulations require

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Overarching goals of an investigation



Collect as much reliable and relevant evidence as possible



Utilize a process where the parties are treated fairly and impartially



Write a report that illustrates you did all of the above



Collect all of your investigation materials into a format that is helpful to the decision-maker

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Overarching goals of an investigation



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Preparing to start the investigation

- Review complaint
- Review notice letters
- Review all initial information
- Review relevant policy definitions and think about the kind of questions you'll need to ask
- What facts does the decision maker need to make a determination?

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Example: Incapacitation

- When alcohol or other drugs are involved, it is important to understand the level of impairment that results from a person's level of consumption. A person's level of impairment is not always demonstrated by objective signs; however, some signs of intoxication may include clumsiness, difficulty walking, difficulty concentrating, slurred speech, vomiting, combativeness, or emotional volatility.
- Evaluating whether another individual is incapacitated requires an assessment of whether the consumption of alcohol or other drugs has rendered that individual physically helpless or substantially incapable of:
  - Making decisions about whether to engage in Sexual Contact or Sexual Intercourse; or
  - Communicating Consent to Sexual Contact or Sexual Intercourse.
- In evaluating Consent where the question of incapacitation is at issue, the University asks two questions: (1) did the person initiating sexual activity know that the other party was incapacitated, and if not, (2) should a sober, reasonable person, in the same situation, have known that the other party was incapacitated? If the answer to either question is yes, then there has not been consent.

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Use chat to share with all of us:

What specific facts do you need to gather for the determination of incapacitation?

- Chat is located at the bottom of your screen
- Click on Chat, and a window will open up
- In the “to” field, make sure you have the word “everyone”
- Type in whatever you want to share, and press “return”
- Keep the Chat open to see what others share
- You can close the Chat at any time by clicking on the red box in the upper left of the Chat window

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Example: Sexual Harassment

Sexual Harassment is any unwelcome conduct, based on sex, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

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Questions you'll need to ask re: sexual harassment

- Specific nature of the conduct (e.g., exactly what was said or done)
- Did Complainant initiate or invite the conduct?
- Frequency of the conduct
- Whether conduct was widespread
- Whether a reasonable person would view the conduct as severe, persistent or pervasive
- And think about: how and who will we ask these questions?

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Collection of evidence

Interviews of parties and witnesses

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An initial fundamental thing to remember:

The goal of interviews

What techniques can we use to help us achieve that goal?



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Party interviews

- First things first:
  - Guiding principles
  - Basics about interview structure
  - Key rules

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Principles for every interview

- Reflect neutrality and professionalism alongside appropriate kindness
- Be open to the person you are interviewing
- Be prepared, and show that you are prepared
- Use clear communication
- Be transparent about your role
- Talk like a human being

- Stay in touch with the parties throughout investigation

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Interviewing the parties: Structure

- Let the party know what is happening, before you meet and when you meet
- Have a standard way that you explain:
  - Your neutrality
  - Investigative process
  - Prohibition on retaliation
  - Confidentiality, privacy, and disclosure issues related to their statement
- Make a note of every written/electronic item they mention
- Ask for (and discuss) list of witnesses

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Interviewing the parties: Structure (cont'd)

- Last question before closing meeting should be open-ended invitation for them to add anything
- Review items of evidence discussed
- At end of meeting:
  - Remind them of next steps and resources
  - Close with a bit of comfortable conversation

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Be alert! **Don't**: (per the Regulations):

Ask about:

- Complainant's sexual predisposition or prior sexual behavior, unless offered to prove that someone other than respondent committed the alleged conduct or concerns specific incidents of the complainant's prior sexual behavior with respect to the respondent and is offered to prove consent

- Information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege

Access, consider, disclose, or otherwise use:

- A party's medical or other treatment records without that party's voluntary, written consent

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Conducting the interview: Roadmap

