



MarymountManhattan

TITLE IX TRAINING

JANUARY 2026

BIEDERMANN·HOENIG·SEMPREVIVO
A PROFESSIONAL CORPORATION



TOPICS COVERED

- New York State Law: NYS Education Law 129-B
- Federal Laws: VAWA, Title IX
- 2020 Title IX Regulations
- When a Complaint is Received
- Title IX investigations
- Investigation Reports
- Conflicts of Interest/Impartiality/Bias
- Decision Makers
- Hearings
- Reaching a determination
- Written Determination
- Appeals
- Informal Resolution



STATE LAWS:
NYS
EDUCATION
“ENOUGH IS
ENOUGH”
LAW
ARTICLE 129-B

NYS “ENOUGH IS ENOUGH” LAW 129-B



- Some requirements under "Enough is Enough"
 - Uniform Statement of Rights
 - Student's Bill of Rights
 - Uniform Definition of "Consent"
 - Alcohol and/or Drug Use Amnesty Policy

NYS “ENOUGH IS ENOUGH” LAW 129-B



- Uniform Definition of “Consent”
 - Affirmative consent is a knowing, voluntary, and mutual decision among all participants to engage in sexual activity.
 - Consent can be given by **words** or **actions**, as long as those words or actions create clear permission regarding willingness to engage in the sexual activity.
 - Silence or lack of resistance, in and of itself, does **not** demonstrate consent.
 - Consent to prior consensual sexual activity does not constitute consent to any other sexual act.
 - Consent may be withdrawn at any time.
 - Consent cannot be given when a person is incapacitated.

NYS “ENOUGH IS ENOUGH” LAW 129-B



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- Amnesty Policy

Students reporting incidents of sexual abuse are granted immunity for violations of alcohol and/or drug use occurring at or near the time of the violence, stalking, or assault.

- **Students' Bill of Rights as it relates to investigations:**
 - Right to report to local law enforcement;
 - The process is fair, impartial, and provides adequate notice and a meaningful opportunity to be heard;
 - Be treated with dignity and receive health care and counseling services, where available;
 - Be free from any suggestion that the reporting individual is at fault or should have acted in a different manner to avoid the crimes or violations;
 - Access to at least one level of appeal of a determination;
 - Be accompanied by an advisor of choice who may assist and advise a reporting individual, accused, or respondent through the conduct process; and
 - Describe the incident to as few institutional representatives as practicable and not be required to unnecessarily repeat a description of the incident.

NYS “ENOUGH IS ENOUGH” LAW 129-B

FEDERAL LAWS: VAWA & TITLE IX

VIOLENCE AGAINST WOMEN ACT (“VAWA”)



- Under the Campus Sexual Violence Act of VAWA, MMC must, among other things:
 - Conduct internal sexual misconduct proceedings that are prompt, fair, and impartial
 - Annually train college administration officials and employees responsible for investigating complaints of sexual misconduct

VAWA DEFINITIONS

“**Domestic violence**” includes asserted violent misdemeanor and felony offenses committed by the victim’s current or former spouse, current or former cohabitant, person similarly situated under domestic or family violence law, or anyone else protected under domestic or family violence law.

“**Dating violence**” means violence by a person who has been in a romantic or intimate relationship with the victim. Whether there was such relationship will be gauged by its length, type, and frequency of interaction.

“**Stalking**” means a course of conduct directed at a specific person that would cause a reasonable person to fear for her, his or others’ safety, or to cause substantial emotional distress.

A photograph of three young women, likely athletes, standing in a line at what appears to be a track and field event. They are wearing athletic singlets: the woman on the left is in a red singlet with blue trim, the woman in the middle is in a dark blue singlet, and the woman on the right is in a green singlet. They are all looking off to the side with focused expressions. The background is a blurred stadium filled with spectators under bright lights.

TITLE IX OF THE EDUCATION AMENDMENT ACT OF 1972

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied benefits of, or be subjected to discrimination under an educational program or activity receiving federal financial assistance.”

TITLE IX REGULATIONS

- On January 9, 2025, a federal district court issued a decision vacating the 2024 final rule.
- The rules now in effect are the final rules that took effect on August 14, 2020.

APPLICABILITY



- Does conduct occur on campus?
- Does the conduct occur off-campus in the context of an education program or activity?
- Does the conduct occur at a location owned/controlled by the university or officially recognized student organization?
- Does the conduct occur outside the United States?
- Does the conduct occur at a private location that is not part of the university's education program or activity

REQUIREMENTS

- Live Hearings
- Investigative Model that separates investigating from decision-making
- Clear Reporting Options, including electronic reporting methods
- First Response Protocol
- Training Requirements including publication on website

ADVISORS



- Complainants and Respondents are entitled to Advisors during the Title IX process. The Advisor can offer guidance, help navigate procedures, review evidence and conducts cross-examination on behalf of the party at the hearing.
- The Advisor cannot speak on behalf of the Complainant or Respondent.
- The Advisor must not be disruptive to the proceedings.
- The Advisor must maintain confidentiality and should not share sensitive records with unauthorized third parties.

OCR 2021 GUIDANCE

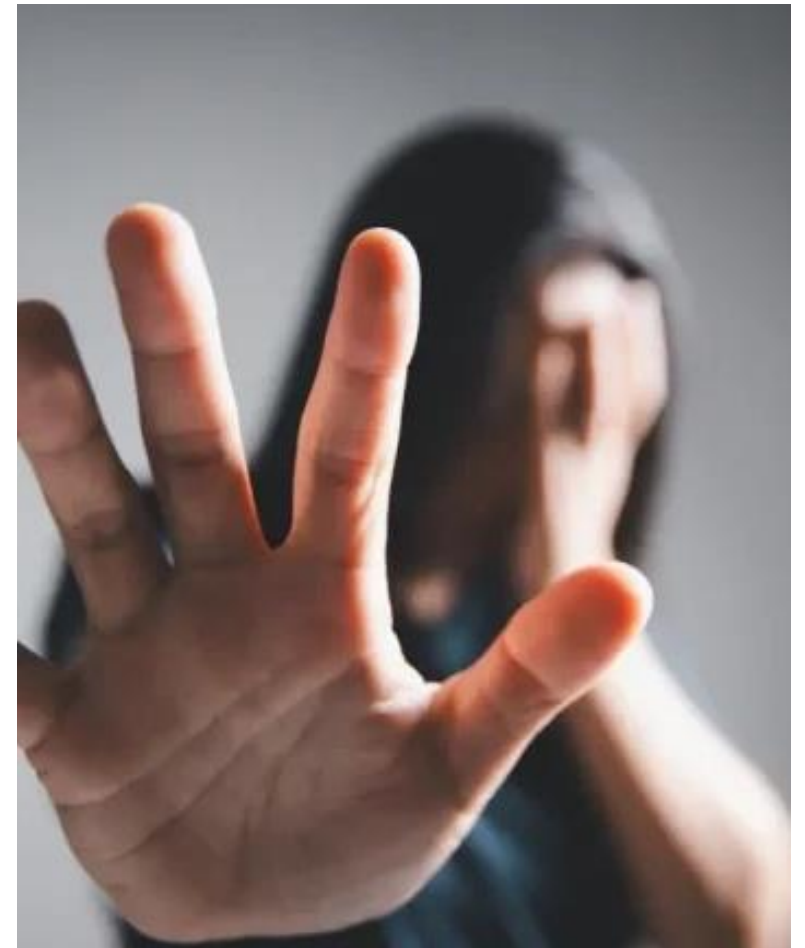
OCR issued a Q&A Guidance Document on July 20, 2021

1. Determining whether sexual harassment “effectively denies a person’s right to equal access to an education program or activity” – reasonable person standard
2. A School must follow the requirements of Title IX and regulations or guidance in effect *at the time of the alleged conduct*.
3. A School may receive actual knowledge of sexual harassment from any person.
4. A School may remove a respondent from campus while a Title IX grievance process is pending if the school determines that the respondent is a threat to others.

