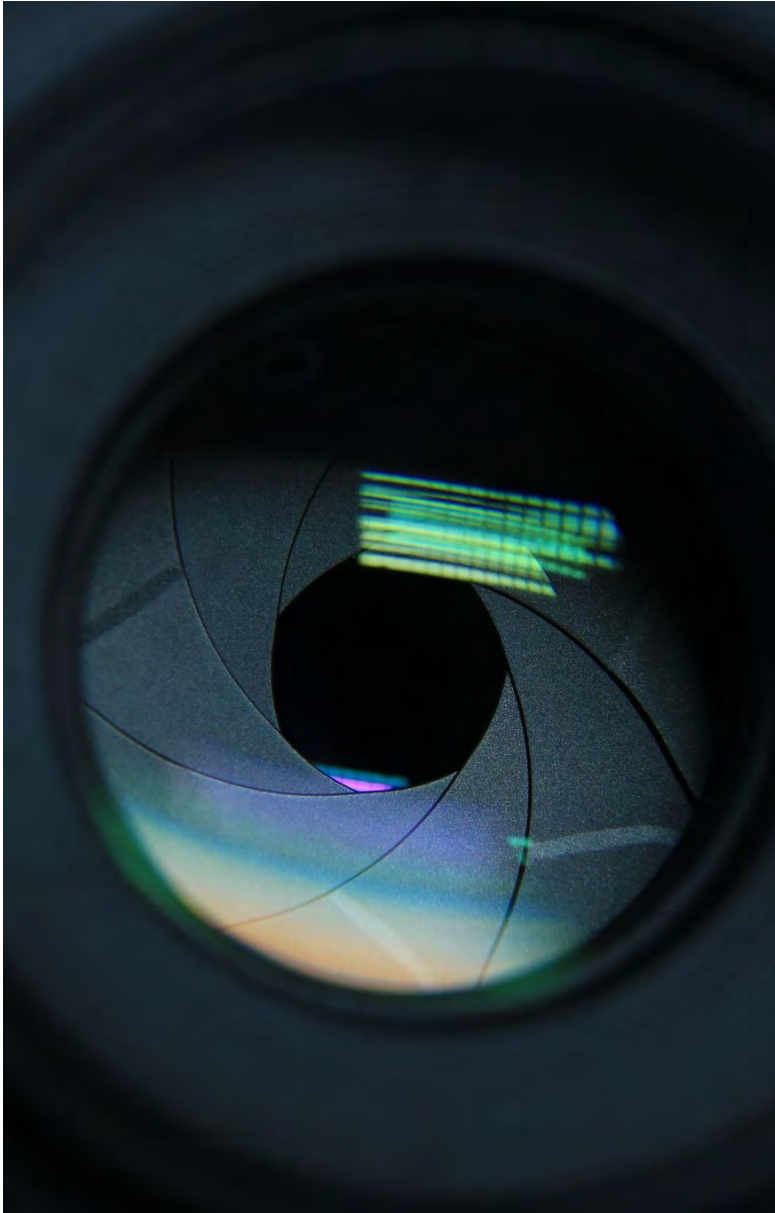

TITLE IX INVESTIGATION INTERVIEWS

During the interview:

- Make sure the interviewee answered the question you asked. Repeat questions if necessary.
- Listen to the answer and explore the unanticipated.
- Recognize that there will always be one or more competing interests.

TITLE IX INVESTIGATION INTERVIEWS

- **During the interview:**
 - Question about any documents that might relate to the complaint (e.g., texts, photos, videos).
 - Take notes throughout the interview detailing specific statements made.
 - Be objective and free from bias.



TITLE IX INVESTIGATION INTERVIEWS

At the end of the interview:

- Feel free to repeat significant facts to ensure that there are no miscommunications. If facts are specifically reconfirmed, be sure to indicate that in your notes.
- Also ask the individual being interviewed whether they have any questions or anything to add.
- Be as honest and upfront as you can about the situation but maintain confidences as much as possible.

