

Luther College Title IX Hearing Board Training

Fall 2020

Agenda

1:00-1:30 PM Trauma-Informed Investigations (Mariah Smith- 30 mins)

1:45 PM Bias (Wintlett Taylor Browne-30 mins)

2:15 PM Title IX overview (Kasey-45 mins)

- New Final Rule TIX Definitions
- New Consent Policy-fraud, kink, reasonable reciprocation
- Understanding the Preponderance of the Evidence
- Brief SANE overview

(15-minute break)

3:15 PM Impartiality, Conflict of Interest, Reasonable Person (Nan-15 mins)

3: 30 PM Deeper Dive of Investigators and Advisors (Kasey-45 mins)

- Investigator Role
- Advisor Role

(15-minute break)

4:30 -5 PM Case Study

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Title IX goals



- Prevent sexual assault on campus, through policies and education designed to foster a campus climate intolerant of sexual misconduct
- Respond effectively when someone is discriminated against, harassed, or assaulted, by ending the misconduct, preventing its recurrence, and ameliorating its effects. **STOP. PREVENT.REMEDY.**

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Title IX

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

- Sex and gender discrimination (including pregnancy & parenting)
- Sexual harassment, sexual assault, rape, stalking, and relationship violence [*sexual exploitation]
- Applies to all members of the Luther community, including students, faculty, staff, and guests



*denotes only Code of Conduct

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Why is this important?



15 reports in 2019-2020 involved some type of social media sexual harassment

	2015-16	2016-17	2017-18	2018-19	2019-20
Reports	25	39	60	94	82*
Complaints	6	3	11	11	7
Investigations	6	8	11	10	4
Hearings	6	3	10	4	2

*Reporting believed to be impacted by COVID-19

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Impact of Sexual Violence on those involved

Complainant (Victim)

- Time lost from class
- Poor academic performance, often withdrawing from the institution
- Mental Health Issues
 - (depression, anxiety, PTSD, suicidal, withdrawn)
- Substance Use
- Ongoing physical health concerns

Respondent (Accused)

- Time lost from class
- Poor academic performance, often withdrawing from the institution
- Mental Health Issues
 - (fear, anxiety, withdrawn)
- Substance Use
- Labeled at small college 'rapist'

Peers or loved ones supporting student

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New Regs

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Luther Title IX Policy:

- Quid Pro Quo (Employee)
- Sexual Harassment (Severe, Pervasive, Objectively Offensive)
- Sexual Assault
- Dating and Domestic Violence
- Stalking

(Only if alleged conduct occurs in the United States and within College educational program/activity)

Luther College Sexual Misconduct Policy:

- Quid Pro Quo
- Sexual Harassment
- Sexual Assault
- Relationship Violence
- Stalking

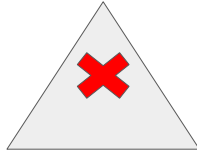
AND

- Sexual Exploitation
 - SH (Severe OR Pervasive)

And conduct outside the jurisdiction of Title IX!

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Dismissal of "Title IX" Cases



RESPONDENT

Schools "may" dismiss the formal complaint if at any time during the investigation or hearing the respondent is no longer enrolled or employed by the school

COMPLAINANT

At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed or the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint

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Prohibited Conduct as of August 14, 2020

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Key Terms

Complainant: An individual who is alleged to be the victim of conduct that could constitute sexual harassment

Respondent: An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment

Advisor: a person chosen by a party, or appointed by the College only if a party does not have an advisor at the hearing, advisors are required to conduct live cross-examination (*in the past advisors have been peers, parents, mentors, or attorneys*)

Formal Complaint: A signed document filed by a Complainant or Title IX Coordinator alleging sexual harassment and requesting the Luther investigate the allegation(s)

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*Sexual harassment

- Quid pro quo- a Luther employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct
- Unwelcome conduct on the basis of sex that is so severe, pervasive, AND objectively offensive that effectively denies a person equal access to the school's education program or activity

*denotes new by August 14 regulations

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Hostile Environment



- unwelcome conduct,
- determined to be so severe, and
- pervasive, and,
- objectively offensive,
- that it effectively denies a person equal access to the College's educational program or activity.

Unwelcomeness is subjective and determined by the Complainant. Severity, pervasiveness, and objective offensiveness are evaluated based on the totality of the circumstances from the **perspective of a reasonable person** in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

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[Sexual exploitation has adapted to the times!]