TITLE IX DEFINITIONS

SEXUAL HARASSMENT

- ❑ Conduct on the basis of sex that satisfies one or more of the following:
 - (1) *Quid Pro Quo* – A College employee conditioning the provision of an aid, benefit, or service of the College on an individual's participation in unwelcome sexual conduct;
 - (2) *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; or
 - (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).



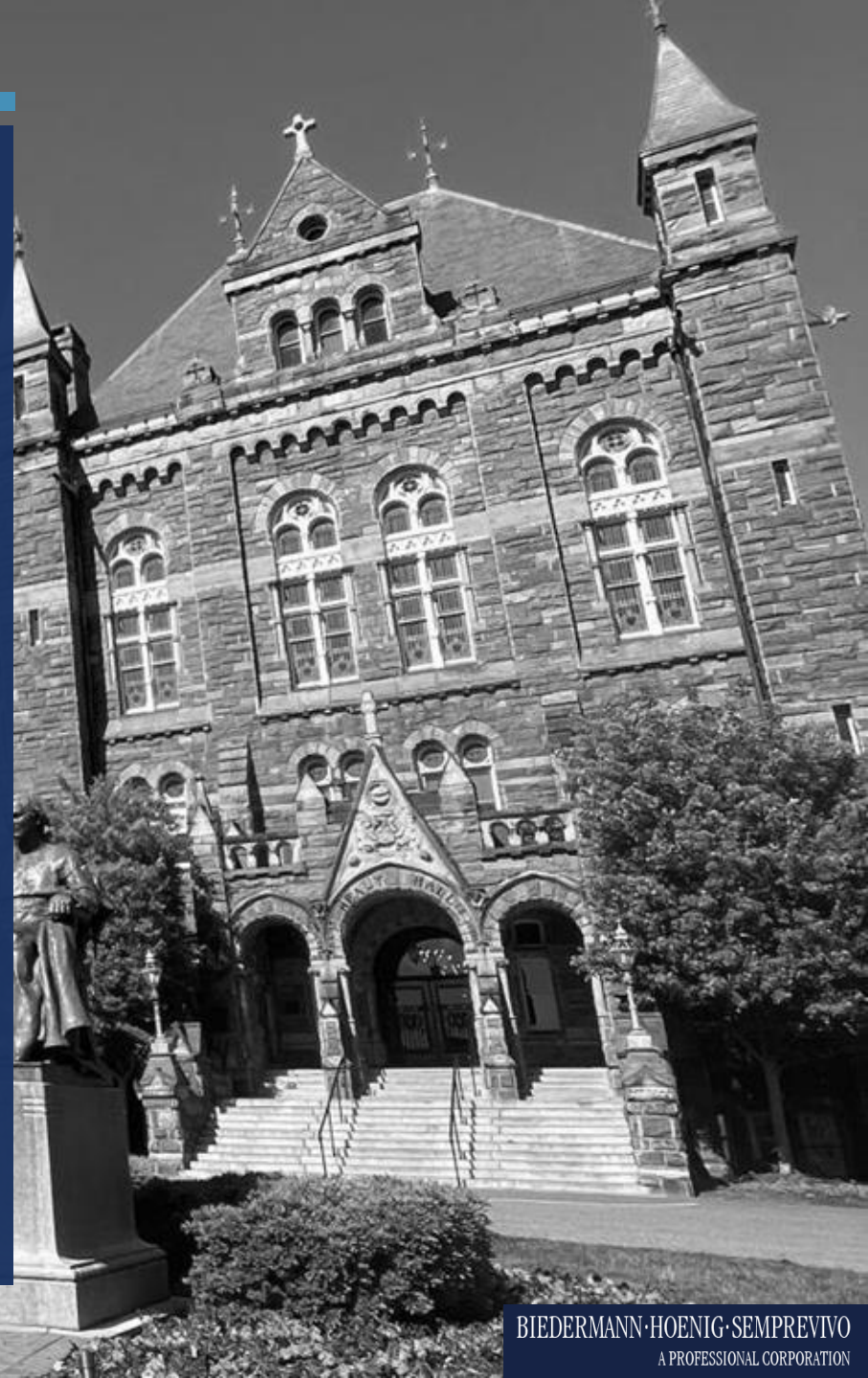
TITLE IX DEFINITIONS

- **SEXUAL ASSAULT**: Includes the following conduct:
 - Forcible sexual acts, forcible rape, forcible sodomy, sexual assault with an object, and forcible fondling
 - Non-Forcible Sexual Intercourse, including incest and statutory rape
- **DATING VIOLENCE**: Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship,



TITLE IX DEFINITIONS

- ❑ **DOMESTIC VIOLENCE:** a felony or misdemeanor crime of violence committed
 - ❑ By a current or former spouse or intimate partner of the Complainant;
 - ❑ By a person with whom the Complainant shares a child in common;
 - ❑ By a person who is or has cohabitated with the Complainant as a spouse or intimate partner;
 - ❑ By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws of New York State; or
 - ❑ By any other person against an adult or youth Complainant who is protected from that person's acts under the domestic or family violence laws of New York State
- ❑ **STALKING:** engaging in a course of conduct directed at a specific person that would cause a reasonable person to –
 - ❑ Fear for the person's safety or the safety of others; or
 - ❑ Suffer substantial emotional distress.



WHAT CONSTITUTES QUID PRO QUO?



- A teaching assistant student supervises a Saturday lab session. The assistant is attracted to a particular student and offers her extra credit assignments.
- Other students are not offered the opportunity for extra credit.
- The student is only allowed to submit extra credit assignments after she goes on a date with the assistant.
- The student declines the date and receives a failing grade.

WHAT CONSTITUTES **SEXUAL HARASSMENT**?



1. A student repeatedly sends graphic, sexually oriented jokes and pictures to other students via social media. Many students find the jokes offensive and ask the sender to stop, but without success. Eventually, some students drop a class they share with the sender. Others avoid the residence hall where the sender lives.
2. A professor engages students in discussions regarding the students' sexual experiences, inquiring about graphic details and private feelings.
 - a. These discussions are not relevant to the course materials or the subject of the class.
 - b. Class participation is part of the student's grade.

TITLE IX - RETALIATION

- Title IX prohibits retaliation against an individual who makes a complaint of a Title IX violation or otherwise participates in the Title IX investigation process.

RETALIATION



- **Elements of retaliation:**

- (1) The individual was engaged in a protected activity;
- (2) The retaliating party was aware of the individual's participation in the protected activity;
- (3) There was an adverse action taken against the individual; and,
- (4) There was a causal connection between the protected activity and the adverse action taken against the individual.

WHAT DOES RETALIATION LOOK LIKE?



TITLE IX – HOSTILE ENVIRONMENT

- The College's action or inaction in response to a Title IX Complaint may support a finding that the College maintains a **hostile environment** that permits ongoing Title IX violations.



HOSTILE ENVIRONMENT

■ Elements of hostile environment:

- (1) The individual suffered intentional, unwanted treatment *because of* his or her sex;
- (2) The harassment was severe or pervasive;
- (3) The harassment affected the terms, conditions, or privileges of the education or work environment;
- (4) The harassment would detrimentally affect a reasonable person; and,
- (5) The College knew or should have known about the harassment and did nothing to stop the behavior.