TITLE IX INVESTIGATION

REFUSAL TO PARTICIPATE

The Complainant, Respondent, or any witness may leave the interview or choose to not participate in the investigation at any point in time.

If the Complainant chooses not to participate, the College must respect this decision, but then must decide whether the investigation should go forward without the Complainant.

If the Respondent or a witness leaves the interview or refuses to participate, advise the Respondent that the administration will be forced to base its determination on all other evidence gathered.

SENSITIVE SUBJECT MATTER

- Investigators should acknowledge the sensitive nature of what will be asked during the interview.
- Explain, however, that the College will be able to come to the most accurate determination after reviewing all of the evidence.
- Be aware that sexual violence may impact students differently depending on the cultural background of the student.
- Never assume that an individual is not telling the truth simply because he or she is not responding to the situation in the same manner as you would respond to the situation.



SENSITIVE SUBJECT MATTER

- Throughout the interview and Title IX investigation, avoid re-victimization.
- Preface the interview or particular questions with statements such as, “I am not implying that you should have taken this action nor am I passing any judgment, but I am collecting all the facts and need to determine exactly what happened.”
- Be sensitive to the fact that the Complainant could be suffering from emotional distress as a result of the incident.

SENSITIVE SUBJECT MATTER

- **Preparation in advance is imperative.**
 - Review your questions out loud so you are comfortable asking the questions.
 - Phrasing of questions is very important. Ensure that your wording or phrasing of questions is not thoughtless or inconsiderate.

SENSITIVE SUBJECT MATTER



Tips for interviews with sensitive subject matter:

- Start with the easier questions, such as the facts leading up to the incident.
- Take breaks as needed.
- Go with your gut – if you feel that the interviewee is getting worked up, take a step back, ask if they need water or a break, to prevent the interviewee from completely shutting down.
- Never say, “I know what you mean/you’re feeling.”
- Never make assumptions – always ask follow-up questions and have the interviewee explain the situation in detail.

TITLE IX INVESTIGATION INTERVIEWS



Mock Interview

Ellie and Michael are freshman students at ABC College. Ellie has alleged that Michael had sex with her without her consent. Ellie went to Michael's dorm room to buy marijuana edibles for her friend, Jen. Michael sexually assaulted Ellie in the dorm room. The investigator receives the initial report from the Title IX Coordinator explaining the above.

TITLE IX INVESTIGATION

MOCK INTERVIEW

What are the elements of the offense(s) at issue?

Example: Rape

1. The penetration of any type
2. Of the penis and the vagina (attempt to do the same)
3. Without the Complainant's consent
4. Including instances where the Complainant is not capable of giving consent because of their age or because of their temporary or permanent or temporary mental or physical incapacity.

TITLE IX INVESTIGATION NOTES TAKEN DURING AN INTERVIEW

Notes taken during the interview should be:

- Objective and free from bias.
- Factual notes with no conclusions.
- Reviewed and finalized immediately after the interview.
- Dated and signed.