Sexual Exploitation refers to a situation in which a person abusive sexual advantage of another person

- **Harassing sexual or gender-based behaviors that become so severe or pervasive as to interfere with an individual's ability to work, learn or participate in the College's programs;** these behaviors can be verbal, physical, visual, communication-based, or any combination thereof, and will be assessed using the totality of the circumstances (**old definition before the new regulations**)
- Voyeurism and invasion of sexual privacy:
 - Observing or allowing others to observe a person undressing, using the bathroom, engaging in sexual activity, or in other private situations in which there is a reasonable expectation of privacy, without consent
 - Taking pictures, video recording, or audio recording of a person undressing, using the bathroom, engaging in sexual activity, or in other private situations in which there is a reasonable expectation of privacy, without consent
 - **Disseminating or threatening to disseminate pictures, video, or audio recording of a person undressing, using the bathroom, engaging in sexual activity, or in other private situations in which there is a reasonable expectation of privacy, without consent (Revenge Porn)**

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[Sexual exploitation continued!]

Sexual Exploitation refers to a situation in which a person abusive sexual advantage of another person

- **Misappropriation of another person's identity on apps, websites, or other venues designed for dating or sexual benefit (Catfishing)**
- **Intentional unwanted disclosure or threats to disclose an individual's sexual orientation, gender identity, or gender expression**
- Engaging in sexual activity with another person while knowingly infected with human immunodeficiency virus (HIV) or a sexually-transmitted disease (STD) or infection (STI), without informing the other person of the infection
- Causing or attempting to cause the incapacitation of another person (through alcohol, drugs, or any other means) for the purpose of compromising that person's ability to give consent to sexual activity, or for the purpose of making that person vulnerable to non-consensual sexual activity
- **Prostituting another person or engaging in sex trafficking**
- **Knowingly soliciting a minor for sexual activity**
- **Creation, possession, or dissemination of child pornography**

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Rape

Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant, including instances in which the Complainant is incapable of giving consent, whether due to incapacity or due to being below the statutory age of consent.

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Fondling

The touching of the private body parts of another person (buttocks, groin, breasts), for the purpose of sexual gratification, without the consent of the Complainant, including instances in which the Complainant is incapable of giving consent.

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Abusive relationships

Violence committed by a person who has been in a romantic or intimate relationship with another. 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. Violence can occur in relationships regardless of gender.

- Dating violence
- Domestic violence

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Stalking

Engaging in a course of conduct, towards another person, that would cause a reasonable person to fear bodily injury to themselves or another; or suffer substantial emotional distress.

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Consent

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Nonconsensual sexual activity

Consent is **knowing, voluntary and clear permission by word or action**, by all participants to a sexual activity. Since individuals may experience the same interaction in different ways, it is the responsibility of each party to make certain that the other has consented **before** engaging in the **specific** activity. For consent to be valid, there must be a clear expression in words or actions that the other individual consented to that specific sexual conduct.

New:
Reasonable reciprocation can be implied. ATIXA Model Policy

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Consent

- *Affirmative* - silence, absence of resistance, or past behavior does not constitute consent
- *Specific* - consent to one sexual activity does not imply consent to a different sexual activity
- *Knowing* - an individual who is **incapacitated** due to sleep, alcohol, drugs, etc. cannot consent
- *Voluntary* - consent cannot be obtained through force, **fraud**, threats, intimidation, or undue coercion
- *Revocable* - may be withdrawn at any time

CONSENT



Freely Given
Reversible
Informed
Enthusiastic
Specific



2 PRONG TEST

"Reasonably should have known"

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Consent Question

Proof of consent or non-consent is not a burden placed on either party involved in an incident. **Instead, the burden remains on the College to determine whether its policy has been violated.** The existence of consent is based on the totality of the circumstances evaluated from the perspective of a **reasonable person** in the same or similar circumstances, including the context in which the alleged incident occurred and any similar, previous patterns that may be evidenced.

1. Force
2. Incapacitation
3. Consent

What **clear words or actions** by the Complainant gave the Respondent permission for that specific sexual activity to take place?

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New Language with Consent Policy

Consent in relationships must also be considered in context. When parties consent to BDSM (bondage, discipline/dominance, submission/sadism, masochism) or other forms of kink, non-consent may be shown by the use of a safe word. Resistance, force, violence, or even saying "no" may be part of the kink and thus consensual, so the College's evaluation of communication in kink situations should be guided by reasonableness, rather than strict adherence to the policy that assumes non-kink relationships as a default. (ATIXA Model Policy)

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Undue Coercion

- FREQUENCY
- DURATION
- INTENSITY
- ISOLATION
- POWER DIFFERENTIAL

how would a reasonable person perceive this amount of pressure?

