

**Texas State University System
2024 Advanced Title IX Training**

Case Study Materials

Maxient Report, November 4, 2024

I am Sophia, a junior in Theatre, and I am making a complaint against Theatre Professor John Williams. This all started last fall, when he started making inappropriate sexual comments during our private lessons. Over time, he started touching me, like rubbing my shoulders or touching my back and stomach when making a point about breathing or movement. I never asked him to do this, and it made me very uncomfortable.

John's attention became more intense as the semester ended, and he initiated a sexual relationship during finals week. I wasn't into this, but he said it would be good for my acting and singing, as a sexual experience would help me learn how to express intense emotions through physical connections. We had sex in his office and at my off-campus apartment through the spring. Once, a janitor caught us in the act.

Also, John is an alcoholic, and he would always bring alcohol and pot to my apartment. We would get drunk and high before having sex. He knew he had to get me really wasted to have sex so that I couldn't say no. He also sent me photos of his erections, which I didn't want.

Over the summer, he started freaking out about cheating on his wife. I just wanted it to be over, so I told him he had to stop. He said he loved me and would leave his wife, but I was done. I broke it off in early August, and he became very upset. He refused to talk and ghosted me on social media.

I went home for a couple of weeks, and I reconnected with my old high school boyfriend. He's been very understanding of the whole situation.

When I got back to campus, John started harassing and stalking me. He started spreading false rumors around the Theatre Department about me being a liar and a whore, and he would drive by my apartment at night to see if I was at home alone. Once, another professor was over for pizza to talk about the situation, and John left a note on his car accusing him of having an affair with me.

He also left cruel notes on my car while I was in class accusing me of being a liar and a whore for allegedly sleeping with this other professor and cheating on my new boyfriend.

I just want him to stop and go away. The other professor I spoke to in September suggested I file a complaint, but John is very influential in the theatre community, and he

could ruin my career and future, so I waited to see if he would go away. I think other theater faculty also knew what was going on but did nothing.

I can't take the stalking and harassment anymore. It keeps getting worse. He even contacted my new boyfriend under an alias, threatened him, and called me a cheating whore.

I am starting to get scared, and I just want him to leave me alone.



Respondent's Response to Investigation Notice: November 5, 2024

Dear Title IX Coordinator:

I was shocked by the allegations in the investigation notice. I have known Sophia since the spring of 2023, when she was in my Introduction to Acting class. I continued to teach her last fall in Advanced Acting class and in one-on-one Voice Studio lessons. Even though she was very flirty, I would never make inappropriate sexual comments to a student. Of course, certain theatre content is sexual, requiring that you engage the material. If I recall, we were working on numbers from Hair and Chicago, which both have overtly sexual themes.

In the spring, we started seeing each other when I was no longer her professor, eventually leading to a sexual relationship, which I believe does not violate University policy. We did not have sex while she was my student. At no point did Sophia ever suggest the sex wasn't consensual, and she wasn't "wasted" when we had sex.

Over the summer, I realized that I was not being fair to my spouse or my family, and I decided to end the relationship. Sophia was very upset, and she threatened to share personal photos I had shared with her.

Despite her threats, I decided I couldn't go on any longer. I broke it off with Sophia and came clean to my wife. My wife and I are working through the ramifications to our marriage and going to couples counseling.

But recent events have made it worse. In the past week, I found out Sophia has shared my personal, intimate photos on social media and with students to get me cancelled. She also has spread false rumors that I assaulted her and that our sexual relationship was not consensual. A friend said that sharing personal photos is revenge porn and a crime in Texas.

If anything, I am the victim of harassment here. Surely the University will not tolerate criminal revenge porn by a student against a professor. As for the alleged harassment, stalking, and leaving notes on her car, I have no idea what she is talking about. I would never do anything like that to a student.

But it doesn't surprise me, as she likes to surround herself with drama. Since coming back this fall, other students have started complaining to me about her lies and drama. And I've heard she is sleeping with another professor and also got back with an old boyfriend around the same time. I also heard she's been cheating on her boyfriend with another Theatre student. I would suspect the notes and harassment has something to do with all the drama in her life and the way she treats other people.

I stand ready to defend myself against these false accusations.

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Excerpts from Investigation Report

- Sophia took John's Introduction to Acting class in spring 2023, and she received a grade of B.
- Sophia took Advanced Acting class and Voice Studio with John in fall 2023, and she received a grade of A in both.
- The Theatre majors were working on numbers from Hair and Chicago in the fall 2023 in their Musical Theatre class, which Sophia was taking.
- The emails collected from the University email system reflect communications between Sophia and John related to her classes. The emails have a more friendly tone beginning in fall 2023, and they could be described as overly friendly or flirty. However, they do not reflect any overtly sexual or inappropriate language. The emails also do not reflect any discussions of John touching Sophia during Voice Studio.
- Both parties reported that their personal communications occurred on SnapChat and neither party produced any such communications. Both said the communications were deleted.
- Sophia stated that during their private lessons, John would often touch her on her stomach and back to point out movement and breath. He would also overly sexualize the content and try to encourage Sophia to be more sexual in her acting. Sophia stated that they were working on songs from Chicago in her private lessons.
- John stated that while he and Sophia developed a friendship in the fall, it was professional. He stated that he sometimes does touch students when trying to discuss movement and breath-work, but it is not sexual. He says he will usually ask the students at the beginning of the semester if there are concerns with touching, but he doesn't recall specific conversations with Sophia. John said Sophia never objected to him touching her.
- Sophia stated John initiated a sexual relationship in December 2023 during finals week, but she didn't tell anybody at the time. John denied this and stated their sexual relationship did not begin until they returned to campus in January 2024. We do not have their personal communications and no witnesses reported being aware of any sexual relationship until Spring 2024.
- Sophia reported that John often brought alcohol and marijuana to her apartment, and he kept a bottle or two in his office. She stated that they always drank, and sometimes smoked marijuana. When they had sex, she was always drunk and/or

high. She stated that she was in various stages of intoxication, but she did not voluntarily consent to sex. She stated she would never voluntarily consent to sex with John.