HOSTILE ENVIRONMENT



- Bullying, abusive or intimidating comments and actions
- Offensive comments that alter the conditions of a person's work, classroom, team or program environment
- Covers conduct by employees against other employees, not just conduct directed at students

INTERSECTION OF TITLE IX AND NYS 129-B

- Sexual misconduct that does not fall under Title IX may still be covered under NYS 129-B and require a response from the College
- ***“A reporting individual is encouraged to report sexual misconduct, domestic violence, dating violence and stalking regardless of where the incident occurred, or who committed it. Even if the College does not have jurisdiction over the responding individual, the College will still take prompt action to provide for the safety and well-being of the reporting individual and the broader campus community.” (MMC Policy Section V)***

WHAT ARE MMC'S OBLIGATIONS UNDER TITLE IX?

Marymount Manhattan College is responsible for properly investigating all allegations of Title IX violations.

The College's Title IX investigation must be adequate, reliable, impartial, and prompt and must include the opportunity for both parties to present witnesses and other evidence.

MMC'S SEXUAL MISCONDUCT POLICY

A copy of the College's policy can
be found

at [www.mmm.edu/offices/human-
resources/policy-sexual-
misconduct-sexual-assault-
stalking-relationship-violence.php](http://www.mmm.edu/offices/human-resources/policy-sexual-misconduct-sexual-assault-stalking-relationship-violence.php)

MMC'S SEXUAL MISCONDUCT POLICY

□ SCOPE

- This policy prohibits a broad range of behaviors that can create a hostile working, living or learning environment, including sexual assault and sexual harassment, collectively referred to as “sexual misconduct.”
- This policy applies to sexual misconduct whenever that sexual misconduct occurs:
 - On campus; or
 - At an off-campus Education Program or Activity as defined in the Policy.
- Sexual Misconduct that occurs off campus and is not part of an Education Program or Activity shall be subject to review and/or investigation under other applicable Codes of Conduct of the College.



TITLE IX COORDINATOR

-
- MMC's Title IX Coordinator – Desiree Sholes
 - Telephone: 212.517.0560
 - Email: dsholes@mmm.edu
 - The Title IX Coordinator ensures that the College is complying with Title IX regulations, including coordinating any investigations of complaints received pursuant to Title IX and implementing Title IX regulations.

TITLE IX DEFINITIONS



- **FORMAL COMPLAINT:**
 - A Formal Complaint is a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that MMC investigate the allegation of sexual harassment.
 - The filing of a Formal Complaint will trigger the Title IX grievance process.

TITLE IX GRIEVANCE PROCESS

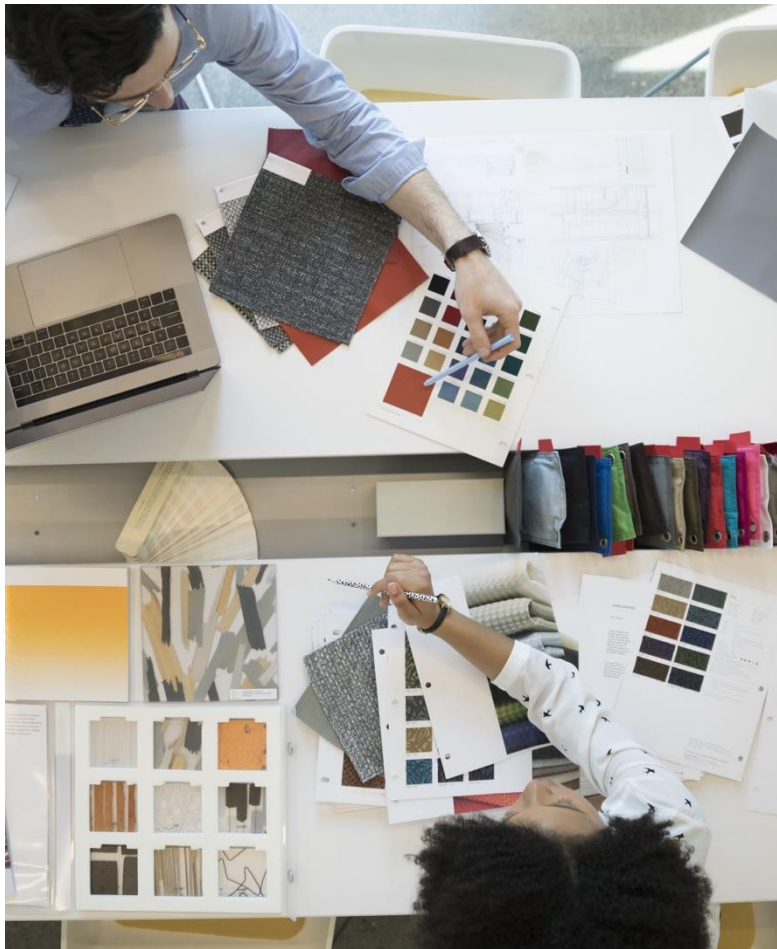
When a Formal Complaint is received that alleges conduct that falls under Title IX, the following grievance process is triggered:

- ❑ Investigation
 - ❑ Interviews of Complainant, Respondent and other witnesses
 - ❑ Review of documents and other evidence
- ❑ Live Hearing
 - ❑ Can be conducted remotely via video conferencing
- ❑ Summary of relevant evidence and Investigative Report, Written Decision
- ❑ Appeal Process

A COMPLAINT IS
RECEIVED...WHAT HAPPENS
NEXT?

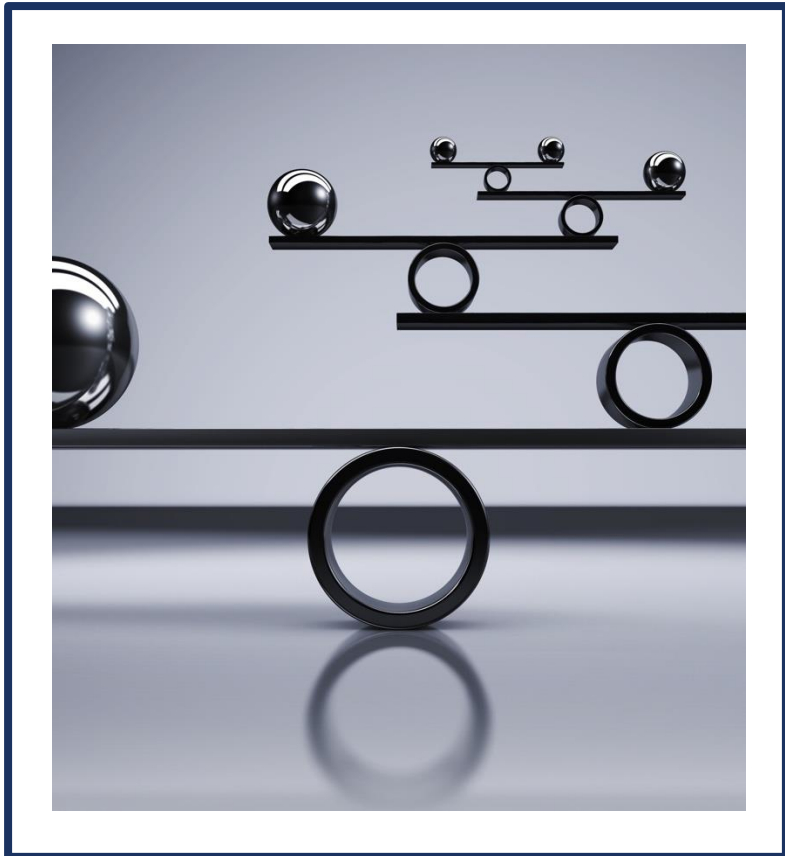


WHEN A COMPLAINT IS RECEIVED



- **Immediately inform the Title IX Coordinator if possible.**
- When speaking to a Complainant, do the following:
 - Advise the Complainant that his/her identity must be disclosed.
 - Listen to the Complainant.
 - Be supportive. Advise the Complainant that the College will review and respond to the allegations.
 - Document the allegations, including all facts as relayed.
 - **Keep notes free from bias or any conclusions.**
 - Request that the Complainant maintain any relevant evidence.
 - Inform the Complainant that the Title IX Coordinator will provide information on various resources.