- Different approaches to interviewing
- Challenges
- Examples

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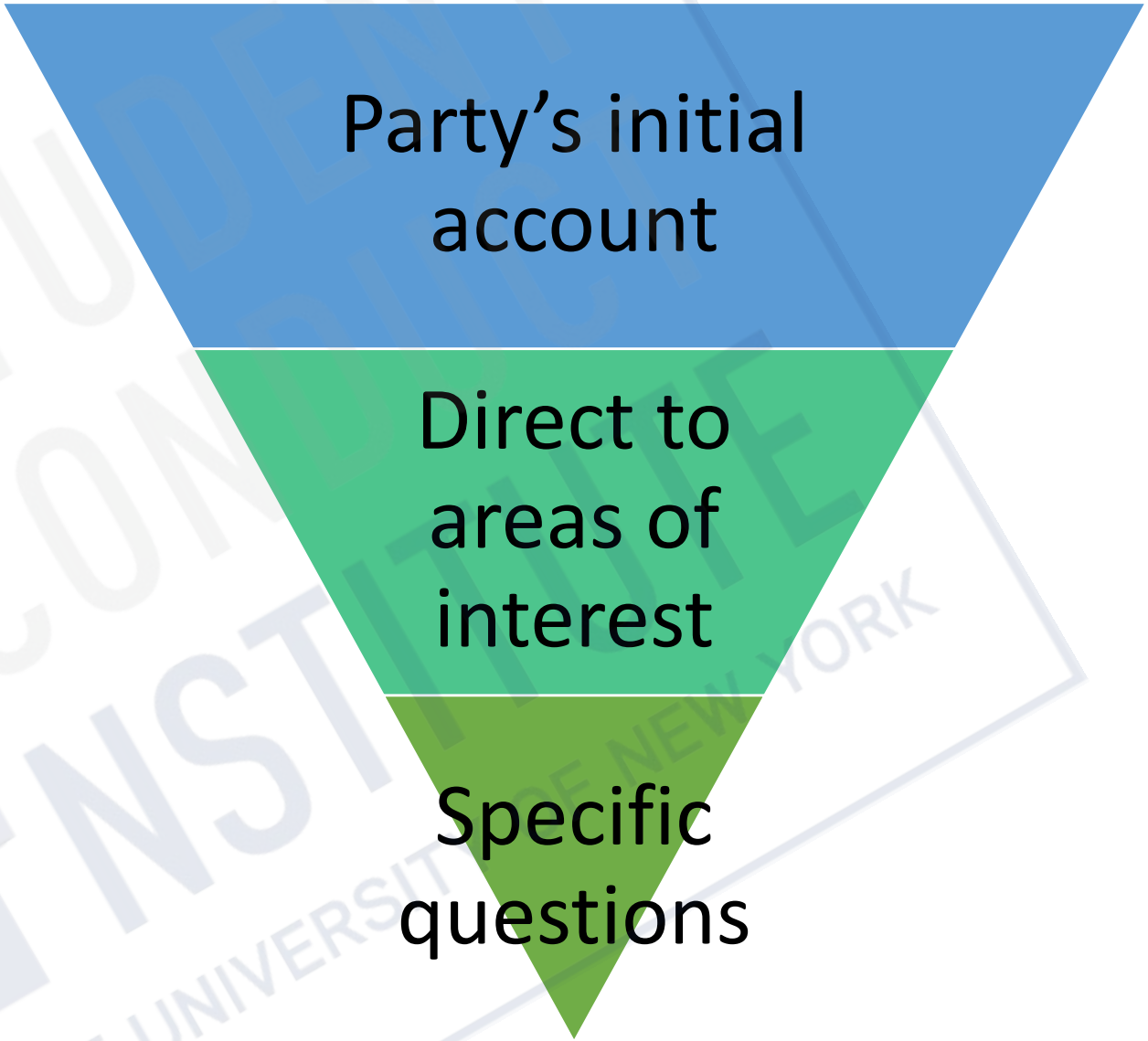
Interviewing techniques

- Learning from different systems:
  - Child forensic interview
  - Trauma-informed interview
  - Forensic experiential trauma interview



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Conducting thorough interviews



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Use chat to share with all of us:

What are some challenges when it comes to conducting interviews of complainants?

- Chat is located at the bottom of your screen
- Click on Chat, and a window will open up
- In the “to” field, make sure you have the word “everyone”
- Type in whatever you want to share, and press “return”
- Keep the Chat open to see what others share
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What does the typical complainant interview sound like? It could start like this:

- Skylar, I understand you have raised concerns about an interaction you had with Cal on November 4, 2021.
- How do you know Cal?
- Starting where makes sense for you, please tell me about your experience with Cal. I'm sure I'll have some follow up questions for you, but I'd first like to hear about your experience in your own words.

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Then it could sound like this:

- Thank you for sharing your experience. As I mentioned, I do have some follow up questions where I'd like to learn more.

- You mentioned attending a party at Kelly's house before going to Respondent's dorm room.
  - Can you tell me all about the party?
  - I'd like to hear all about that party, like what you did, who you may have interacted with, what prompted you to leave, etc.
  - Who did you go to the party with?
  - What is Kelly's last name?

- You mentioned sending a text message to Respondent an hour after you left their apartment. Do you still have that? Are you willing to share it with me?