TITLE IX INVESTIGATION - AFTER THE INTERVIEW

01

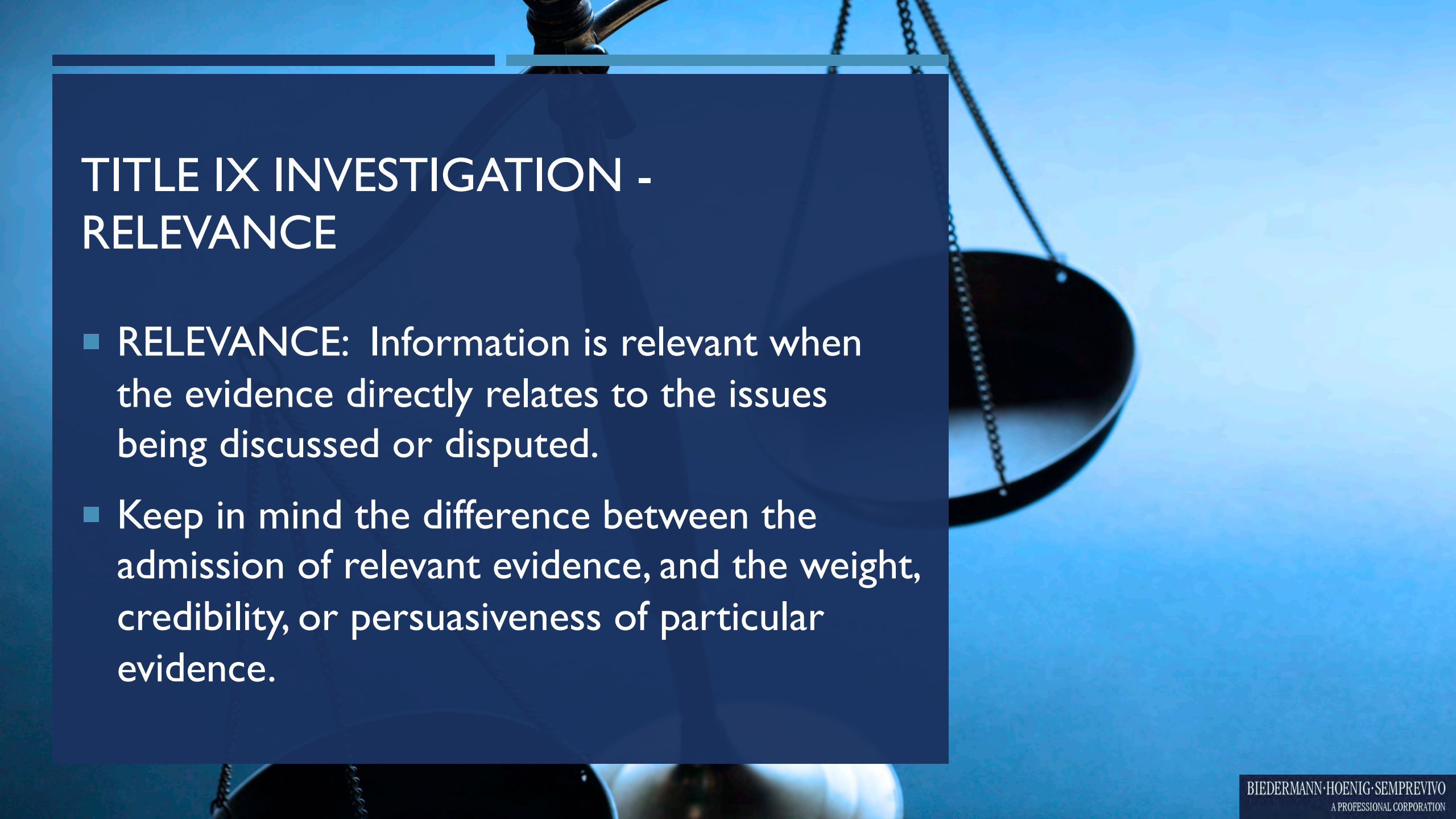
Review notes taken during the interview to determine if any additional information is needed.

02

Assess the need to re-interview someone if cause arises.

03

Maintain confidentiality and respect the rights of all involved. Only share your interview findings and notes with specified College faculty and staff.



TITLE IX INVESTIGATION - RELEVANCE

- **RELEVANCE:** Information is relevant when the evidence directly relates to the issues being discussed or disputed.
- Keep in mind the difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of particular evidence.

INVESTIGATION REPORT - RELEVANCE



To determine if a piece of information is relevant, ask yourself the following questions:



Is this information related to the applicable policy definitions?



Would the omission of this information detract from someone's understanding of the allegations?



Does this information provide context that is helpful for determining what occurred?