WHEN A COMPLAINT IS RECEIVED

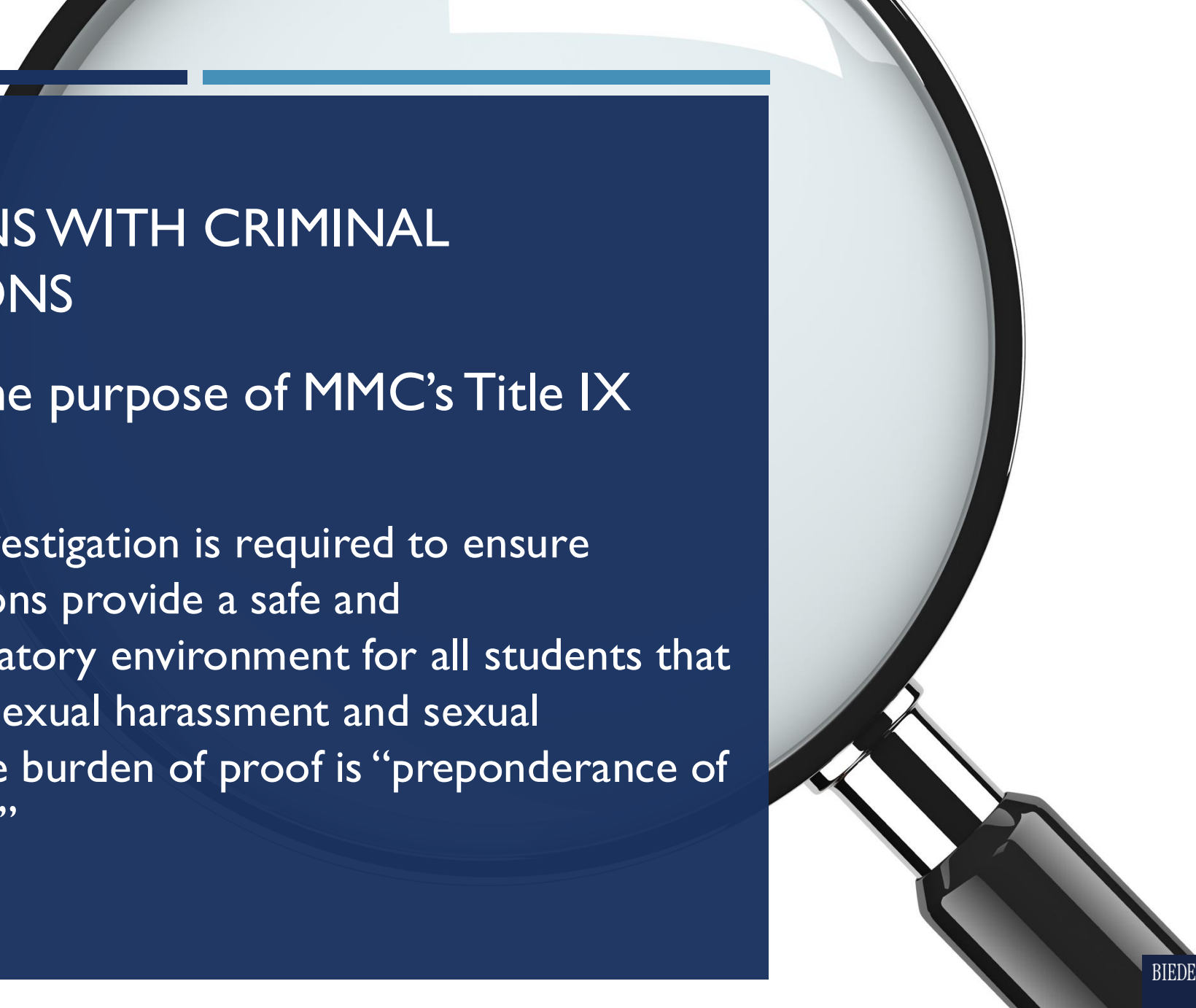


- Steps the College must take after being made aware of a potential Title IX Violation:
 - The College must contact the Complainant and explain the reporting options, grievance process and supportive measures.
 - Although the College shall seek consent from the Complainant before beginning an investigation, the College may be required to go forward with an investigation absent consent from the Complainant if the report presents a threat to the College community.
 - NOTE: If a Formal Complaint is filed for conduct that falls under Title IX, the grievance process is triggered.
 - The College must inform the Complainant that it cannot ensure confidentiality and will take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality.
 - Title IX Team members privy to information of a private nature should only discuss the evidence with individuals who are tasked with similar roles.

INTERACTIONS WITH CRIMINAL INVESTIGATIONS

- Complainants also have the right to bring a criminal complaint against the Respondent.
- The timing of a College's Title IX investigation will typically coincide with the timing of the criminal investigation. The College's investigation should continue unless it would interfere with the police's investigation.
- Efforts should be made to cooperate and coordinate with local law enforcement as much as possible during a concurrent criminal investigation.





INTERACTIONS WITH CRIMINAL INVESTIGATIONS

Keep in mind the purpose of MMC's Title IX investigations:

- A Title IX investigation is required to ensure that institutions provide a safe and nondiscriminatory environment for all students that is free from sexual harassment and sexual violence. The burden of proof is “preponderance of the evidence.”



THE INVESTIGATION

TITLE IX INVESTIGATION

The Title IX Coordinator has asked you to be the lead investigator of a Title IX complaint. Now what?

- ☐ Timing
- ☐ What information do you already have?
- ☐ Identify the key players
- ☐ Develop a plan



TITLE IX INVESTIGATION

What should an investigation consist of?

- ❑ A review of the policy alleged to be violated
- ❑ Separate interviews of the Complainant, the Respondent, and other witnesses (if applicable).
- ❑ A review of any relevant documents, photographs, or other materials.



TITLE IX INVESTIGATION

Rights of Complainants and Respondents:

- ❑ Both parties have the right to participate in the investigative process or elect not to participate.
- ❑ Both parties may present evidence.
- ❑ Both parties are entitled to have an advisor of their choice present for all investigative and disciplinary proceedings. The advisor may be an attorney.



TITLE IX INVESTIGATION

General Tips for Investigators:

- Maintain an appropriate relationship with the Complainant and Respondent throughout the investigation process.
- Remember that your job is to fact-find in an impartial manner.
- Investigators should conduct themselves in a professional manner during the investigation.
- Avoid making any assumptions or conclusions during the interview process.



TITLE IX INVESTIGATION INTERVIEWS

- Investigators should conduct thorough interviews to limit, as much as possible, the number of times that a Complainant is questioned about the incident.