- John appeared evasive when asked if he and Sophia ever had sex in his office. At first, he claimed not to remember, and then said it was possible after reviewing the pictures referenced below. But he said any sex was consensual.
- John admitted to keeping a bottle of alcohol in his office for special occasions (e.g., to celebrate with his colleagues), but he denied he ever drank with students in his office. He does not remember drinking with Sophia in his office, and he denied ever smoking pot with Sophia in his office.
- John stated that in the spring 2023, it was common for him to go to Sophia's off-campus apartment, and they engaged in consensual sex. John stated he would sometimes bring beer over, but he didn't remember bringing liquor over. John stated both he and Sophia may have one or two drinks before having sex, but they were never drunk or wasted.
- John stated he does occasionally smoke marijuana, and he understood Sophia did as well before they started their relationship. John stated he and Sophia would occasionally smoke marijuana at her apartment, but he stated that they did not smoke to the point of being incapacitated. John did not recall if he provided the marijuana, as he recalled Sophia would often have it on hand.
- Witnesses interviewed stated both Sophia and John drank and smoked marijuana with others separate from being together. John's colleagues confirmed that John was known as somewhat of a heavy drinker, and he often had drinks with colleagues in his office, where he always had a bottle or two on hand.
- One faculty witness, Adam Simmons, recalled Sophia getting drunk at the after-party after the department's final performance of Chicago, and he remembered that John offered to drive her home that night. He only thought something of it later when Sophia told him about John's conduct one night at Sophia's house earlier this fall.
- None of the other witnesses recall ever seeing Sophia or John drunk together.
- Sophia was able to produce two photos that John sent her of his genitals. In the photo, you can see John's face, as well as a bottle of alcohol to the side. The photos look to have been taken in John's office. Sophia said he sent these photos to her out of the blue in May. Sophia said John sent these photos via Snapchat, but she saved them to her phone because they were so unusual and unexpected.
- John admitted that the photos were of him, but said it was a personal matter and that there is nothing wrong with sharing such photos with someone's intimate partner.
- John reported that his wife suspected he was having an affair in July, and eventually he admitted the affair to his wife. He then broke off the relationship with Sophia in early August. In response, Sophia became very upset and accused him of ruining her life. John also stated that he did block her on social media and via text because he wanted to move on and focus on his marriage.
- Sophia said that she broke up with John in early August, just before going home for a few weeks. Sophia said John became very upset and ghosted her.

- Sophia said that when she went home, she reconnected with her high-school sweetheart, James, and they started going out again.
- Sophia stated that when she returned, she saw John's car, a white F-150 pickup, drive by her house repeatedly at night. She couldn't see inside, but she was confident it was him.
- She also heard that John was talking to other Theatre students about her and spreading rumors that she was a liar and slept around with a lot of men. She provided the names of two students, who allegedly heard these conversations, Sarah and Beth.
- Sarah refused to participate in the investigation. Beth stated that she recalled students having lunch with John one day, and Sophia's name came up. Beth stated that Sophia is known to be a "drama queen," and she is constantly upset at somebody or something. When Sophia's name came up, John made it clear he had a poor review of Sophia, but he didn't elaborate. Beth did not recall any specifics of what John said, and she didn't recall John using words like "liar" or "whore." Rather, Beth had the sense that John considered Sophia to be untrustworthy. Beth also confirmed that Theatre professors sometimes touch students during class to correct dance or acting movements and/or to teach the students how to breath and use their body. Beth said it's a common part of acting classes, particularly musical theatre with dancing.
- Sophia stated that in September, she confided in her professor, Adam Smith, about her affair with John and her feelings that he was spreading false rumors about her and causing her classmates to avoid her. Adam is a younger professor, and Sophia stated she felt like she could talk to him and trust him. Sophia said she invited Adam over that night for pizza and beer, and they talked about the whole situation and she told Adam everything. Sophia confirmed that she told Adam about how John would get her drunk and high so he could have sex with her. Adam encouraged her to make a report to the Title IX office, but she wasn't ready yet. She was hoping Adam would talk to John and smooth things over. Adam said it wasn't his place to get involved. Sophia asked Adam to keep their discussion private. That night, when Adam went to his car, there was a note on his windshield that said, "You're getting the dirty seconds, you naughty boy. You should leave that skank alone. She can't be trusted. Don't get too close or you'll get burned." Sophia believes the note was from John.
- Adam confirmed Sophia's version of events, although he did not recall that they had beer that night. That evening, Adam took a photo of the note, which he provided to the investigator.
- When asked if Adam considered reporting Sophia's concerns to the Title IX office, he said that she had asked him to keep their relationship confidential. In addition, he understood that it was a consensual relationship that had a bad ending. He stated that Sophia did not share with him any allegations of sexual assault or non-consensual sex. Adam confirmed that Sophia said that they often had sex after drinking and smoking marijuana. But Adam said he still recommended she talk to someone in Title IX who was more familiar with ways in which the University could help her, but he wanted to stay out of it. Adam also confirmed that Sophia suspected John was bad-mouthing her in the Department

based on the way others were treating her, but Adam couldn't imagine John doing that. Also, Adam had no idea who would leave the note on his car.

- Sophia said she thought things calmed down in early October, but last week, John left two notes on her car while she was in class. The note called her a "lying bitch" and another called her a "double-faced skank." She took pictures of the notes at the time and shared the notes with the investigator.
- Sophia also reported that someone keeps sending her boyfriend, Bill, text messages and calling his phone from a false number and telling Bill that Sophia is a liar and "whore" who sleeps around. The caller also threatened Bill if he didn't leave me alone. She is sure it is John.
- Bill, who lives in another state, spoke by phone with the investigator and generally confirmed Sophia's statements about being contacted anonymously, although he didn't describe any threats. Bill didn't keep the texts and blocked the number, so he didn't have a record of who called him or left him messages about Sophia.
- Bill also stated that he recently visited Sophia, and that at the end of his trip, he broke up with Sophia but declined to provide a reason. Bill said this all happened last week and that he's done with Sophia and doesn't want to be involved any further. Bill then ended the interview.
- The investigator also requested video footage from the parking lot where Sophia parked on the days she says notes were left on her car. On the footage, a white male approximately 6' feet tall and medium build can be seen walking by her car and stopping at Sophia's car for a brief moment, and then moving on. However, the identity of the male is unclear from the footage due to the distance. The University Police Department stated that no other footage was available that could confirm the identity of the person.
- The investigator confirmed that John is a white male, is 6'0" tall, and is of medium build, but with a bit of a "beer belly." The investigator also confirmed that Bill is a white male, is 5'11" and of average build, and Adam is also a white male, is 6'2", and of average build.
- During his interview, John declined leaving any notes on Sophia's car. Similarly, Adam said he had no knowledge of any notes being left on Sophia's car. The investigator did not get to ask Bill about the notes, as Bill ended the interview before the investigator could ask the question.
- As for John's intimate photos, he stated that some of his students told him that Sophia had shared the photos in a group chat on Snapchat and was accusing him of sexually assaulting her. Some of the students had taken screenshots because it was so shocking. He provided the names of two students, who confirmed that Sophia had indeed shared the photos of John on Snapchat.
- Sophia initially denied sharing the photos, but then said she did it because students were avoiding her because John was spreading false rumors about her. That's when she decided to tell the truth about his predatory behavior.
- Sophia said that prior to sending the photos, she had not told anyone else at the College about what happened with her and John, other than Adam, her boyfriend, and confidential discussions with a therapist, which were private.

- The investigator stated that the University searched Sophia's University email account, and confirmed that she sent John's photos to numerous individuals, including students at the University and numerous individuals in the Theatre community outside the University.

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List of possible questions of Sophia by the Decision Maker:

- Can you please describe the physical contact between you and John during your Voice Studio classes?
- Did you consider it sexual? Why?
- Did you ever object to John touching you during your lessons?
- Do other Theatre professors touch students in class when discussing breathing or movement?
- In your complaint, you stated that you were "wasted" when you had sex with John. Can you describe what you mean?
- How much alcohol did you drink?
- How much marijuana did you smoke?
- Do you remember what happened after you drank and smoked?
- Did you ever black out?
- Were you able to stand up and walk on your own at the time?
- Do you remember having sex with John after drinking and smoking?
- Did you ever tell John to stop?
- Did you ever tell John to leave?
- Did you ever express any form of verbal or non-verbal consent?
- Did you ever tell John after the fact that you did not consent to having sex with him?
- Can you provide the context in which John sent you the pictures of his genitals?
- Why did you send those pictures to other people?