"Acknowledge that there is a socially tolerated amount of pressure for sex."

"Coercion pushes to and THEN past someone's resistance point."

"Did they engage in sexual activity because they wanted to or to get the pressure to stop?"

"Is the pressure seductive or attacking?"

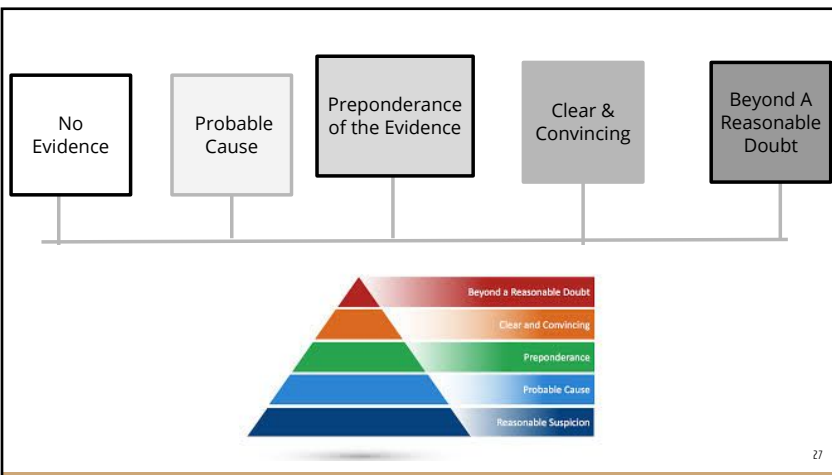
Brett Sokolow
President of ATIXA



The Preponderance of Evidence Standard



"More likely than not"
50% and a feather



Amnesty-

Parties or witnesses can be hesitant to report to College officials or participate in grievance processes because they fear that they themselves may be in violation of certain policies, such as underage drinking or use of illicit drugs. (Now applies to employees)



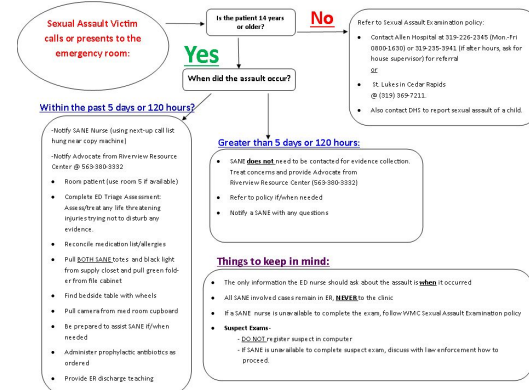
Sexual Assault Nurses Examination (SANE)

Staff Involved:

- Emergency Room Staff (Registration Representative)
- Sexual Assault Nurse Examiner
- Riverview Center Advocate
- Law Enforcement (Police & Sheriff's Office)
- Other Sexual Assault Response Team Members (Crime Victim/Witness Coordinator, County Attorney, Title IX Coordinator, Luther Security)



Exam Process



SANE's Role

- Provide care and support in a safe environment
- Examine and treat patient, including documentation
- Perform forensic evidence collection
 - DNA evidence collection
 - Written descriptions
 - Body drawings
 - Photographs of injuries
- Provide STI prophylaxis and emergency contraceptive
- Provide referrals for follow-up care and treatments
- Serve as an "Expert Witness" if called to trial

SANE's Kit



- Each Kit includes-
- Instructions
 - Victim information lab form
 - Bags with label affixed
 - Fingernail scraper
 - Paper bundle
 - Swab boxes with labels
 - Sexual assault victim/survivor form
 - STI & sexual assault information pamphlet
 - Iowa Attorney General's Card
 - Sterile, cotton-tipped swabs
 - Police evidence seals
 - Biohazard label
 - Lancet
 - FTA card
 - Labeled envelopes

Example of Sexual Assault Exam Discharge Forms

Follow-up Exam Recommendations for the Post Sexual Assault Patient

Testing	1 week (baseline)	3 weeks	6 weeks	3 months	6 months
Chlamydia	(X)				
Gonorrhea	(X)				
Trichomonas	(X)				
Syphilis (RPR)					
Syphilis (TPHA)					
HIV					
Other					