TITLE IX INVESTIGATIONS

Presumption is respondent did not violate policy

No presumption based on a party's status as complainant or respondent

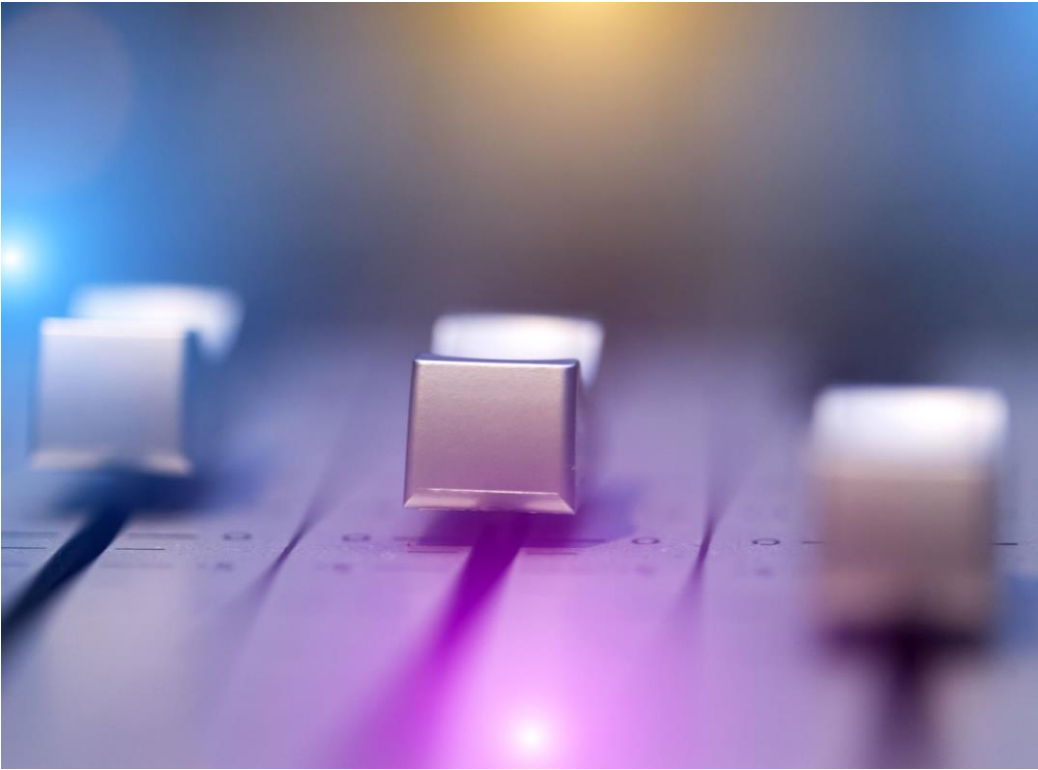
Bias-free institutional participants



TITLE IX INVESTIGATION INTERVIEWS

Before the interview:

- Prepare questions for the interview. A timeline is useful when multiple events are alleged.
- Review all documents/materials received prior to the interview so you can ask appropriate questions.
- Review the definitions contained within the College's Sexual Misconduct Policy and other potentially relevant policies to determine what information you need to obtain.



TITLE IX INVESTIGATION INTERVIEWS

At the beginning of the interview:

- Make it known that the College takes allegations of sexual misconduct very seriously.
- Acknowledge that you will be asking some difficult questions and explain your intent.
- Stress the importance of honesty during the interview.

TITLE IX INVESTIGATION INTERVIEWS

During the interview:

- Have the interviewee tell their story first.
- When you start questioning, begin with general questions, but get more specific as the interview progresses.
- Get the details – the “who, what, where, when, why.”
- Identify all potential witnesses and relevant records.

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.

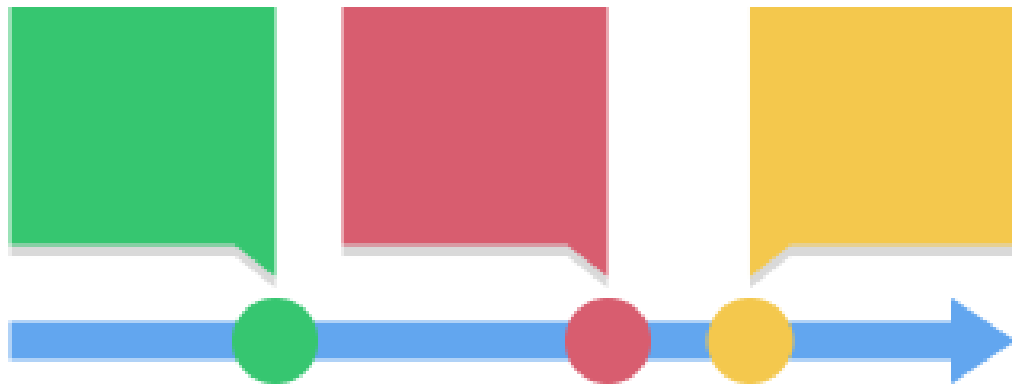


TITLE IX INVESTIGATION INTERVIEWS

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.

CONSENT- INCAPACITY ANALYSIS



Create a timeline of

- Drug and alcohol use by the reporting party;
- Use of medication by reporting party that couldn't interact with drug or alcohol use that could affect consciousness;
- Physical and cognitive behaviors demonstrated and who observed it;
- Text messages or videos of the reporting party;
- Card swipes or security footage; and
- Any information with a timestamp.

CONSENT FACT PATTERNS

- Fact Pattern #1: The state law sets the age for consent at 17. Over the summer, the college hosts a college preparatory program. One of the attendees, age 15, has sex with a counselor, age 17. The encounter occurs at the dormitory. The attendee does not claim coercion or rape.
- Fact Pattern #2: During a dance class, David claims to be groped by his partner, Marcy. Marcy denies any improper touching and states that the dance as choreographed calls for the placement of her hands on his backside. David claims that the way Marcy touches him makes him uncomfortable.
- Fact Pattern #3: Brian and Susie have been dating for 2 months. They have had sexual intercourse in the past. One night, Susie drinks to excess while on a date with Brian and blacks out. The next day, she learns that she had sex with Brian. Brian says that he asked her to engage in sex and Susie did not say no.
 - Does prior consensual intercourse change the analysis?

COERCION IS NOT CONSENT

- Coercion is an unreasonable pressure to engage in sexual activity. When an individual verbally and/or physically expresses that they do not want to engage in or continue in a sexual act, continued pressure beyond that point can be coercive.
- Factors to evaluate include:
 - Duration
 - Frequency
 - Isolation
 - Intensity

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 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 because 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 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