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Use chat to share with all of us:

What are some challenges when it comes to conducting interviews of respondents?

- Chat is located at the bottom of your screen
- Click on Chat, and a window will open up
- In the “to” field, make sure you have the word “everyone”
- Type in whatever you want to share, and press “return”
- Keep the Chat open to see what others share
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What does the typical respondent interview sound like?
After beginning like a complainant's interview, it could sound like this:

- Thank you for sharing your account of your interaction with Skylar.
- I want to make sure you've had a chance to hear some of the specifics of Skylar's allegations and that you have a chance to directly respond.
- Skylar said after the encounter, you called them and apologized for a "bad decision." What is your response to hearing that?

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How might respondent interviews differ from complainant interviews?

- All the same principles (from prior slides) regarding structure and follow-up questioning apply equally here
- You may have some open-ended questions and some specifically prepared questions
- Be prepared for a demand to know the allegations– and tell them what the allegations are
- Give respondent opportunity to respond to every claim
- Explore all reasons why complainant might have raised the concerns: “Do you have any idea why the complainant would make these allegations?”



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Tough questions and issues that sometimes arise during interviews

- Alcohol consumption
- Specific details of/surrounding the sexual act
- Post-incident initiation of contact by complainant toward respondent
- Complainant's 18-month delay in reporting incident
- Reluctant party
- Party wants lots of witnesses
- Party doesn't want a particular witness
- Very emotional party

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Make sure you've collected enough information for decision-maker to make their determination



Relevance + Reliability + Credibility = Weight/ probative value

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Relevant evidence



No definition from the Regulations



Should be interpreted using its plain and ordinary meaning.



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

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How does a decision-maker assess credibility?

- Motive or bias to give inaccurate account (such as relationship to the parties or has anything to gain or lose from the case)
- Inherent plausibility/logic of account
- Corroboration/Consistency with other evidence
- Inconsistency within their own account? Reasonable/minor or significant?
- Demeanor

- To discuss: difference between credibility and reliability

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Witnesses



Advise witnesses of neutrality, lack of confidentiality, and retaliation



Ask about relationship to parties (at beginning)/conversations about interview (at end)



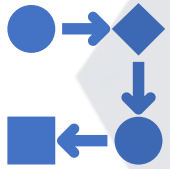
Give the witness very little specific information about the allegations



Last question before closing meeting should be open-ended invitation for them to add anything

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Following up after initial rounds of interviews



Why might we need to follow up?



Is it okay to follow up?



How do you pose the follow-up questions?

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Other (sometimes) challenges:

Advisors during the investigative process

- Emails—who should you communicate with?
- Problematic advisor behavior during interviews
- Advisors who are new to the Title IX process

Q & A:
Investigative interviews

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Title IX Investigator Training

September 14, 2023

SUNY Student Conduct Institute

Reminder! We already talked about

- What the regulations say about investigations
- Understanding the goals of an investigation
- Preparing to investigate
- Conducting comprehensive interviews of parties and witnesses

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Our agenda for today

- Collecting other evidence
- How to do evidence review
- Summarizing interviews
- Writing investigation reports
- Addressing bias

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Collection of evidence

Evidence other than interviews

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Other evidence common in campus investigations

- Texts/emails
- Social media posts
- Police reports
- Photos
- Medical records
- Phone records
- Surveillance videos
- Key card swipe records

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Issues related to collecting evidence

- Burden is on the institution
- Challenge re: authenticity of an item
- Learning about additional potential policy violations during the investigation



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Multiple choice question

- A window will pop up on your screen
- Read the question and the answer options
- Pick the best answer
- Sit back and enjoy seeing how your colleagues responded

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Q & A:
Collecting other evidence and documenting investigative steps

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Evidence review

Share with both parties the evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

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Understanding directly related

- Regulations don’t define directly related
- A broad net– broader than “relevant” evidence
- Preamble says should be interpreted according to its plain and ordinary meaning

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Poll: Interview policy

- A window will pop up on your screen
- Read the question and the answer options
- Pick the one answer that best fits you
- Sit back and enjoy seeing how your colleagues responded

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p.s.–
a best practice regarding unrecorded interviews

Send draft of interview notes (of unrecorded interview) to person for review for accuracy



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Logistics of evidence review:

What does this look like?