(X) if patient is symptomatic for STI or was not tested in the ED
 X Recommended follow-up testing per CDC
 X Other blood collection for STI testing with HIV (also testing)
 The baseline pap of STI testing is performed at 10 weeks. This is required to stage HIV (to detect seroconversion). Please do not delay testing until after 10 weeks post-exposure.
 * If emergency contraception was not given in the ED or if emergency contraception

Example of Sexual Assault Exam Discharge Forms

- Evidence Collected Today:**
- Vaginal swabs and smears
 - Blood card sample
 - Photographs
 - Clothing tag
 - Combed pubic hair
 - Urinal sample
 - Rectal sample
 - Other

Treatments:

- Pregnancy
- STI
- Other

Treatment:

- Antibiotic
- Contraception
- Mifepristone
- Antiepileptic
- Other

Emergency Contraceptive Pills:

- Plan B
- Other

Follow-Up:
 We strongly encourage you to be seen by your regular health care provider in the next two to three weeks to have a re-evaluation and possible testing done for sexually transmitted infections. If you need assistance with making this appointment, call the sexual assault advocate at Riverview Center at (888) 557-5310 or (530) 388-3332.
 If at any time you have questions or concerns, we strongly encourage you to contact the Riverview Center. If you have further questions, you can ask the advocate to contact the Sexual Assault Nurse Examiner.
 Your examiner today was _____

Follow-up Care and Recommendations

- Follow-up appointment with primary care provider within 2-5 days, if possible
- Follow-up STI testing and pap around 6 weeks
- Continual follow-up with Riverview Center Advocate
- Counseling if needed

Sexual Misconduct Investigation and Adjudication

Complaint

- A report becomes a complaint when:
 - the victim communicates desire to go through the formal grievance process and signs a Formal Complaint.
- there is a clear threat to campus safety

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Investigation

- Both parties received advance written notice of investigation and allegation(s)
- Investigators interview witnesses and obtain other evidence (fact gathering)
- Both parties have opportunity to submit written accounts and suggest potential witnesses
- Both parties (and their advisor) will have 10 days to review and respond to initial drafts of investigation summary and 10 days to review and respond to final summary
- Timeframe: 3-5 weeks

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Conflict of Interest & Bias



Both parties have opportunity to:

- View list of Hearing Board Members & object to any who might be biased
- Request the Title IX Coordinator recuse due to bias
- Parties cannot object to an appointed College Advisor unless they can provide rationale the advisor is not working in their best interest.
- Appeal under grounds of conflict of interest & bias that sufficiently proves it would have changed the outcome.

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TITLE IX Hearing

- Introductions and hearing procedures
- Opening statement by the complainant
- Opening statement by the respondent
- Board questions for the complainant and respondent
- Submission to cross-examination for parties (questioning by advisor)
- Break
- Witness statements and questions
- Submission of witness(es) to cross-examination (questioning by advisor)
- Questions for the complainant and respondent
- Break
- Questions for the complainant and respondent
- Closing statement by the complainant
- Closing statement by the respondent
- Conclusion
- Deliberation
- If necessary, sanctioning

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Factors considered when sanctioning



- The nature, severity of, and circumstances surrounding the violation(s)
- The Respondent's disciplinary history
- The Respondent's role and level of responsibility at the College
- The impact on the parties (eliminated Impact statements for 2020-2021)
- Institutional precedent for how similar infractions have been addressed
- Any other information deemed relevant by the Hearing Board



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STUDENT

- Unilateral No Contact Directive:
- A Mental Health or Substance Abuse Evaluation
- Probation:
- Residence Hall Suspension: Termination of a student's right to live or be present in College-owned housing for a definite period of time.
- Suspension
- Expulsion
- Educational sanctions

EMPLOYEE

- *Unilateral No-Contact Directive*
- *Educational sanctions*
- *Required counseling*
- *Imposition of performance improvement plan*
- *Probation*
- *Loss of annual pay increase*
- *Loss of oversight or supervisory responsibility*
- *Demotion or job reassignment*
- *Suspension, with or without pay*
- *Revocation or denial of tenure for a specified period of time*
- *Termination of employment*