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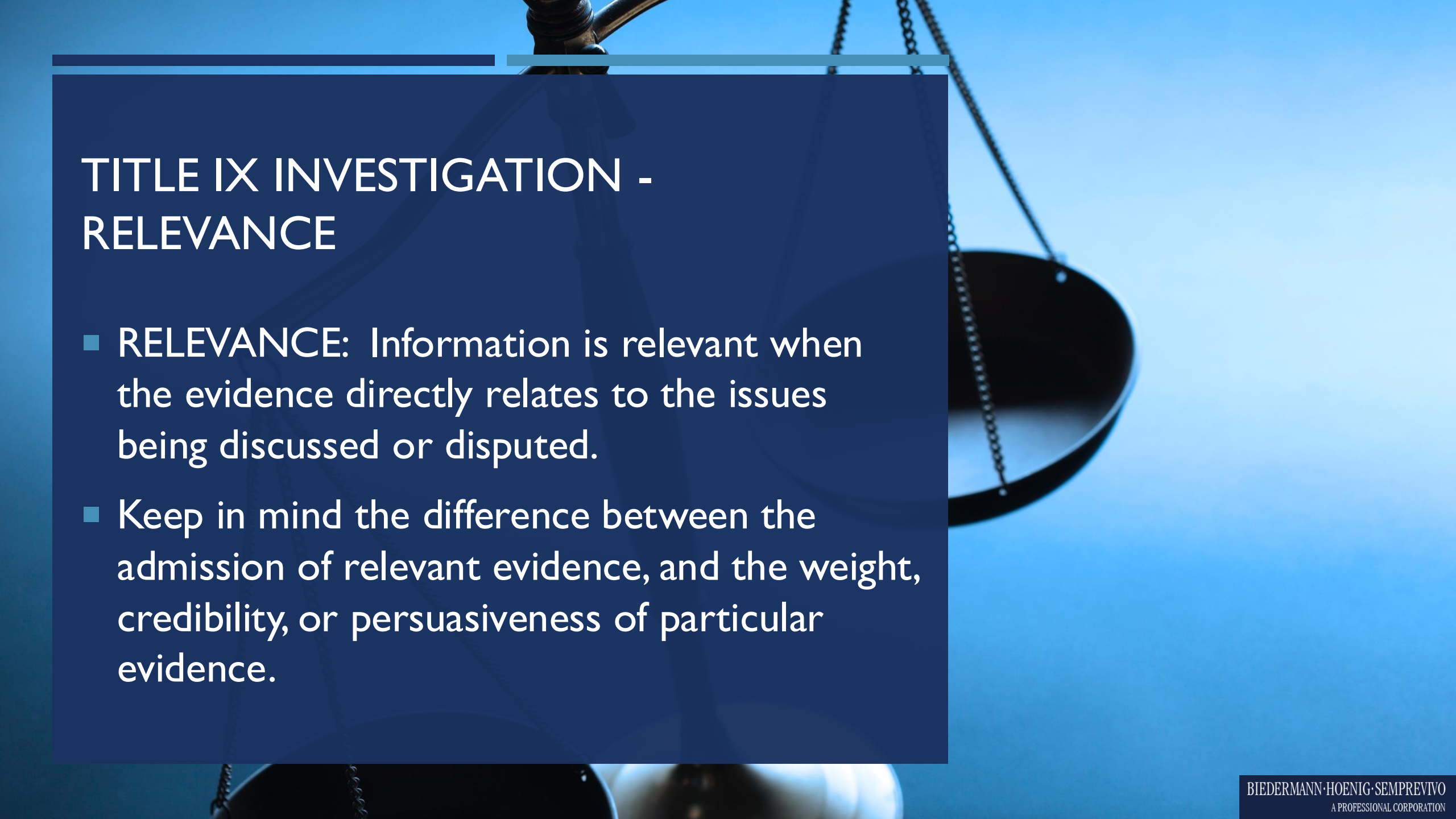
Review notes taken during the interview to determine if any additional information is needed.

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.

STANDARD – PREPONDERANCE OF THE EVIDENCE



Standard is preponderance
of evidence



More likely than not – >50%



Even a slight tilt of the scales
in favor of a party is enough
to meet the burden

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



- 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



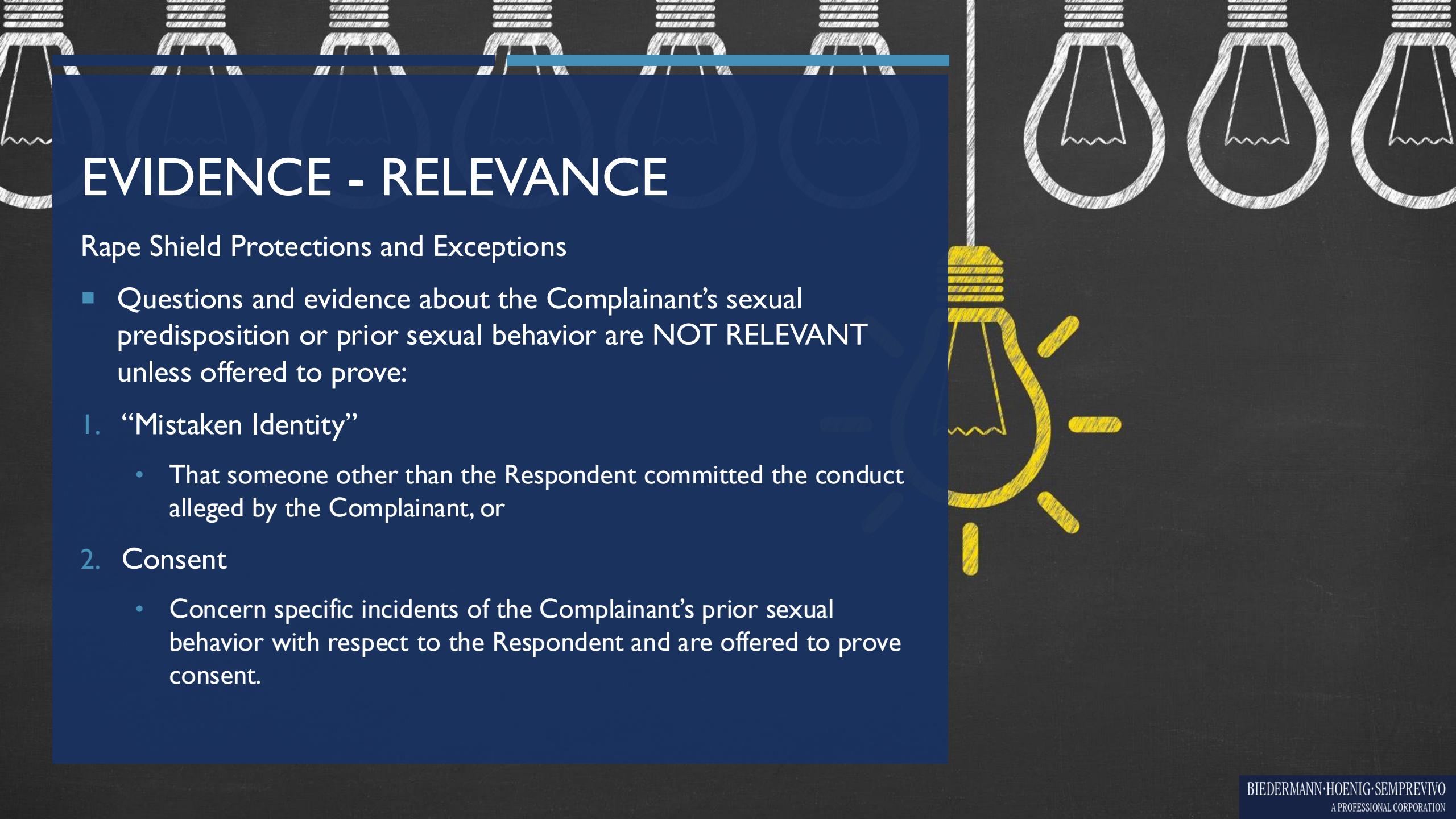
Relevance is the standard that these final regulations require, and any evidentiary rules that a recipient chooses must respect this standard of relevance.



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.

The background of the slide features a dark grey or black surface with several white-outlined lightbulbs. A horizontal blue bar is positioned across the top. On the right side, a single lightbulb is drawn in yellow with radiating lines, indicating it is turned on. The main content area is a solid dark blue rectangle on the left.

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 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.
- The parties will have five (5) days to submit an impact statement to be considered during the sanction process.

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.
- Proofread, sign, and date each Investigation Report.