- When you told Adam about you and John, did you tell him that John had sexually assaulted you?
- Did you tell him John was harassing you?

List of possible questions of Sophia by the Sophia's Advisor:

- Did you ever give John consent to touch you during your Voice Studio classes?
- Why didn't you tell him to stop?
- Do you often drink and smoke pot?
- Why did you drink and smoke pot with John?
- Were you always drunk and/or high when you had sex with John?
- Did you ever affirmatively give John consent to have sex?
- Why didn't you tell him to stop?
- Why did you allow this situation to go on for so long?
- Did you see a therapist based on the trauma caused by being sexually assaulted by John?
 - This question would likely be prohibited based on a protected privilege applying to the information, unless Sophia affirmatively waives the privilege. See Policy 7.7.5; 8.3.5.
 - Sophia asserted that such discussions were private in her interview. Thus, it would likely be improper to allow such questions at the Live Hearing, as the investigation was unable to gather any evidence relating to her therapist. For this question to proceed, the Live Hearing would need to be postponed, and Sophia would need to waive the privilege and allow her therapist to provide notes to the investigator, and such notes would become part of the evidentiary record.
- Were you upset when the relationship with John ended?

List of possible questions of Sophia by John's Advisor:

- Did you invite John over to your apartment during your relationship?

- Was it a typical dating relationship, in terms of spending evenings together?
- Did you have dinner with him?
- Did you ever go out to dinner or to a movie?
- Did you watch TV at your place?
- Did you keep beer or alcohol in your apartment?
- Did you ever drink around others when John wasn't around?
- Did you keep pot in your apartment?
- Did you ever smoke pot around others when John wasn't around?
- How many times did you have sex with John?
- You're alleging that you were wasted every single time you had sex with John, right?
- And you're alleging that every single one of these times he raped you, right?
- And you never reported any of these rapes to the police, did you?
- And you never went to the hospital and got an exam, did you?
- And you never reported any of this to Title IX until November 4, did you?
- But you kept inviting John over and getting drunk and high with him after, according to you, he had repeatedly raped you, correct?
 - The above questions are relevant as they may solicit evidence relating to specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove Consent.
- And you haven't produced any emails or text messages with John or anyone else describing what happened between you and John as rape or sexual assault, until you sent his personal photos to your friends, right?
- And only on November 4 did you accuse him of sexual assault, the same day you sent his photos to your friends and accused him of sexual assault?
- John sent those photos to you in private Snapchat communications with you, correct?

- Did you consider those communications to be private at the time?
- Did you share those communications with anyone else the time?
- Are you aware that sending someone's intimate personal photos without their consent is a crime in Texas?
- You told the investigator that you had Adam over to your house to talk about your situation with John, right?
- You told the investigator that you and Adam drank that night, right? You had pizza and beer.
- Did you smoke pot with Adam?
- Did you have sex with Adam?
 - This question would be precluded because it concerns Sophia's prior sexual history and it is not offered for an appropriate purpose under Policy section 7.15.1.
- Why did you and your boyfriend recently break up?
- Did you cheat on your boyfriend with another Theatre student?
 - This question would be precluded because it concerns Sophia's prior sexual history and it is not offered for an appropriate purpose under Policy section 7.15.1.
- Wasn't your boyfriend in town at the time the notes were left on your car?
- How do you know your boyfriend didn't leave the notes on your car?

List of possible questions of John by Decision Maker:

- Did you and Sophia drink alcohol when you had sex?
- How much alcohol would Sophia drink?
- How much marijuana would Sophia smoke?
- Was Sophia drunk or high afterwards?
- Were you drunk or high afterwards?

- Would the two of you have sex when Sophia was drunk? When she was high?
- Was Sophia able to stand up and walk on her own at the time?
- Do you remember having sex with Sophia after drinking and smoking?
- Did she express any form of verbal or non-verbal consent?
- Did she ever tell you to stop?
- Did she ever tell you to leave?
- Did you ever tell you after the fact that she did not consent to having sex with you?
- Can you provide the context in which you sent her the pictures of your genitals?
- Did her sending those pictures to others harm you? If so, how?
- Did you ever leave a note on Adam's car outside of Sophia's apartment?
- Did you ever leave notes on Sophia's car on campus?
- I am going to play a video for you of security footage from a campus parking lot. Is the person in the security footage you?
- If not, how can you be certain, as the police report that the person has a height and build similar to yours?

List of possible questions of John by John's Advisor:

- Is it common for you to touch students in Voice Studio lessons?
- Why did you touch Sophia during her Voice Studio lessons?
- Did you drink alcohol every single time you saw Sophia?
- Did you smoke pot every single time you saw Sophia?
- How would you define incapacitation in terms of unable to give consent?
- Was Sophia ever incapacitated when you two had sex?

- Did she ever say she didn't want to have sex?
- Why did you believe she was consenting?
- Did she ever tell you after the fact that she had not consented?
- Have you ever had sex with your wife after drinking alcohol or smoking pot?
 - This question would be precluded as irrelevant under section 7.15.1.
- Did you ever stalk Sophia and drive by her house after you ended the relationship?

List of possible questions of John by Sophia's Advisor:

- How was your relationship with your wife when you began your affair with Sophia?
- Didn't you tell Sophia you were unhappy and you would leave your wife once your kids were out of the house?
- Didn't you tell Sophia that you were in a sexless marriage and you were extremely sexually frustrated?
 - This question would be precluded as irrelevant because it concerns a Party's prior sexual behavior and is not offered to prove consent.
- Sophia didn't ask you to send her intimate photos, did she?
- I'm presenting a photo of you from social media showing you in the in a purple Minnesota Vikings hoodie. That's you, right?
 - This question and the photo may be precluded if it was not pre-submitted in advance in accordance Policy section 7.10.

Decision Maker's Questions of Investigator:

- You personally conducted the investigation that is reflected in your report, correct?
- Was each party provided the opportunity to review the evidence and report and provide comments?

- Did either party provide any comments?
- Can you describe what the University Police Department reported regarding the person in the video?
- Does the person in the video fit the description of John or any other person involved in the investigation who might have left the notes?
- Can you describe the evidence regarding Sophia's dissemination of the intimate pictures of John?



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Advanced Title IX Training

Complex Issues in Live Hearings

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Littler Mendelson P.C.
November 8, 2024



LSCPA



Purpose of Live Hearings (per the DOE)



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



Preamble to the 2020 Regulations



Agenda

- Refusal of parties to participate
- How to ask questions in a Live Hearing
- Questions that go to credibility
- Making fair and impartial relevancy determinations
- Impact of trauma during Live Hearing
- How to handle hostile witnesses or advisors





Refusal to participate

- A party or witness has the right to refuse to participate.
- Parties should continue to receive all notices.
- Retaliation includes discrimination against an individual based on their decision to refuse to participate in an investigation or hearing. Policy 3.14.