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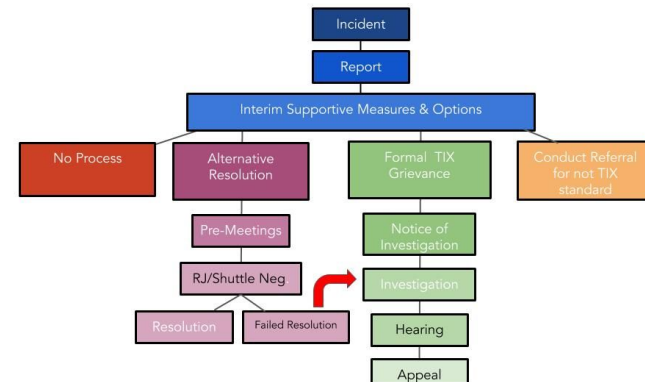
Alternative Resolution

- Voluntary alternative to the formal conduct process after Formal Complaint
- Not appropriate in all situations - TIXC must approve
- Intended to provide an avenue for survivors to get support and respondents to accept some accountability in situations where the formal hearing is not the best solution

Non-Qualifiers:

- weapon was used or threatened
- premeditated predatory behavior
- minor (or other vulnerable populations) involved
- circumstances involving an employee
- repeated pattern of behavior or escalation during pre-conferences, the college comes to believe that one/both parties would not be participating in "good faith"

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Advisor Role

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Advisors



- Advisor can be anyone
- Party may select a witness as Advisor
- If a party does not have an Advisor to conduct cross-examination at a live hearing the college **MUST** appoint an Advisor.
 - Must be conducted directly, orally, and in real time (live)
 - Questions can challenge credibility
- Luther College will limit the role of Advisors during the hearing with the exemption of cross-examination as well as consult with party (as in the past)
- Will remain seated during cross-examinations

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Advisors

- Advisors cannot ask questions that are 1. irrelevant, 2. unduly repetitious, or 3. abusive.
 - Rape Shield (no prior sexual history)

If a question has already been asked and answered it could now be considered **irrelevant**.

Information that helps prove or disprove a fact at issue, it should be admitted because it is **relevant**.

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Advisor Cross-Examination

If a party or witness does not submit to cross-examination at the hearing, the Hearing Board **must not** rely on any statement of that party or witness (from investigation or hearing) in reaching a determination.

Meaning: A party or witness must answer all deemed **RELEVANT cross-examination questions that are posed. One refusal will more than likely prohibit the Hearing Board to use any other submitted information.(ATIXA)**

Hearing Board cannot draw a conclusion based on the participation or lack of participation in a live hearing.

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Advisor may address credibility

The Board will have final say on credibility.

- Advisors may check or have a party clarify accuracy of information
- Advisors may ask questions surrounding memory errors, evasion, or misleading information
 - In your written statement you said you couldn't recall where John was and now you are placing John in your residence hall room, can you clarify that for the Board?
- Advisors with their party may focus on corroboration and consistency
- Questions may focus on source of information and why that is relevant
 - You said you know this is true because Nicole heard it from Sarah, but do you or Nicole actually have any firsthand knowledge of the incident? Could your statement be considered gossip or hearsay?

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Relevant Sexual History

Evidence of the Complainant's prior sexual history or predisposition is explicitly not relevant except for **two limited exceptions (ATIXA)**:

1. Offered to prove that someone other than the Respondent committed the conduct alleged, or
2. Concerns about specific incidents of the Complainant's sexual behavior with respect to the Respondent and is offered to prove consent

(Even if admitted/introduced by the Complainant)

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Advisor and Hearing Decorum

- Be professional (as well as personal appearance and attire)
- Be prepared with some questions or strategy discussed with your party
- Be respectful with tone and manner when questioning
- Maintain composure and eye contact
- Remain seated
- Request a break if emotions are running high
- Be conversational, frequently nodding as a sign of active listening
- Pause after questions to ensure the Chair will find it relevant
- Never look shocked or stunned

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CASE STUDY-ADVISOR

In the opening statement the Complainant states he/she never would have had sex with the Respondent because he/she was a virgin and never had sex before, therefore, he/she could not possibly have had consensual intercourse.

Q) Is this opening statement relevant? (Why or Why not)

Q) Can an advisor address questions about virginity? (Why or Why not)

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Notice of Investigation and Allegations (NOIA)

- The identity of the involved parties (if known)
- The misconduct being alleged
- The date and location of the alleged incident(s) (if known)
- The policies implicated (***and continued policies implicated**)
- *A statement that the College presumes the Respondent is not responsible for the reported misconduct unless and until the evidence supports a different determination
- Information on the right to an Advisor of their choosing
- *A statement informing the parties that the College's Policy prohibits knowingly making false statements, including knowingly submitting false information during the resolution process
- *Detail on how the party may request disability accommodations during the interview process and formal grievance process
- The name(s) of the Investigator(s), along with a process to identify, in advance of the interview process, to the Title IX Coordinator any conflict of interest that the Investigator(s) may have
- The parties' rights to review and comment on investigative evidence.