TITLE IX INVESTIGATION STANDARD OF PROOF

- The investigator's fact findings will be made using the "preponderance of the evidence standard."
- This standard requires that the information supporting a finding that the policy was violated be more convincing than the information in opposition to it.
- Under this standard, individuals are presumed not to have engaged in behavior that violates the policy.

TITLE IX INVESTIGATION REPORT

- The Investigator will prepare an investigation report summarizing all evidence relevant to the claims and factual findings, and provide the final Investigation Report to the Title IX Coordinator and a separate Decision Maker to reach the determination regarding responsibility.
- Prior to the conclusion of the investigation, copies of all evidence directly related to the allegations made against the responding individual(s) and a copy of the Investigation Report will be sent by the College to the parties and to the parties' advisors, if any.
- The parties will have ten (10) days to submit a written response, which the investigator will consider prior to completion of the investigative report.

DRAFTING AN INVESTIGATION REPORT

What to include in the Investigation Report:

- Specific Policy Provisions at issue.
- Individuals interviewed and evidence reviewed.
- Relevant facts gathered during the interview process.
- Explanation as to why some facts are more probative than others.
- Proofread, sign, and date each Investigation Report.



EXAMPLE

DRAFTING AN INVESTIGATION REPORT

TITLE IX INVESTIGATION REPORT

EXAMPLE OUTLINE

-
1. Allegations
 2. Documents Reviewed
 3. Procedural History
 4. Standard of Evidence
 5. Applicable Policy Provisions
 6. Interview Results
 - a. Interview(s) with Complainant(s)
 - b. Interview(s) with Respondents(s)
 - c. Interview(s) with Witness(es)
 7. Undisputed Relevant Facts
 8. Disputed Relevant Facts
 9. Analysis
 10. Conclusions

IMPARTIALITY, CONFLICTS OF INTEREST & BIAS

IMPARTIALITY

Impartiality is key to the Title IX formal grievance process

- ❑ Serving impartially includes avoiding the following:
 - ❑ Prejudgment of the facts at issue
 - ❑ Conflicts of interest
 - ❑ Bias

PREJUDGEMENT OF FACTS

To prejudge is to pass judgment prematurely or without sufficient reflection or investigation.

Neither the Complainant nor the Respondent should be met with prejudgment while participating in the Title IX process.

PREJUDGEMENT OF FACTS

- Sex Stereotypes Examples:
 - Men do not know how to express emotions
 - Women are more nurturing than men
 - Men are better at science and math than women
 - Women do not like sports



PREJUDGEMENT OF FACTS

Avoid prejudgment of the facts by doing the following:

- ❑ Keep an open mind
- ❑ Do not jump to conclusions - explore all of the facts prior to making any conclusions
- ❑ Be particularly cautious about checking your assumptions in situations involving sexual assault, drugs, or alcohol use



CONFLICTS OF INTEREST

- A conflict of interest occurs when personal or private interests may compromise one's judgment, decisions, or actions
- *Example of Potential Conflict:* The Decision Maker for a particular case was the Complainant's professor the previous semester.
- *Example of Potential Conflict:* The investigator is a professor in the department where the Respondent Professor is the Chair.



CONFLICTS OF INTEREST

How do you determine whether a conflict of interest disqualifies you from serving in the grievance process?

- First determine what kind of conflict it is
 - *Is it an actual conflict of interest?*
 - A direct conflict between one's official duties and responsibilities, and a competing personal interest or obligation
 - *A perceived conflict of interest?*
 - A situation where it could reasonably be perceived that a competing interest could improperly influence the performance of one's official duties and responsibilities
 - *A potential conflict of interest?*
 - Arises where a personal interest or obligation could conflict with one's official duties and responsibilities in the future

CONFLICTS OF INTEREST

How do you determine whether a conflict of interest disqualifies you from serving in the grievance process?