Refusal to participate – continued

- Party and witness's prior statement can be considered in live hearing, even if they refuse to participate or answer cross examination questions.
- A party's refusal to participate or answer cross questions can be a basis for assessing credibility if Decision Maker unable to ask relevant questions.
- Some institutions will have university-appointed advisor appear on behalf of non-participating party to ask cross questions of the other party, but this can be risky.





Refusal to participate – tips

- Complainant's refusal to participate may result in permissive dismissal due to inability to collect evidence. Policy 5.5.
- Keep engaging with party throughout the process, even if they decline to participate.
- During the Live Hearing, Decision Maker should acknowledge party has chosen not to participate and ask investigator or Title IX Coordinator to summarize attempts to contact and notice of hearing.
- During each step of Live Hearing, recognize that non-participating party would have opportunity to present evidence if present.
- If Decision Maker feels there are unanswered questions that could go to the non-participating party's credibility, Decision Maker can state on the record.



How to Ask Questions in Live Hearings

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



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

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



Tips for Questions – Short Questions in Chronological Order

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



Tips for Questions – Cross Examination

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



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Questions
that go to
credibility



CREDIBILITY

Every detail counts.



Credibility Assessments

- Ask questions that go to the facts that courts consider when assessing credibility.
 - Witness's Manner and Demeanor
 - Personal vs. Second-Hand Knowledge
 - Witness's Bias or Interest
 - Corroborating Testimony or Evidence
 - Inconsistencies and Prior Statements



Credibility Questions – Examples

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



Making Fair and Impartial Relevancy Determinations

What is relevant?

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

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

RELEVANCE = PROBATIVE + MATERIAL





Making Fair and Impartial Relevancy Determinations

What is not relevant?

- Information protected by a legal recognized privilege;
- Evidence about Complainant's sexual predisposition or prior sexual behavior
 - Unless offered to prove that someone other than the Respondent committed the conduct alleged by the Complainant, or
 - If evidence concerns specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and is offered to prove consent.
- Any party's medical, psychological, and similar records (unless the party has given voluntary written consent).

Sexual Misconduct Poly 3.15.3, 7.15, 7.7.5



Evidence of Prior Bad Acts

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



Determining Relevancy of Questions

Relevancy determinations occur in real time during Live Hearings.

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



Sexual Misconduct Policy, Sections 7.15-7.16



Handling Objections and Inquiries from Advisors

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

But

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



Tips for Making Fair and Impartial Relevancy Determinations

- Take your time to consider the applicable rules.
- Ask clarifying questions of the parties / advisors to determine relevance.
- If complex issues arise around documents, consider redactions of irrelevant or prohibited material.
- State on the record the relevancy ruling and why.
 - For example, “I am not allowing the question, as it goes to the Complainant’s prior sexual history and is not offered for one of the two exceptions.”



Tips for Making Fair and Impartial Relevancy Determinations – continued

- Make sure to apply the same rule to both sides. If one side can't ask questions about a particular issue, the same rule applies to the other.
- Focus on the probative and materiality prongs of relevancy to avoid irrelevant and harassing questions, such as:
 - Do you think your parents would be proud of your behavior? [Not probative or material.]
 - Isn't it true that you failed out of your first university? [Not material.]
- Enforce presumption of non-responsibility during Live Hearing. Address responsibility only in written decision.



Role of Trauma in Live Hearing

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



Role of Trauma in Live Hearing

- Begin hearing with a respectful tone and recognize formal, professional environment.
- Create physical space for parties, allow participation from separate rooms, avoid parties having to directly face each other.
- Make it clear parties can take a break at any time. If a party appears to be getting emotional, offer to take a break.
- Ask questions in a calm, respectful manner. No raised voices.
- Enforce Rules of Decorum to avoid harassing and traumatizing questioning of parties and witnesses, while also allowing for robust cross examination.
- Avoid / prohibit questions with overly accusatory tone:
 - Isn't it true your lying about what happened to you?
 - Why don't you just admit you're a rapist?



Role of Trauma in Live Hearing

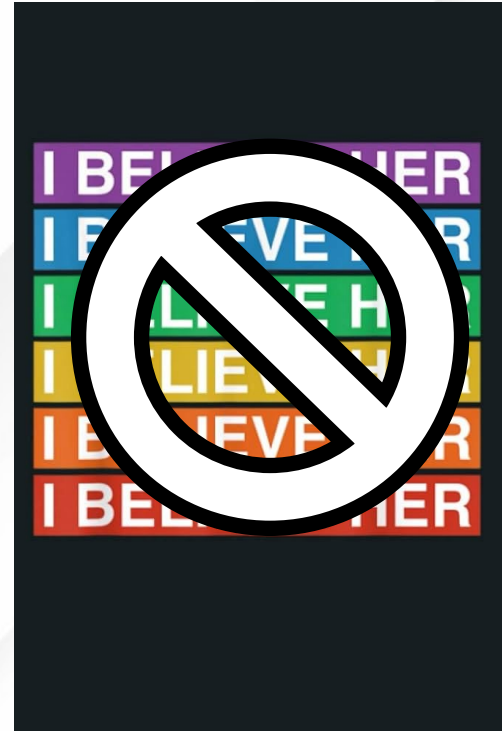
- Recognize that party's "odd" or "unusual" behavior may be explained by trauma.
- Party may continue to be affected by trauma when recalling a traumatic event.
 - Various "normal" responses include
 - Emotional, crying
 - Flat affect – seeming numb
 - Laughing, light-heartedness, inappropriate
 - Cycling of emotions





Considering Trauma as Decision Maker

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





Difficult Parties and Advisors

- “If a party’s advisor of choice refuses to comply with a recipient’s rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the Party to use a different advisor.
- Similarly, if an advisor that the recipient provides refuses to comply with a recipient’s rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.”

Preamble to 2020 Title IX Regulations.





Tips for Handling Difficult Parties or Advisors

- Set the tone of professionalism and decorum at the outset.
- If needed, remind the parties that behavior in violation of University rules can result in disciplinary action.
- If parties refuse to cooperate, take a break and inform them that further violations will result in waive of their participation in the hearing.
- If advisors refuse to cooperate, take a break and inform them that further violations will result in them being excluded from the hearing and the University will appoint an alternative advisor to the party.



Questions





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Advanced Title IX Training

Drafting Investigation Reports & Written Determinations

Darren G. Gibson, Shareholder

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November 8, 2024



LSCPA



Agenda

- Scope and content of investigation report
- Identifying the alleged policy violations
- Summarizing relevant evidence
- Incorporating references to evidence
- Providing clear timelines and chronologies
- Making findings versus recommendations



Agenda – continued

- Drafting a Written Determination and required content
- Addressing the elements of each policy violation
- Making credibility determinations
- Sanctions and rationale for particular sanctions



The Chronology

Chronologies are extremely useful in investigations.