TITLE IX INVESTIGATION REPORT

WHAT TO INCLUDE

-
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

KEEP IN MIND

**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

IMPARTIALITY TIPS

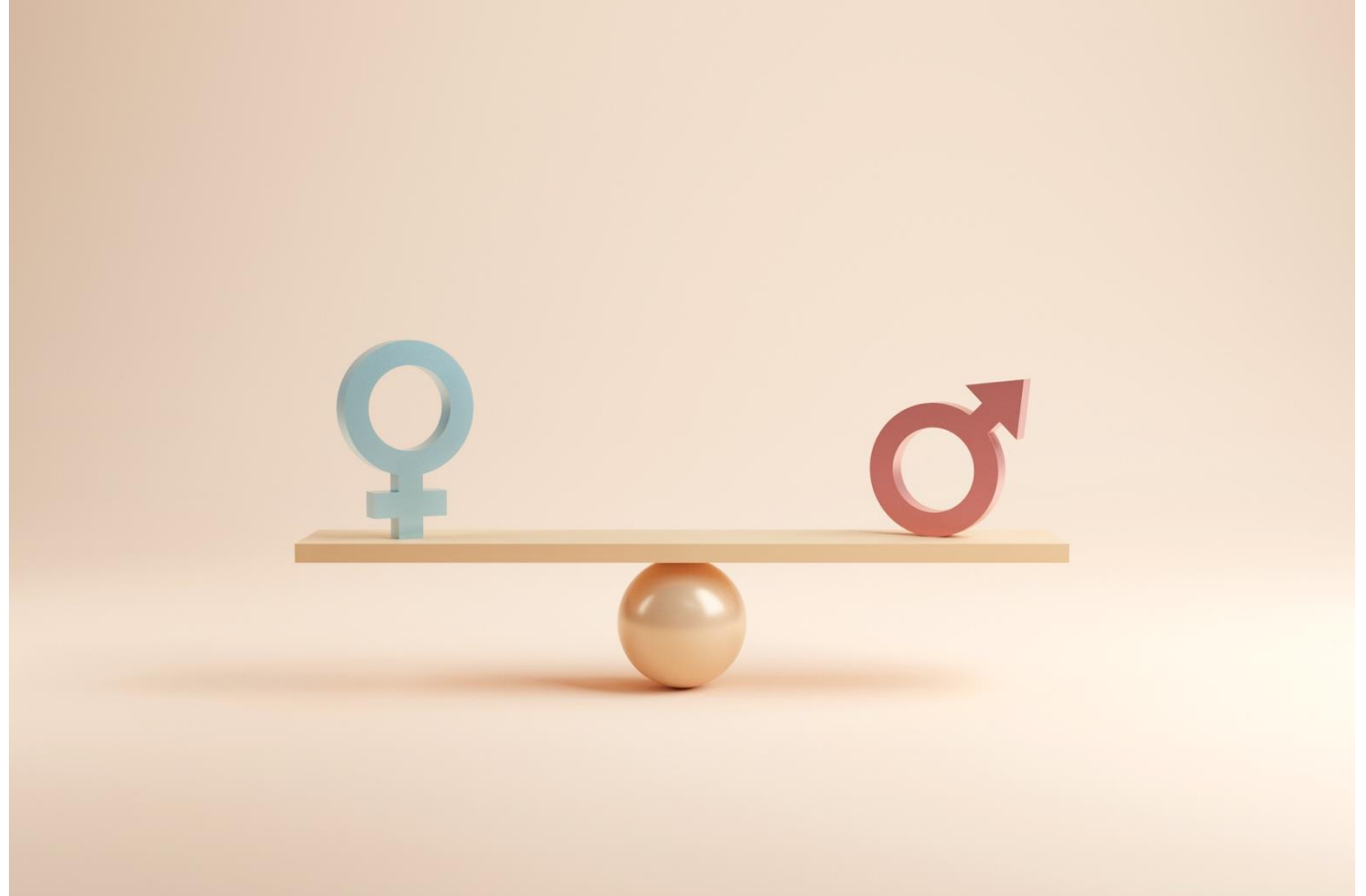


Be sure to view and evaluate all evidence in an impartial manner.

- ☐ 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.

PREJUDGMENT 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



PREJUDGMENT 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



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

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.

FACT WITNESSES AND CHARACTER WITNESSES

Fact witness: personal knowledge about specific facts that are relevant to determining whether an alleged act occurred

Character witness: knowledge about a person's general traits or their general disposition

FACT OR CHARACTER WITNESS?

- Mary claims that her classmate, John, sexually assaulted her at an orientation event. Georgia also attended the event with Mary and John and offers to testify about what she saw that night and what Mary told her afterwards regarding the assault.
- Charlie has been friends with John since grade school. Although he was not at the orientation event, he offers to testify that John is a kind person and would never harm another person. Charlie also has accompanied John to volunteer at a women's clinic.

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

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.

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

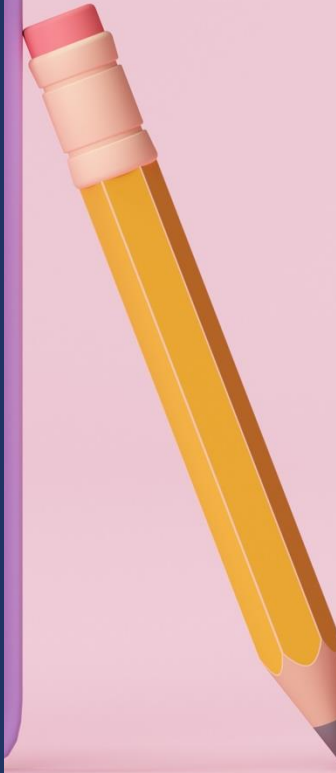


Weighing evidence:

- ☐ 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)

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.



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.

PREGNANCY ACCOMMODATIONS

- Title IX protects against discrimination based on pregnancy and related conditions.
- Pregnant students can request reasonable accommodations in academic and extracurricular programs, which include excused absences due to pregnancy or childbirth, return to the same academic and extracurricular status before medical leave began, and the opportunity to make up work missed while on leave.
- Pregnant students may request reasonable adjustments, such as a larger desk, more frequent trips to the restroom, or elevator access.
- Pregnant students are entitled to the same special services that students with temporary medical conditions are provided.
- Institutions must provide reasonable modifications based on individualized needs but do not have to fundamentally alter programs.

PREGNANCY ACCOMMODATIONS

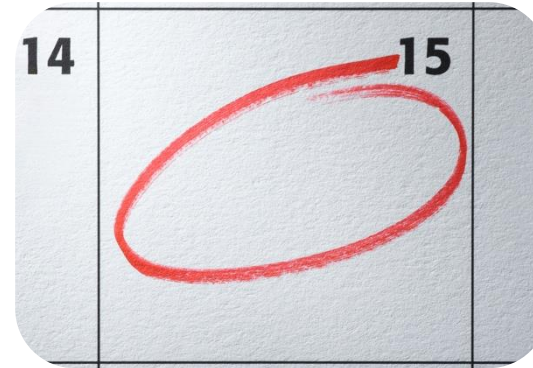
Accommodations can include:



Breaks to express
breast milk or to
breast feed



Access to online or
homebound
education



Changes in schedule
or course sequences



Extensions of time
and rescheduling

VIOLATION OF TITLE IX

- In June 2022, the DOE announced that it reached a resolution with Salt Lake Community College regarding a student's complaint of pregnancy discrimination. OCR found that the College violated Title IX when it did not:
 - Respond promptly and equitably to a student's complaint of pregnancy discrimination;
 - Engage in an interactive process with the student to determine the appropriate special services and/or academic accommodations to provide in light of her pregnancy; and
 - Excuse her absences related to pregnancy, provide her with the opportunity to make up work missed due to pregnancy-related absences, or provide her with alternatives to making up missed work at a later date.
- OCR also concluded that the College violated section 504 for not engaging in an interactive process with the student and not considering whether her pregnancy caused a temporary disability, which required accommodations.

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>

DOE V. BAUM



John Doe and Jane Roe were students at the University of Michigan. Halfway through Roe's freshman and Doe's junior year, the two crossed paths at a "Risky Business" themed fraternity party. While there, they had a drink, danced, and eventually had sex. Two days later, Roe filed a sexual misconduct complaint with the university claiming that she was too drunk to consent. And since having sex with an incapacitated person (unsurprisingly) violates university policy, the administration immediately launched an investigation. Over the course of three months, the school's investigator collected evidence and interviewed Roe, Doe, and 23 other witnesses. Two stories emerged.