- Then ask yourself the following questions:
 - *Will this conflict prevent me from being able to impartially participate?*
 - *How would I feel if my colleagues became aware of the conflict?*
 - *How would I feel if the conflict appeared in the media with respect to the grievance process?*
 - *If I saw someone else with the same potential conflict, would I think they should be barred from participating?*

BIAS

A bias is a tendency, inclination, or prejudice toward/against someone

Biases are often based on stereotypes, rather than actual knowledge of an individual or a particular circumstance and are frequently based on a person's gender, race, or sexual orientation

Biases can result in prejudgments, which lead to improper decisions or potentially discriminatory practices

Example: A Title IX Decision Maker finds a Complainant in a case more credible than a Respondent because the Complainant is a female.



BIAS

- ❑ You may or may not be aware of your own biases. Biases can be (and are often) **implicit**, meaning that certain attitudes and stereotypes can affect understanding, actions, and decisions in an unconscious manner.
- ❑ **Ways to Combat Bias:**
 - ❑ Pay attention to your language
 - ❑ Avoid generalizations
 - ❑ Question your thinking and challenge your assumptions
 - ❑ Listen carefully and openly

IMPARTIALITY TIPS



Be sure to view and evaluate all evidence in an impartial manner.

- ☐ Maintain objectivity
- ☐ Do not consider interactions with the Respondent or Complainant that are not relevant to the investigation at hand.
- ☐ Do not seek information about the Respondent or Complainant from anyone not involved in the investigation.
- ☐ Do not let any preconceived notions about complainants and respondents generally affect how you conduct the investigation.
- ☐ Accept evidence at face value unless called into question by other evidence.
- ☐ Keep in mind that evaluating factual evidence may entail assessing the credibility of witnesses.

IMPARTIALITY FACT PATTERN

Kate Kimpton is an investigator for the College's formal grievance process. She is a professor in the Womens Studies department and is known on campus as being an advocate for Womens' rights. Darren is a student at the College and has brought a Complaint against Mary, another student, alleging that Mary sexually harassed Darren. He alleges that Mary sent him inappropriate text messages after he refused to date her. Mary is minoring in Womens Studies but has not taken a class with Professor Kimpton. Mary regularly attends protests for Womens' rights with other members of the college community. Professor Kimpton is assigned to investigate this complaint.

Are you concerned about Professor Kimpton's impartiality with respect to bias? Does the fact that Professor Kimpton teaches in the Womens Studies department destroy impartiality here?



IMPARTIALITY FACT PATTERN

- **Factors to Consider:**
 - The size of the Womens' Studies Department
 - Do Mary and Professor Kimpton have a relationship inside or outside of the College Community?
- **Perceived Bias** – Mary and Professor Kimpton's shared affiliation with the Womens' Studies department may appear to demonstrate that Kimpton is biased towards Mary.
- **Implicit Bias** – Professor Kimpton's experience as a Womens' rights activist may create an implicit bias of which she is not aware.
- Remember, simply knowing one another does not mean bias or impartiality exists



DECISION MAKERS

What is your role as a Decision Maker?

- Evaluate evidence
- Attend and participate (as needed) at Live Hearings
- Reach conclusions about whether the Respondent is responsible for the alleged sexual harassment
- Issue a written determination regarding responsibility.

EVIDENCE



- The College carries the burden of collecting evidence
- Only **relevant** evidence may be considered by the Decision Maker
- Privileged evidence is not admissible without consent
- Medical Records and Mental Health Records are not admissible without consent
- There are no other restrictions on evidence (legal rules of evidence don't apply)
- Parties have the right to inspect the evidence
- Decision Maker evaluates credibility during the Live Hearing

EVIDENCE



- **Privileged Evidence is Inadmissible pursuant to Section 106.45(b)(1)(x) of the regulations**
- The college may not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege in writing.
- *Examples of Privilege:* patient-doctor; attorney-client; spousal privilege

EVIDENCE - RELEVANCE



Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance.



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.



An institution may adopt rules of order or decorum to forbid badgering a witness and may fairly deem repetition of the same question to be irrelevant.