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



The Investigative Report

Purpose:

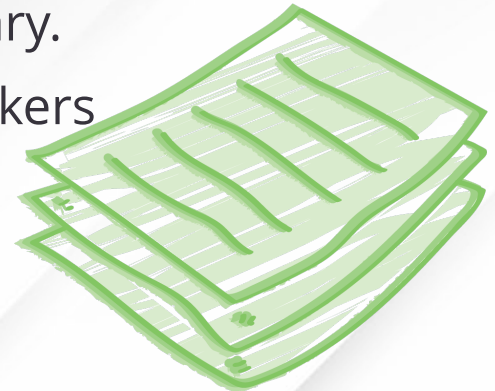
- Record of investigation steps and evidence collected.
- Writing process can clarify analysis and uncover additional questions.
- Likely used to justify action based on findings.
 - *E.g.*, dismissal, reprimand, etc.
- May be cited in legal proceeding, OCR investigation, or other related proceeding.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





Critical Tasks of an Investigative Report

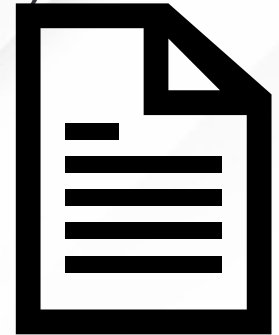
- Third parties must be able to understand full picture without outside explanation.
- Discuss all allegations raised and applicable policies.
- Document evidence objectively and accurately.
- Avoid unnecessarily controversial commentary.
- Provide enough information for Decision Makers to make a determination.





Proposed Report Outline

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





Drafting the Investigative Report

Basics

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

Summary of Evidence

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

Conclusions regarding Responsibility

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



Drafting the Report



DO

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



DON'T

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



Credibility Assessments

- Investigative report may contain Investigator's credibility assessments
 - Go through applicable credibility factors in report when making credibility assessments.
 - Manner and demeanor, personal vs. second-hand knowledge, bias or interest, corroborating evidence, inconsistencies and prior statements.
 - Apply factors to specific statements and/or witnesses.
 - Clearly explain why one party or witness appears more credible than another.
- Decision Maker not bound by Investigator's assessments.



Common Issues with Investigative Reports

Insufficient Structure

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

Lack of citations to evidence

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

Failure to clearly delineate the claims and conclusions

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

Doesn't show policy was followed in conducting investigation

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



Common Issues with Investigative Reports

Failure to recognize both sides

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

Credibility determinations are not explained

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

No narrative or chronology of events

- Reports often merely repeat evidence gathered then make determination.



Recommended Final Steps

Maintain a separate investigative file, to include:

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





Drafting the Written Decision

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





Drafting the Written Decision

Decision Maker issues written determinations that:

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

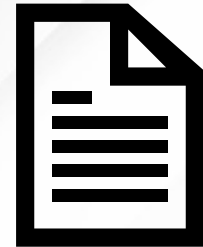
Sexual Misconduct Policy, Section 7.20



Proposed Determination Outline

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

Policy section 7.20





Drafting the Written Decision – Focus on Facts

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



Drafting the Written Decision – Concentrate on Credibility

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



Drafting the Written Decision – Delve into Determinations

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



Reminder of the Appropriate Evidentiary Standard

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

Sexual Misconduct Policy Glossary



Scenario: Evaluate the Determination

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

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

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



Drafting the Written Decision – Sanctions & Remedies

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

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

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



Factors for Sanctions

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



Questions





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Advanced Title IX Training

Pregnancy-Related Cases

Melissa J. Ackie, Associate

Little Mendelson P.C.
November 8, 2024



LSCPA



Agenda





What is Pregnancy Discrimination under Title IX?



Title IX – Sex Discrimination Defined 20 USC § 1681 *et seq.*



- Title IX prohibits any education program or activity receiving Federal financial assistance from discriminating on the basis of sex.
- Title IX (20 USC § 1681 *et seq.*) does not expressly define “sex” to include pregnancy.
- However, it is well settled both in case law, legislative history, and the Regulations, that Title IX discrimination on the basis of sex encompasses pregnancy and parental status.



Title IX – Sex Discrimination Defined 34 CFR 106.21(c)

(c) Prohibitions relating to marital or parental status. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:


1. Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;
2. Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;
3. Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and
4. Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss” or “Mrs.” A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.



Department of Education Office for Civil Rights (OCR)



OCR Priority Resources Released in October 2022

 **U.S. Department of Education**
Office for Civil Rights
October 2022

Discrimination Based on Pregnancy and Related Conditions
A Resource for Students and Schools

The Department of Education's Office for Civil Rights (OCR) enforces Title IX of the Education Amendments of 1972 (Title IX), which prohibits discrimination based on sex in education programs or activities that receive Federal financial assistance. The Department's Title IX regulations prohibit discrimination based on pregnancy and related conditions in institutions that receive Federal funds (referred to here as "schools"). These protections, which include a prohibition on discrimination based on termination of pregnancy, have been in place since 1975, when the Department's regulations implementing Title IX were first issued following Congressional review.* The regulations make clear that Title IX protects students and employees from discrimination based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. Specifically, the regulations provide:

Discrimination and exclusion

Schools must not discriminate against any student, or exclude any student from their education program or activity, including any class or extracurricular activity, based on a student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. 34 C.F.R. § 106.40(b)(1). A school also must not discriminate against or exclude from employment any employee or employment applicant on these bases. 34 C.F.R. § 106.57(b).

Medical and other benefits and services

Schools must treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom the same as any other temporary disability with respect to any hospital or medical benefit, service, plan, or policy for students. 34 C.F.R. § 106.40(b)(4). For employees, schools must treat pregnancy and the same related conditions, including termination of pregnancy, as well as any temporary disability resulting therefrom, as any other temporary disability for all job-related purposes, including employment-based medical, hospital, and other benefits. 34 C.F.R. § 106.57(c).

* The Title IX statute can be found at 20 U.S.C. §§ 1681 - 1688. Section 1688 provides that nothing in Title IX requires or prohibits any person or entity from providing or paying for any benefit or service related to an abortion, and nothing in Title IX permits a penalty to be imposed on any person because the person is seeking or has received any benefit or service related to a legal abortion. In addition, § 1681(a)(3) provides an exemption for educational institutions controlled by a religious organization if the application of Title IX's nondiscrimination requirement would not be consistent with the religious tenets of such organization. This resource includes citations to relevant sections of the Department's Title IX regulations in the Code of Federal Regulations (C.F.R.).

Please note that on July 12, 2022, the Department published in the Federal Register a notice of proposed rulemaking that includes proposed changes to some of the Title IX regulations discussed in this resource. Any final changes to the Title IX regulations will be published in a subsequent final rule in the Federal Register.

Page 1 of 3

- Schools must not discriminate or exclude a student based on a student's or employee's ***pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery*** therefrom.
- Schools must treat pregnancy, childbirth, false pregnancy, and recovery therefrom **the same as any other temporary disability.**



OCR Priority Resources Released in October 2022

- If a school does not have a leave policy for students or employees, or the student or employee does not qualify for leave under the policy, **a school must provide leave to a student for pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery** therefrom, for as long as the student's/employee's physician deems necessary.
- After leave expires, employee must be reinstated to the employee's pre-leave status or to a comparable position without reduction of compensation or loss of promotional opportunities or any other employment rights or privileges.
- Schools must treat pregnancy and the same related conditions and any temporary disability resulting therefrom as any other temporary disability for commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, along with other employment-based benefits.