- Actual items of evidence
- Transcribed interviews v. unrecorded interview notes
- File-sharing platform
- Preliminary report??
  - Pros and cons

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Q & A:
Evidence review process

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Investigation report



Regulations say the investigator must create an investigative report that fairly summarizes relevant evidence



No required structure in Regulations

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Overarching goals of an investigation



Collect as much reliable and relevant evidence as possible



Utilize a process where the parties are treated fairly and impartially



Write a report that illustrates you did all of the above



Collect all of your investigation materials into a format that is helpful to the decision-maker

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What does it mean to summarize

- Transcripts of recorded interviews
- Written summaries of unrecorded interviews
- Police reports
- Text messages
- Medical records
- Surveillance videos
- Key card swipe records

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Summarizing an interview

- Remember relevance
- Chronological narrative
- “Direct quotes”
- When appropriate, note demeanor
- When to note advisor actions/other things that happen during the interview
- “I don’t know” and “I don’t remember”
- Summarizing inconsistencies
- Topic sentences
- Show how the information came out

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Addressing parties' responses to evidence review in investigation report

- What do you do when:
  - Party provides new screenshots of text messages
  - Party identifies five additional witnesses who were never mentioned previously
  - Party annotates the other party's interview summary, pointing out all the times they believe the person lied
  - Party points out the ways in which other party's account is contradicted by the surveillance video evidence
- Use footnotes throughout investigation report and include section in report called "Party Responses to Evidence Review." Summarize party's position/arguments in that section.
- Both responses will be an additional item of evidence to be included with investigation report.
- Document additional investigative steps and include any additional evidence collected.

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Investigation report structure—

necessary sections (per me)

- Background
- Allegations from complaint
- Relevant policy provisions
- Procedural steps
- Table of evidence collected
  - Includes parties' responses to the evidence review and any additional evidence submitted
  - Indicates who provided each item
- Summary of party interviews
- Summary of witness interviews

OR

- Chronological synthesis of all evidence collected
- Party responses to evidence review
- Appendices/Exhibits
  - Including exhibit of irrelevant evidence

Investigation report structure—Background

On November 2, 2021, undergraduate student Skylar Smith ("Complainant") filed a Formal Complaint against undergraduate student Taylor Jones ("Respondent") alleging violations of the University's Title IX and Sexual Misconduct Policy ("Policy"). Following the Title IX Coordinator's initial assessment and outreach to both parties, on November 14, 2021, the University commenced a formal investigation into the Formal Complaint pursuant to the University's Title IX and Sexual Misconduct Grievance Procedures ("Procedures"). This Investigation Report details the University's investigation into those allegations and summarizes the relevant evidence collected.

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Investigation report structure—<u>Allegations from Formal Complaint</u>

In their Formal Complaint, Complainant alleged as follows:

[Either include exact language from Formal Complaint, if appropriate].

or paraphrase, such as:

On or about October 7, 2021, when the parties were in Respondent's dorm room in Academia Hall, Respondent repeatedly touched and grabbed Complainant's buttocks even after Complainant told Respondent to stop touching their buttocks, while Complainant was highly intoxicated and unable to consent.

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Investigation report structure—<u>Relevant Policy provisions</u>

The allegations in the Formal Complaint implicate the Policy's definitions of Sexual Assault: Fondling; Consent; and Incapacitation.

The Policy defines Sexual Assault: Fondling as

The Policy defines Consent as

The Policy defines Incapacitation as

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Investigation report structure—<u>Procedural Steps</u>

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DATE	ACTION
7/31/2021	Formal Complaint filed
8/9/2021	Notice letter issued to Complainant and Respondent via email
8/13/2021	Email outreach for interview to Complainant
8/19/2021-8/20/2021	Email outreach for interview to Respondent
8/23/2021	Second interview of Complainant
8/27/2021	Email outreach for interview to Witness 1; sent draft of interview summary to Complainant for review
8/31/2021	Email outreach for interview to Witness 2
9/1/2021	Interview of Witness 1
9/2/2021	Interview of Respondent; sent draft of interview summary to Witness 1 to review
9/3/2021	Second email outreach for interview to Witness 2
9/5/2021	Email from Respondent identifying Witness 5 as witness
9/7/2021	Interview of Witness 2
9/8/2021	Interview of Witness 3, Witness 4
10/4/2021	Draft Investigation Report and Directly-Related Evidence shared with the parties
10/14/2021	Complainant submitted response to Draft Investigation Report and Directly-Related Evidence
10/15/2021	Final Investigation Report and Relevant Evidence submitted to Title IX Coordinator

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Investigation report structure—<u>Table of evidence collected</u>