EVIDENCE - RELEVANCE

Rape Shield Protections and Exceptions

- Questions and evidence about the Complainant's sexual predisposition or prior sexual behavior are **NOT RELEVANT** unless offered to prove:
 1. "Mistaken Identity"
 - That someone other than the Respondent committed the conduct alleged by the Complainant, or
 2. Consent
 - Concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent and are offered to prove consent.

TITLE IX HEARINGS

- Both parties have the right to submit, cross-examine, and challenge evidence at a live hearing, which will be recorded.
- Each party's respective Advisor will conduct cross examinations at the hearing.
- A Hearing Officer will preside over the hearing and will determine whether a question is relevant before the party or witness is required to answer.
- Either party can request for the live hearing to take place in separate rooms. Participants may attend the hearing virtually, provided that all participants are able to see and hear each other.
- The Decision Maker will objectively review all relevant evidence set forth at the hearing, including evidence that is inculpatory and exculpatory.

TITLE IX HEARINGS - LOGISTICS

- Live hearings may be conducted in person in the same room. An audio recording device will be provided by the Title IX Office for the Title IX Coordinator to use to record all components of the live hearing.
- At any party's request, the live hearing may be conducted in separate rooms, using Zoom technology.
 - The Title IX Coordinator will be the host of the Zoom session

TITLE IX HEARINGS

TECH CONSIDERATIONS

- Parties must be able to hear and see each other.
- Parties and Decision-Maker must be able to view evidence being presented.
 - Consider screen-sharing and/or sending documents electronically in advance.
- Parties should have ability to communicate with their respective advisors in private.
 - Consider “breakout rooms.”

HEARINGS – CROSS-EXAMINATION

- Cross-examination must be conducted by a party's Advisor **only**.
- Must be conducted directly, orally and in real time.
- If a party does not have an advisor, the College will provide an advisor who can convey the questions that a party would like to have asked.
 - No party should ever be allowed to personally question any witness or any other party.
- Before an answer is given, the Hearing Officer must first determine and indicate whether the question seeks relevant information.
- The Hearing Officer must explain any decision to exclude something as not relevant.

HEARINGS – RECENT CHANGE

August 24, 2021 OCR Letter

- *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021)
 - The court vacated the part of the regulations that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: *“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility....”*
- “The Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.”



REACHING A DETERMINATION



At the conclusion of the live hearing and evidence gathering, you will make a determination of responsibility.



Your determination must be based on an objective evaluation of the evidence gathered during a procedure that conforms to the presumption of innocence.



Remember that the Standard of Proof of the College is the Preponderance of the Evidence.

REACHING A DETERMINATION



Be sure to view and evaluate all evidence in an impartial manner.

- Maintain objectivity.
- Accept evidence at face value unless called into question by other evidence.
- Keep in mind that evaluating evidence may entail assessing the credibility of witnesses.
- Do not consider interactions with the Complainant or Respondent that are not relevant to the determination at hand.

REACHING A DETERMINATION



Weighing evidence:

- ❑ Determine what evidence is probative by looking at the relevant **policy definitions**.
- ❑ If you have conflicting probative evidence, then you must determine the credibility of each individual's statement by considering factors such as:
 - ❑ Eyewitness accounts of third parties
 - ❑ Other pertinent evidence (e.g., photographs, texts)

REACHING A DETERMINATION

Policy Definition	Relevant Facts from Complainant Interview:	Relevant Facts from Respondent Interview:	Determination, Relevant Facts:
Sexual Misconduct			
Sexual Assault			
Sexual Harassment			
Stalking			
Dating or Domestic Violence			

WRITTEN DETERMINATION

- At the conclusion of the investigation and hearing, the Decision Maker must issue a single final written determination.
- The written determination must be contained in one document and cannot be issued piece meal.
- The written determination must be sent to all parties simultaneously.