U.S. Department of Education Office for Civil Rights

Discrimination Based on Pregnancy and Related Conditions / October 2022

Leave policy

If a school does not have a leave policy for students, or the student does not otherwise qualify for leave under the policy, a school must provide leave to a student for pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, for as long as the student's physician deems medically necessary. After that leave, the student must be reinstated to the status the student held when the leave began. 34 C.F.R. § 106.40(b)(5).

For employees, if a school does not have a leave policy, or if an employee has insufficient leave or accrued employment time to qualify for leave under the school's policy, the school must treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time. After that time, the employee must be reinstated to the employee's pre-leave status or to a comparable position without reduction of compensation or loss of promotional opportunities or any other employment rights or privileges. 34 C.F.R. § 106.57(d). In addition, schools must treat pregnancy and the same related conditions and any temporary disability resulting therefrom as any other temporary disability for commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, along with other employment-based benefits. 34 C.F.R. § 106.57(c).

Additional information for students, parents and guardians, and schools

OCR's *Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972* (2013, first published in 1991) (OCR Pamphlet), www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf, also has useful information about the rights of students and the obligations of schools under Title IX to students who are pregnant or experiencing or recovering from pregnancy-related conditions, including termination of pregnancy. Examples include:



Title IX protects students against harassment by school employees or other students because of their pregnancy and related conditions. OCR Pamphlet at 8.



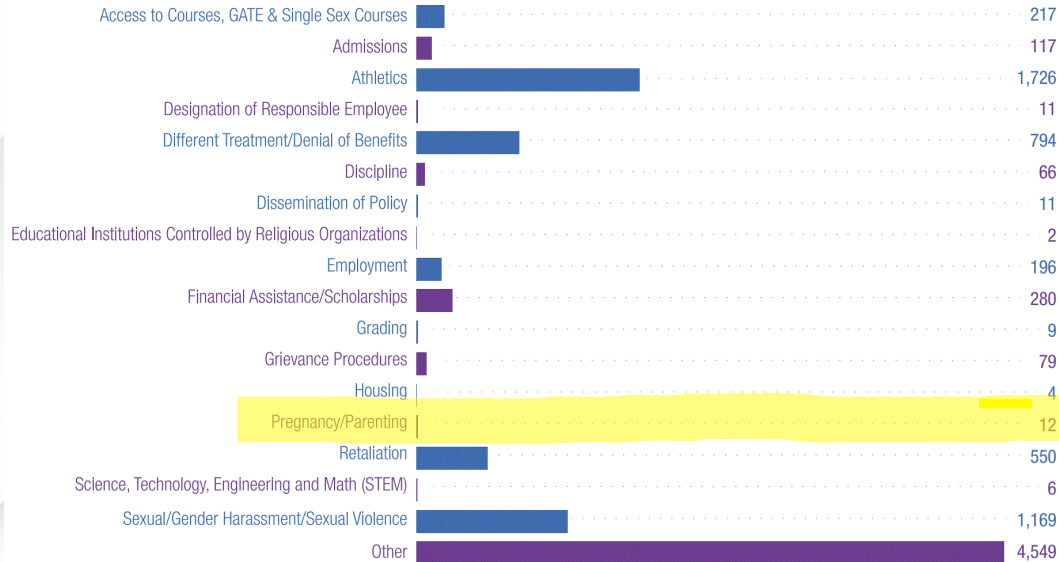
A school must ensure that its teachers' policies and practices do not discriminate against students because of pregnancy and related conditions. For example, a teacher may not refuse to allow a student to submit work after missing a deadline because of absences due to pregnancy or childbirth. Additionally, if a teacher's grading is based in part on class attendance or participation, the student should be allowed to earn the missed credits and be reinstated to the student's pre-leave status. OCR Pamphlet at 11.

Page 2 of 3



OCR Complaints – The Numbers

Figure 6: Title IX Complaint Allegations Received in FY 2023



OCR receiving relatively few pregnancy/parenting complaints

Total Number of Complaints Raising Title IX Issues, **FY 2023 = 8,151**

Note: A single complaint can raise multiple issues; therefore, the total number of issues raised will exceed the number of complaints received.



OCR Objectives Results Preventing Discrimination Based on Pregnancy or Parental Status

Cuyahoga Community College (OH) Findings

College failed to make reasonable and responsive adjustments for the student in response to her pregnancy-related requests and failed to provide information to pregnant students on its Title IX webpage or elsewhere about how to seek accommodations related to pregnancy.

Remedy

College agreed to review its practices, policies, and procedures for adjustments for pregnant students; revise or develop written policies and procedures and submit those to the OCR for review; publish the policies prominently on its website and elsewhere as appropriate; provide Title IX training on the rights of pregnant students and the college's obligations; conduct a post-training survey to assess effectiveness of the training; and develop a system to track requests for pregnancy-related adjustments and sending that information to OCR on a monthly basis.

California Career College (UT) Findings

College violated Title IX when it forced a student to withdraw upon learning that she was pregnancy and when she returned, declined to place her at the same point in the program that she was in before her leave of absence.

Remedy

College agreed to make updates to both the website and its catalog regarding the rights of pregnant students pursuant to Title IX, as well as offering the student the opportunity to re-enroll at the college at the same status as the time when her pregnancy related leave of absence began.



OCR Resolution in 2023 *Troy University (AL)*

Findings

OCR's investigation confirmed that the student notified the university of her pregnancy and reflected repeated instances in which the student experienced negative consequences stemming from a lack of accommodations for her pregnancy.

Remedy

- Providing the student adjustments to grades negatively impacted by the university's handling of her requests, as well as reimbursement for documented expenses related to courses she has had to retake since the semester when she was pregnant.
- Reviewing and, where necessary, revising or drafting policies and procedures on how to address requests for adjustments from pregnant students to ensure that it complies with Title IX.
- Updating its website to provide information such as the Title IX rights of pregnant students, the process for requesting adjustments, and a link to the grievance procedures that apply to complaints of pregnancy-related or other sex discrimination.
- Faculty and staff training regarding the Title IX rights of pregnant students and the university's obligations regarding pregnant students, as well as a survey to gauge the effectiveness of the training.
- Tracking of students' requests for pregnancy-related adjustments and the university's responses to the requests.



Texas Senate Bill 412



TX Senate Bill 412 – Protections for Pregnant and Parenting Students - Quick Facts

Institutions cannot require pregnant or parenting students to

- Take a leave of absence or withdraw from the student's degree or certificate program;
- Limit the student's studies;
- Participate in an alternative program;
- Change the student's major, degree, or certificate program; or
- Refrain from joining or cease participating in any course, activity, or program at the institution.