First, Doe told the investigator that Roe did not appear drunk and that she was an active participant in their sexual encounter. According to him, the night went something like this: after he and Roe had a drink, danced, and kissed at the party, the two decided to go upstairs to his bedroom. Once there, they kissed "vigorous[ly]" and eventually made their way onto his bed. After they jointly removed their clothing, he asked Roe if she wanted to have sex. She said, "Yeah," and the two proceeded to have intercourse followed by oral sex.

DOE V. BAUM

When they were done, they cuddled until Roe became sick and vomited into a trash can by Doe's bed. Doe rubbed her back for five or so minutes and then left to use the bathroom and talk with friends. By the time he returned, Roe was crying and another female student was helping her gather her things. He asked Roe if she was okay, but Roe's new companion told him to "[g]o away" and the two women walked out of the room. At the time, he assumed that Roe was upset because he had left her alone after they had sex. He asserted that he had no reason to believe that she was drunk or that Roe thought any of his sexual advances were unwelcome.

Roe remembered the night differently. According to her, she was drunk and unaware of her surroundings when she and Doe went to his room. While kissing near the doorway, she told Doe "no sex" before she "flopped" onto his bed. Without asking, Doe undressed her and had intercourse with her while she "laid there in a hazy state of black out." And at some point, she passed out and woke up to Doe having oral sex with her. Afterwards, she felt a "spinning sensation" and fell back onto the bed. Doe asked her if she was okay, and she told him that she was not. So Doe placed a trash can by the side of his bed and left the room. She proceeded to vomit into the trash can. Afterward, she attempted to find her clothes but could not get her bearings. Feeling a sense of "desperation and defeat," she tried to catch another female student's attention by making "vomit sounds." It worked, and the female student helped Roe find her clothes, put them on, and get back to her dorm.



DOE V. BAUM

Credibility Analysis: How do we assess what happened given these two versions of the incident?

- I. Other witnesses – 23 other witnesses were interviewed.
 - Almost all of the male witnesses corroborated Doe's story, and all of the female witnesses corroborated Roe's. For example, Doe's roommate said that Roe "didn't seem like she was hammered or that drunk," although he stated that he did not "want to speculate" about whether she had had some alcohol because he did not talk to her directly or "really interact with [her]" much.
 - Roe's sorority sisters, on the other hand, reported that Roe seemed "more than a little buzzed" at the party because her eyes were "open but unfocused" and she "trail[ed] off at the end of sentences." The female student who helped Roe leave the party told the investigator that she found Roe crying and "very drunk" in Doe's bed. And two other friends provided that when Roe returned to her dorm that night, she sobbed on the floor of her room and said "she thought she'd been raped."

DOE V. BAUM

- Given the students' conflicting statements, the investigator concluded that the evidence supporting a finding of sexual misconduct was not more convincing than the evidence offered in opposition to it.
- The investigator did note, however, that Witness 2 might have been a more credible witness because she had no prior connection to Doe, Roe, or their respective Greek organizations. But because Witness 2 only observed Roe after the sexual encounter had ended, the investigator concluded that she could not address the relevant question—Roe's level of intoxication *during* the encounter or what signs of intoxication she manifested at that time. So after three months of thorough fact-finding, the investigator was unable to say that Roe exhibited outward signs of incapacitation that Doe would have noticed before initiating sexual activity.
- Accordingly, the investigator recommended that the administration rule in Doe's favor and close the case.



DOE V. BAUM

- Roe appealed, arguing that the evidence did not support the investigator's findings and asked the University to reconsider. The case was presented to the Appeals Board, and after two closed sessions (without considering new evidence or interviewing any students) the Board reversed the decision. The Board found Roe's description of events more credible than Does, and Roe's witnesses were more persuasive. As a result, the university set the investigator's recommendation aside and proceeded the sanction phase. Doe agreed to withdraw from the university rather than face expulsion.



WHAT CONCERNS DO YOU SEE WITH THE PROCESS?

DOE V. BAUM

The University did not provide Doe with a hearing even though there was a credibility dispute.

Doe was not afforded the opportunity to cross-examine Roe.

Female witnesses in support of Roe were credited, while male witnesses in support of Doe were discredited.

DOE V. BAUM

This case is now cited for the holding that when a case turns on credibility, due process requires some form of cross-examination.

ROE V. ST. JOHN'S UNIVERSITY

- In April 2018, Richard Roe and Jane Doe were both SJU students studying abroad, living in a SJU dorm
- On the first night of the program, Roe and Doe went to a club with other students. Doe asked Roe to dance. They both drank alcohol at the club.
- Later that night, Roe went to Doe's room. According to Roe, Doe invited him in, took his hand, and placed it on her fully clothed breast.
- Roe claimed he immediately said he was not interested in sex. Doe told him to leave, which he did.
- In September 2018, Doe filed a complaint accusing Roe of sexual misconduct.
- In October 2018, SJU held a Conduct Hearing. The Conduct Board found Roe responsible for non-consensual sexual contact, emphasizing the alleged lack of affirmative consent, due to Doe's intoxication.



ROE V. ST. JOHN'S UNIVERSITY

- Roe received a one-semester suspension, which was affirmed on appeal in January 2019.



ROE V. ST. JOHN'S UNIVERSITY

- A second student, Mary Smith, accused Roe of sexual assault occurring on December 15, 2018, in New York City, while Roe was serving the Doe-related suspension
- Roe alleged Smith was intoxicated at a bar and someone drove her to Roe's home. Roe claimed that Smith initially went to sleep outside on a cold patio. Roe invited Smith to sleep in the living room on a couch.
- Roe claimed that he positioned Smith on her side due to concern that she might vomit, fell asleep at the foot of the couch, and Smith left the next morning without incident.





ROE V. ST. JOHN'S UNIVERSITY

- On January 4, 2019, the hashtag #SurvivingSJU appeared and thousands of tweets criticized SJU's handling of sexual assaults.
- Roe claimed an anonymous tweet with that hashtag posted his picture and said that he had "raped" the poster and only received a half-semester suspension.
- Roe alleged that Doe liked the tweet quickly and later tweeted about writing a final statement for the Conduct Hearing.
- Roe believed that Doe authored the anonymous tweet because it contained information that only the school and the parties knew about the suspension details.
- After receiving threats, Roe's attorney contacted SJU.
- SJU responded that it could not discipline the poster because it could not identify who posted the tweet.

ROE V. ST. JOHN'S UNIVERSITY

- On January 5, 2019, Smith filed her complaint with SJU.
- SJU issued a no-contact order and suspended Roe pending investigation.
- The panel at the Conduct Hearing found Roe responsible for non-consensual sexual conduct, citing inconsistencies and credibility issues.
- Roe was expelled. His appeal was denied.



ROE V. ST. JOHN'S UNIVERSITY

- Roe claimed that SJU violated Title IX by discriminating against him because of his sex in 2 different ways. First, he claims that anti-male bias influenced SJU's disciplinary proceedings. Second, he claims that SJU's failure to investigate his allegations regarding the anonymous tweet demonstrated deliberate indifference to a hostile educational environment

ROE V. ST. JOHN'S UNIVERSITY

- The Second Circuit affirmed dismissal of Roe's federal claims, holding that:
 - Roe did not plausibly allege sex-based discrimination by SJU in investigating, adjudicating, or disciplining him. His allegations showed (at most) unfairness or procedural flaws, but not that SJU acted in such a way because he is male.
 - Roe did not plead a plausible TIX retaliation claim, because his alleged protected activity was not adequately tied to an adverse action taken against him "because of" that activity.