Signature

WRITTEN DETERMINATION

The Written Determination must include the following:

1. Identification of the allegations potentially constituting sexual harassment as defined in § 106.30;
2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather evidence, and hearings held;
3. Findings of fact supporting the determination;
4. Conclusions regarding the application of the College's code of conduct to the facts;
5. A statement of and rationale for each result as to each allegation including the determination of responsibility, any disciplinary sanction imposed on the Respondent and whether remedies designed to restore or preserve equal access to the College's educational program or activity will be provided to the Complainant; and
6. Procedures and permissible bases for the complainant and respondent to appeal.

TITLE IX APPEALS

The new regulations require the right of appeal be offered to both parties. Parties can appeal the outcome of a Title IX investigation on the following grounds:

- A material deviation from the procedures affected the outcome of the case;
- There is new and relevant information that was unavailable, with reasonable diligence and effort, at the time of the investigation, that could reasonably affect the findings; and/or,
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter.



TITLE IX INFORMAL RESOLUTION

Conditions required for implementing
Informal Resolution in a particular case:

- All parties are provided with written notice of the allegations;
- All parties are informed of the requirements of the informal resolution process and any consequences of participating; and,
- The college obtains voluntary, written consent from all parties.

Informal Resolution is not permitted in cases with allegations of an employee sexually harassing a student.

CASE STUDY

- Taylor is a transgender student that recently transitioned from identifying as female to identifying as male. Riley and Taylor have been classmates for the past two years and they also live in the same apartment complex off campus.
- As part of his transition, Taylor started to wear more masculine clothing to school. One day, during class, Riley used her cell phone to comment on an old photograph of Taylor on Facebook stating that Taylor looks just as ugly now in men's clothing as he did then when wearing a dress. The next day, during the same class, Riley again used her cell phone to post a cartoon drawing of a penis on Taylor's Facebook page.
- The following week, Taylor opened his mailbox at his apartment building and found an unsigned piece of paper that said "Stop trying to change who you really are. It's making everyone else feel uncomfortable."
- Taylor has filed a complaint with the Title IX Coordinator stating that he is increasingly concerned for his safety both at school and at home.

CASE STUDY

- ☐ Is the activity complained of covered under Title IX?
- ☐ Did it occur on campus?
- ☐ Did it occur as part of an Education Program or Activity?
 - ☐ Did the College exercise substantial control over both the respondent and the context in which the sexual harassment occurred?
- ☐ Does the alleged conduct fall under the definition of sexual harassment?

CASE STUDY

Elements of Sexual Harassment

- Unwelcome conduct
- Determined by a reasonable person to be so severe, pervasive, and objectively offensive
- That it effectively denies a person equal access to the recipient's education program or activity

CASE STUDY

You investigate the allegations and are drafting your investigation report. You learned the following information during your interviews of the parties and witnesses. Should you include them in your report?

1. Taylor and Riley were roommates in the dorms freshman year and were very close friends.
2. Taylor's friend said that the day before Taylor found the note in his mailbox, the friend saw Riley in the lobby of the building.
3. Riley had been on academic probation the prior Spring semester for failing a class.
4. Riley claims that her friend Ashley, who also used to be close friends with Taylor, was logged into Riley's Facebook account and wrote the comments.
5. Riley only moved into Taylor's building about two months ago.

CASE STUDY

- ❑ The parties proceed to a live hearing. After a full grievance process, the College's appointed Decision Maker (who is close friends with the College advisor to whom Taylor made his initial report) finds that Riley is responsible for engaging in sexual harassment as defined in the Title IX regulations.
- ❑ After receiving the Decision Maker's determination, Riley feels that the Decision Maker had a conflict of interest that affected the outcome of the grievance process. She submits an appeal request to the Title IX Coordinator.
- ❑ **Does Riley have a valid claim that there was a conflict of interest here?**

TITLE IX RESOURCES

- <https://sites.ed.gov/titleix/>
- <https://sites.ed.gov/titleix/policy/#fact-sheet>
- <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
- <https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf>



ANY QUESTIONS?