TX Senate Bill 412 – Protections for Pregnant and Parenting Students - Quick Facts



Institutions shall provide reasonable accommodations to a pregnant student, including accommodations that:

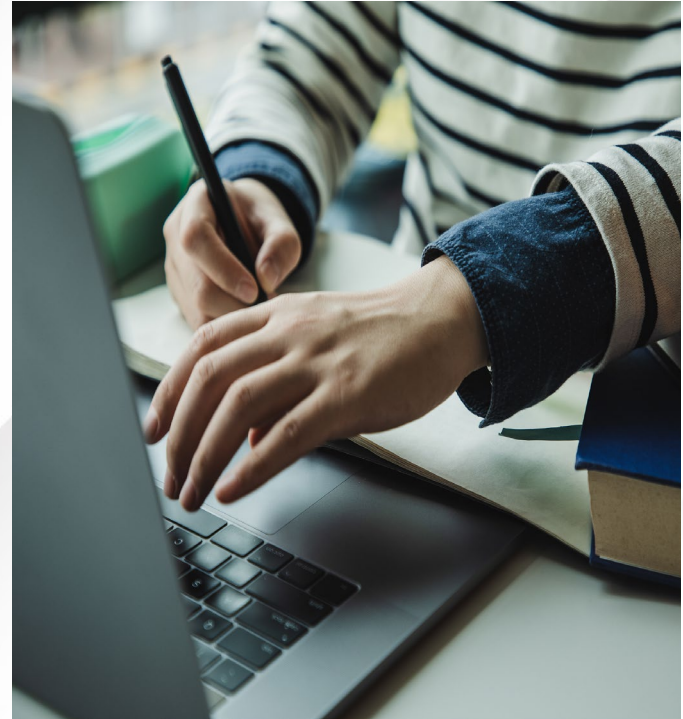
- Would be provided to a student with a temporary medical condition
- Are related to the health and safety of the student and the student's unborn child



TX Senate Bill 412 – Protections for Pregnant and Parenting Students - Quick Facts

Institutions *shall, for reasons related to a student's pregnancy, childbirth, or any resulting medical status or condition:*

- Excuse the student's absence;
- Allow the student to make up missed assignments or assessments;
- Allow the student additional time to complete assignments in the same manner as the institution allows for a student with a temporary medical condition; and
- Provide the student with access to instructional materials and video recordings of lectures for classes for which the student has an excused absence under this section to the same extent that instructional materials and video recordings of lectures are made available to any other student with an excused absence.





TX Senate Bill 412 – Protections for Pregnant and Parenting Students - Quick Facts



Institutions *shall allow* a pregnant or parenting student to:

- Take a leave of absence; and
- If in good academic standing at the time the student takes a leave of absence, return to the student's degree or certificate program in good academic standing without being required to reapply for admission.



TX Senate Bill 412 – Protections for Pregnant and Parenting Students - Quick Facts



Institutions *shall adopt a policy for students on pregnancy and parenting discrimination*. The policy must:

- Include the contact information for the employee or office of the institution that is the designated point of contact for a student requesting each protection or accommodation under this section;
 - Be posted in an easily accessible, straightforward format on the institution's Internet website; and
 - Be made available annually to faculty, staff, and employees of the institution.
- *Deadline to Adopt Policy: January 15, 2024*



Pregnant Worker Fairness Act (PWFA) and Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)



Quick Overview - Pregnant Worker Fairness Act (42 USC § 2000gg *et seq.*)

- Modeled after the Americans with Disabilities Act (ADA), the PWFA expands the protections for pregnant employees and applicants by requiring employers with 15 or more employees to make reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions.
- Intended to reach conditions that are modest, minor or episodic and do not rise to the level required to be a disability under the ADA.
- Requires the interactive process.
- Private right of action available.
- Same remedies available as Title VII.



Quick Overview - Pregnant Worker Fairness Act (42 USC § 2000gg *et seq.*)

- PWFA is specifically intended to prevent workers impacted by pregnancy, childbirth, and related medical conditions from being forced out on unpaid leave or out of employment, when other options may exist
- **KEY DIFFERENCE BETWEEN ADA AND PWFA:** the PWFA deems an individual impaired by pregnancy, childbirth, or related medical conditions still “qualified” and entitled to reasonable accommodation, ***even if unable to perform essential job functions for a temporary period***, as long as that function can be performed in the near future and otherwise accommodated



Defining “Pregnancy, Childbirth and Related Conditions”

Current Pregnancy

Past Pregnancy

Potential
Pregnancy

Lactation including
breastfeeding or
pumping

Contraception

Menstruation

Infertility and
Fertility Treatment

Endometriosis

Miscarriage

Stillbirth

Abortion



Quick Overview Providing Urgent Maternal Protections for Nursing Mothers Act (29 USCA § 218d)

The PUMP Act expands the Fair Labor Standards Act (FLSA) to provide workplace protections for lactating employees by requiring employers to provide all employees who are nursing with reasonable time and private space, other than a bathroom, to express breast milk.

Break Time Requirements

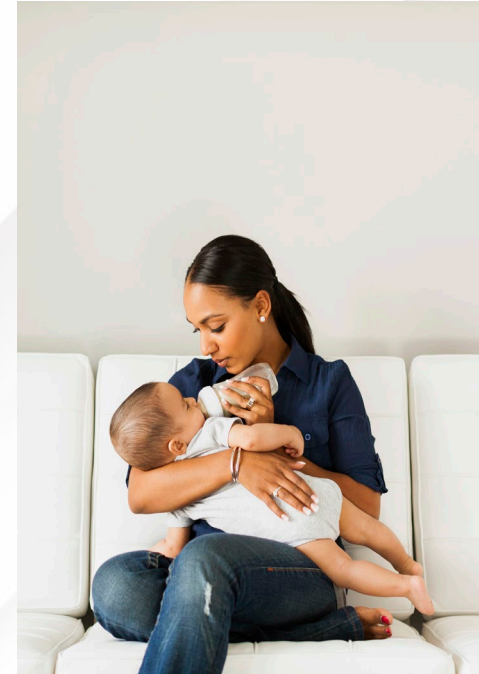
- Flexibility.
- Frequency, duration, timing, location of private space, nursing needs over time (which may fluctuate) and specific pumping setup.

Lactation Space Requirements

- Private space.
- Functional space.

Posting Requirements

- Updated DOL Minimum Wage Poster.





Litigation



Orr v. South Dakota Board of Regents (District South Dakota, May 16, 2023)

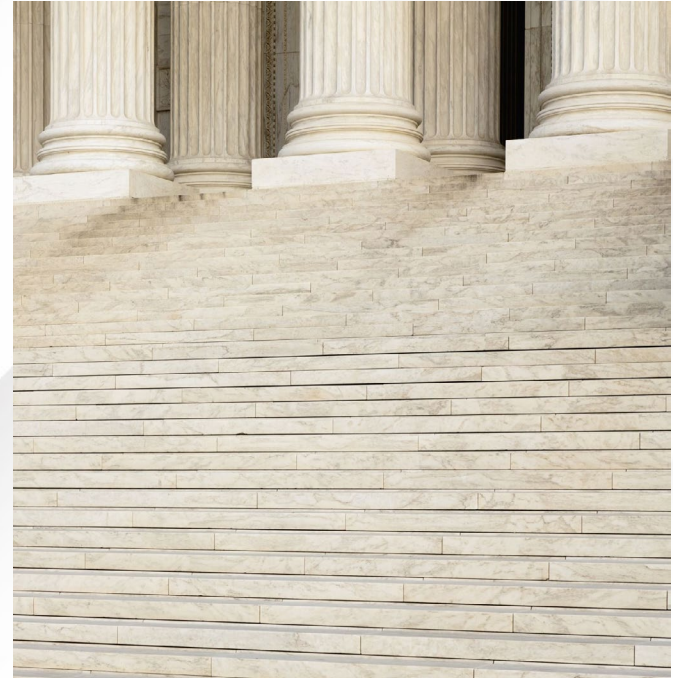
Allegation

Non-tenured faculty member alleged University violated Title IX by discriminating on the basis of sex when University denied tenure because of his commitment to his family and use of paternity leave. University denied allegation and moved for summary judgment.