*New to Luther 53

Investigator Role

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Investigator Steps



All investigations are **thorough, reliable, impartial, prompt,** and fair. Investigations involve interviews with all relevant parties and witnesses, and obtaining available relevant evidence, both inculpatory and exculpatory.

All parties have a full and fair opportunity, through the investigation process, to suggest witnesses and questions, to provide evidence, and to fully review and respond to all evidence on the record.

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Investigations

- Each party will be asked to participate in an initial interview and may be asked to participate in a follow-up interview(s) as needed.
- When participation of a party is expected, provide that party with **written notice** of the date, time, and location of the meeting.
- Interview all available, relevant witnesses and conduct follow-up interviews as necessary.
- Allow each party the opportunity to suggest relevant witnesses.
- Allow each party the opportunity to request an expert witness **at the party's personal expense.**
- Complete the investigation promptly and without unreasonable deviation from the intended timeline.
- Provide regular status updates to the Title IX Coordinator throughout the investigation.

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Investigative Tips



- Be mindful of the setting, tone, privacy, exits, plan break area
- Have all the supplies you need (paper, pen, kleenex)
- Be prepared with questions you need to ask (re-read the compliant)
- Be sure to read the script prior to the start and finish with what they can expect next in the process. **In writing** request any mentioned evidence.
- When questioning, details matter. (Example: "You said John touched Jane," Can you recall where on Jane or have more details about that interaction?)

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10 days of review (X2)



Schools **must** send the parties, and their advisors, evidence directly related to the allegations, in electronic format or hard copy, with at least **10 days** for the parties to inspect, review, and respond to the evidence.

- Investigators interview witnesses and obtain other evidence (fact gathering) with the burden of gathering evidence and burden of proof must remain on schools, not on the parties. Schools must send **written notice** of any investigative interviews, meetings, or hearings.
- The investigators **must** consider all the written responses prior to writing and completing the final investigative summary report. Report should fairly summarize relevant evidence.
- After the final investigative summary report, parties and their advisor will be able to review for **at least 10 days** prior to the hearing.

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Written Investigation Summary

Investigative report must summarize relevant evidence and clarifications from parties.

Written report should use their first name. In the past we used Ms. or Mr., we are going with just the first name after the initial paragraph statement.

Vital to continue to document all dates of interviews and review periods. (Example September 1-September 1, **2020-2021 Tracking Sheet**)



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CASE STUDY

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Initial Allegation from Sally

Sally signs a formal complaint alleging that her Luther friend, Tom, took a picture of Sally and photoshopped her face on a naked body that looks like a porn star. Sally says she knows it was Tom because she sent that picture of her face to him over the summer and only him. Sally states she never posted it on any social media either. Sally also adds Tom is a visual media major and at one time wanted to date Sally but agreed to be just her friend. Sally goes on to state the picture is now viral with the student population. Sally's roommate just showed her that she saw the image on SnapChat and asked Sally if this was a real photo. Sally assumes it is on lots of social media platforms. Sally ended up withdrawing from the class she has with Tom to avoid him. NOIAs are sent to Sally and Tom as well mutual NCD.

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Initial Interview with Tom

Tom meets with two Title IX investigators as well as his advisor which happens to be his TRIO coach. Tom responds to investigators he did do the photoshopping of Sally's face on the nude body and takes complete responsibility for that specific action. However, Tom does continue to say he did not share that image with anyone else. That was for his own person use as he does have romantic feelings for Sally. He realizes now he shouldn't have modified a picture of her as she did not consent to those edits but he is adamant he did not share and would not as Sally is a friend of his, he repeats he would not do that to her. Investigators ask more of Tom of who would have access to the modified photo of Sally. Tom reports he has a roommate Mark. Tom does say Mark did borrow Tom's computer for 4 days this month as his computer was being serviced at the HelpDesk.

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Next Steps

Q) Has Tom violated policy?

Q) If investigators start to interview Mark, what steps need to be taken first?
What policy violations should be considered based on what we know?

Do you consider this situation "Title IX" or "Sexual Misconduct"?

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