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Description	Date	Exhibit
Formal Complaint	September 22, 2021	A
Notice of Investigation to Complainant	November 15, 2021	B
Notice of Investigation to Respondent	November 15, 2021	C
Amended Notice of Investigation to Complainant	November 22, 2021	D
Amended Notice of Investigation to Respondent	November 22, 2021	E
Complainant's initial interview summary	December 10, 2021	F
Complainant's initial response to interview summary	February 8, 2022	G
Complainant's follow-up interview summary	February 21, 2022	H
Screenshots of Snapchat messages provided by Complainant	February 22, 2021	I
Respondent's initial interview summary	December 28, 2021	J
Respondent's initial response to interview summary	February 4, 2022	K
Witness 1's initial interview summary	January 28, 2021	L
Witness 1's response to initial interview summary and additional information	February 12, 2022	M
Irrelevant evidence	Various	N

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Investigation report structure—Option 1
Summary of party interviews

The investigator interviewed both parties via Zoom. Complainant's advisor, Sal Price, was present for their interview. Respondent chose not to have an advisor present for their interview. Prior to the parties' interviews, the investigator advised each party of the following: investigator neutrality, that information shared with the investigator was not confidential and would be shared with the other party and included in the investigation report, and the of University's prohibition on retaliation.

The information summarized in the sections below is presented from the perspective of the party interviewed.

A. Complainant

Complainant is a first-year student studying chemistry. Complainant first me Respondent in chemistry lab.

Complainant described first meeting Respondent at a party at a house on 9th Street. Complainant attended the party with their friend, Lior.

B. Respondent

Respondent is a first-year student studying physics. Respondent was in chemistry lab with Complainant but did not interact with them there.

Respondent arrived at the 9th Street party around 11:00 p.m., after watching a baseball game at the stadium.

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Investigation report structure—Option 1
Summary of witness interviews

The investigator interviewed all witnesses via Zoom. Prior to each witness interview, the investigator advised each witness of the following: investigator neutrality, that information shared with the investigator was not confidential and would be shared with the parties and included in the investigation report, and of the University's prohibition on retaliation.

The information summarized in the sections below is presented from the perspective of the witness interviewed.

A. Witness 1

Witness 1 is Complainant's roommate. Witness 1 does not know Respondent.

Witness 1 was present in Complainant's dorm room when Complainant returned from Respondent's apartment. Witness 1 could tell that Complainant looked disheveled and had been crying.

B. Witness 2

Witness 2 is Respondent's boyfriend. Witness 2 does not know Complainant.

Witness 2 attended the same party where Complainant and Respondent first interacted. Witness 2 saw the parties "grinding" on the dance floor.

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Investigation report structure—Option 2
Synthesis of evidence gathered

A. Initial Meeting and Interactions Between Parties

The parties met at the 9th Street party, where they danced together and did four shots of tequila together. (C. Trans., p. 4; R. Trans., p. 2). While Complainant had also consumed alcohol prior to the party, Respondent was unaware they had done so. (C Trans., p. 9; R. Trans., p. 5). Witness 2 saw the parties "grinding," but they were concerned because they felt Complainant was hunched over and unable to stand up due to intoxication. (W2 Trans., p. 2).

B. Parties Leave 9th Street Apartment

The parties left the 9th Street apartment in an Uber. (C. Trans., p. 11; R. Trans., p. 9). According to Complainant, Respondent insisted on getting in the Uber with them to make sure they got home okay. (C. Trans., p. 12). According to Respondent, Complainant was scared to take an Uber alone and begged Respondent to come with them. (R. Trans., p. 10).

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Investigation report structure—Response to evidence review

On January 24, 2022, both parties provided responses to the evidence review. In their response (Exhibit H), Complainant identified two additional witnesses (Witness 4 and Witness 5) and provided argument regarding the summary of Respondent's interview.

In their response (Exhibit I), Respondent submitted additional text messages exchanged between the parties on the day following the incident (Exhibit J) and provided argument regarding the summary of Complainant's interview and Witness 2's interview.

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Other sections I've seen in reports

- Timeline of events
- Credibility assessments
- Disputed/undisputed facts
- Statement of jurisdiction
- Objective of the investigation
- List of training the investigator has taken
- Recommended findings

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Q & A:
Summarizing relevant evidence and writing the investigation report

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Regulations require that investigators be unbiased

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Use chat to share with all of us:

How can bias show up in an investigation?

- Chat is located at the bottom of your screen
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What does it mean to be unbiased?

- Don’t have a bias for or against complainants or respondents generally
- Don’t have a bias for or against an individual complainant or respondent
- Treat parties equally/equitably during interviews
- Seek to interview witnesses identified by both parties
- Don’t prejudge the evidence

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Deeper dive into bias

- Bias is not an action; it occurs in a person's head
- What is implicit bias?
- Different kinds of bias

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Thank you!

I welcome your feedback.

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