Findings

Court granted summary judgment, finding:

- University articulated legitimate and non-discriminatory reason for denying tenure, specifically he was deficient in research category.
- He failed to show pretext because he admitted his book was on indefinite hold with publisher due to lack of progress.
- Not similarly situated to alleged comparators.





Jessica Childers v. Casey County School District Board of Education, et al. (Western District of Kentucky, July 19, 2023)

Allegation

Plaintiff Childers alleged that a School District violated Title IX by discriminating against her on the basis of her sex after the district failed to renew her contract after she returned from maternity leave and utilized an accommodation to express milk during her breaks. School District denied and moved for summary judgment.

Findings

Court granted summary judgment, finding:

- No causal connection between non-renewal and termination and her pregnancy-related accommodations.
- School District provided a legitimate, non-discriminatory and non-retaliatory basis for nonrenewal and termination by producing evidence of her non-tenure and poor performance.
- Plaintiff's disagreement with performance assessment was insufficient to establish pretext.
- No HWE because not severe or pervasive.



Kessler v. Ohio State University (Southern District of Ohio, November 21, 2022)

Allegation

Non-tenured professor alleged University violated Title IX when Dean threatened to withdraw her academic appointment in retaliation for her participation in an investigation and corroboration of complainant's concerns.

Dean allegedly told her he was disappointed with the amount of information shared in her interview, she had not respected a senior faculty member, and he would revoke her academic appointment if she failed to adhere to his directives.

Findings

Court denied University summary judgment on retaliation claim, finding:

- Dean had the authority to withdraw plaintiff's academic appointment and threat sufficient for OSU to be liable under Title IX.
- Genuine dispute of material fact whether dean threatened to withdraw her academic appointment and took other actions as retaliation for her participation in an investigation.





Questions



**Texas State University System
Title IX Sexual Misconduct Hearing Script**

Parties Who May be Present at the Hearing:

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

Introduction of the Participants and Hearing Policies:

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

Introduction of Participants

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

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

Educational Purpose of Hearing

Chairperson: The Hearing will be conducted in accordance with the procedures outlined in the section 7 of the Texas State University System Sexual Misconduct Policy and Procedures. This is an educational Hearing and not a court of law. The Hearing is being recorded in accordance with Sexual Misconduct Policy to provide a record of the procedures and statements. The expectations throughout the Hearing are to be honest. If it is determined that a student participant in this Hearing has made false or misleading statements, the student may be subject to potential disciplinary actions under the Code of Student Conduct.

No student will be found in violation of the Sexual Misconduct Policy without sufficient information and evidence showing that it is more likely than not that a policy violation has occurred and any sanctions will be proportionate to the severity of the violation and the cumulative conduct history of the student.

This is a Formal Hearing and the expectation is that all individuals involved conduct themselves in a professional and respectful manner. The Decision Maker will address any inappropriate behavior.

Roles of the Participants

Decision Maker: The Complainant is the party or individual reporting the complaint or concern. The Respondent is the party or individual responding to the complaint or concern regarding their behavior and is alleged to have violated the Sexual Misconduct Policy.

The Investigator in this case was assigned to investigate the report made by the Complainant(s). The Investigator's role is to conduct a thorough, reliable, and impartial investigation and compile the information that they gathered into the Investigation Report.

My role as the Decision Maker is to oversee and conduct the hearing, determine the relevancy of all questions asked during the hearing, ask questions of the parties and any witness during the hearing, and ultimately issues the written decision of responsibility and sanction, if any, after the hearing. I will explain to the Party's Advisor why a question excluded is not relevant. My relevancy decision is final and may only be challenged as a procedural defect on appeal.

Each Party is entitled to have an Advisor of their choice at the hearing. Each Party must have an Advisor to conduct cross-examination of the other Party and witnesses. A Party may not directly question the other Party or witness. An Advisor may, but is not required to be, an attorney. In addition to cross-examination, the Advisor may provide support, guidance, or advice to Complainant or Respondent, but may not otherwise directly participate in the hearing.¹

Final Investigation Report

Decision Maker: As an expectation prior to this hearing, I have thoroughly reviewed the information provided in the Investigation Report.

At this time can the Complainant and Respondent acknowledge that they have had the opportunity to inspect and review evidence and the right to review the complete investigative report prior to the hearing?

In addition, pursuant to section 7.10 of the Sexual Misconduct Policy, the parties were to provide the Decision Maker the following materials at least three calendar days prior

¹ If a Party does not have an Advisor, the Component will appoint an Advisor of the Component's choice, without fee or cost to the Party, for the limited purpose of conducting cross-examination, including questions challenging the Party or witness's credibility. A Component is not required to appoint an attorney as an Advisor.

to the hearing:

- Any written response to the investigative Report;
- Documents, or other evidence to be used at the hearing;
- The name of each witness who is to appear on that Party's behalf;² and
- A list of initial questions and cross-examination questions for the opposing Party and any designated witness.³

State whether the parties did or did not provide the requested materials.

Information-Gathering Portion of the Hearing:

Decision Maker: This is the information-gathering portion of the Hearing. The Complainant and the Respondent will have the opportunity to give a statement, after which the Decision Maker, the Complainant's advisor and the Respondent's advisor may ask questions of the involved parties in order to clarify and/or supplement the Investigation Report. If either the Complainant or the Respondent would like to address something that is said during this portion of the Hearing, they may do so by raising their hand and being acknowledged by me.

- Would the Complainant like to give an opening statement?
- Would the Respondent like to give an opening statement?
- [Decision Maker asks questions of Complainant]
- Does the Complainant's advisor wish to ask Complainant any questions?
- Does the Respondent's advisor have questions for the Complainant?
- [Decision Maker asks questions of Respondent]
- Does the Respondent's advisor have questions for the Respondent?
- Does the Complainant's advisor have questions for the Respondent?
- [Decision Maker asks questions of witnesses and/or Investigator]
- Does the Complainant's advisor have questions for any witnesses or the Investigator?
- Does the Respondent's advisor have questions for any witnesses or the

² Witnesses not previously interviewed or identified may be allowed to testify only at the discretion of the Decision Maker.

³ Each Party, through their Advisor, will be permitted to conduct cross-examination even if written questions are not previously submitted by the Party.

Investigator?

- Would the Complainant like to give a closing statement?
- Would the Respondent like to give a closing statement?

Decision Maker: Thank you to the participants for the information presented in today's Hearing. At this time, the Decision Maker will deliberate whether (Respondent's full name) is responsible for violation(s) of the Sexual Misconduct Policy.

Per the Sexual Misconduct Policy, the Decision Maker will issue a written determination, which shall be sent simultaneously to the Parties, along with information about how to appeal the determination. Please keep in mind that both parties may utilize appeals process outlined in the Sexual Misconduct Policy. If either part has any additional questions, please contact the Title IX Coordinator.

Thank you all for your participation today.