



Luther College Title IX Hearing Board Training

Fall 2023

Student Code of Conduct

Luther College is a community of scholars whose members include its students, faculty and staff. As a community, we share a dedication to creating an environment that supports trust, respect, honesty, civility, diversity, free inquiry, creativity, and an open exchange of ideas. We also recognize the need to establish a Code of Conduct that *sets forth expectations for student behavior*, promotes growth and development, guides student action, and defines procedures and sanctions for *behavior that is inconsistent with the aims and objectives of a community of scholars*. For the benefit of the community, the Code of Conduct limits certain behaviors and activities. It also attempts to *protect the academic integrity, health, welfare, safety, rights, and property of the college community*.

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Student Code of Conduct

- Luther College strives to strike a balance between freedom and the policies necessary to promote its basic purposes of teaching and learning. Since enrollment at Luther is a voluntary act, *students voluntarily assume the obligations of behavior* reasonably imposed by the college as it carries out its mission. *These obligations are generally much higher than those imposed on all citizens in society*. Luther College expects students to *maintain standards of personal integrity* that are in harmony with the educational goals of the college; *assume responsibility for their actions*; and *respect the rights, privileges and property of others*.

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Student Code of Conduct

- The Code of Conduct also reinforces the concept that students have rights: the *right to be treated as individuals within the disciplinary process*; the right to be *protected from arbitrary, capricious, or malicious acts on the part of other members of the community*; and the *right to study, learn, live, and work in an environment free from behavior* that could *disrupt the college's functions, cause injury to persons, or cause damage to or loss of property*.

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What IS our code of conduct?

- Civil document by which the college community:
 - Defines what the living learning environment will be like and
 - Sets forth conditions governing a student's eligibility to remain part of the community.
- Purpose: Educative. Designed to support a quality living learning environment for ALL students.

Source: Stoner, E. (2008). Gehring Academy Training Institute, Salt Lake City, UT.

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Luther College Hearing Board

- Cases involving violations of the Code of Student Conduct that could result in the sanction of suspension or expulsion.
- Cases in which the student involved does not accept responsibility for the violation with the understanding that the full range of sanctions are available should the student be found responsible.
- Violations of a more serious nature, including but not limited to cases of sexual misconduct or assault, organizational misconduct, violations by students with significant disciplinary records, or consideration of sanctions for students who have received 10 or more points (Alcohol and Other Drugs Policy).

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Tenets of the LCHB

- To regard each student as an individual, deserving individual attention, consideration, and respect.
- To consider the facts fully and carefully before resolving any case.
- To speak candidly and honestly to each student.
- To hold each student to a high standard of behavior, both to protect the campus community, and to promote student moral development.
- To recognize the reality of human fallibility, as well as the stresses associated with collegiate life, and to demonstrate compassion, understanding, and a sense of humor.
- To contribute to the educational mission of the College by interpreting policies, rendering decisions, and recommending sanctions that contribute to the intellectual and moral development of the entire student body.
- You may be approached regarding the outcome of a case – you can not provide any information.

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Key Competencies - LCHB

- Effective communication skills
 - Including active listening, articulation of thoughts
- Attention to detail
 - Including questioning and investigation review
- Understanding of campus culture
- Care for the campus community
- Care for the individual student
 - Supportive measures and accountability
- Comprehension of campus policies and procedures
 - Including consistency and proper application

Source: Inabnost, J. (December 2008). Continuing Development of Effective Conduct Board Training. Power Point Presentation.

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Conflict of Interest Prejudgement “Assumptions” Bias

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Conflict of interest

- Decorah is small, Luther is smaller
- Relationship or future relationship with parties involved
- Examples: Enrolled in your Spanish class for next semester (recuse)
- Involved in the same fraternity as you and you were their pledge master (recuse)
- Once were enrolled in the same Health 100 class and you remember their presentation (remain)
- (maybe a witness-would need to talk through)
- Just because you know someone doesn't mean you can't hear the case
 - "In a University setting, prior contact among the faculty and students is likely; that fact alone does not indicate bias or partiality." - Holert v Univ. of Chicago
- Could the outcome of this case impact me?
 - Invested because of the athletic team, choir, research project, work-study student, fellow club officer
- Hearsay/Preconceived reputation (think you know what happened before hearing the case)

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Prejudgement “Assumptions”

- “Classic bar fight with two drunk kids”
- Replacing facts with your own personal experience that has similarities with the case
- “Students always lie when they are caught”

everything is never as it seems.

Anchoring and Presumption of Innocence

“Anchoring” is the tendency to be overly influenced by the first piece of information that we hear

- Subconsciously interpret newer information from the reference point of our anchor information
- Reluctant to make changes to our perceptions, even if the situation calls for it
- Consider: our decision-making process
- Proposition: read respondent's narrative first

By law, we have a presumption of non-responsibility.

Bias

"It is our generation's responsibility to believe women." #MeToo

"Student athletes on our campus have been entitled to get whatever they want, now we will make sure that stops."

"One frivolous accusation can ruin a young man's life."

"The system is broken, they are not responsible, they were only accused for the color of their skin."

Conflict of Interest & Bias - Parties

Complainants and Respondents have opportunity to:

- View list of Hearing Board Members & object to anyone (with rationale)
- Request the Title IX Coordinator recuse due to bias
- Appeal under grounds of conflict of interest & bias that sufficiently proves it would have changed the outcome

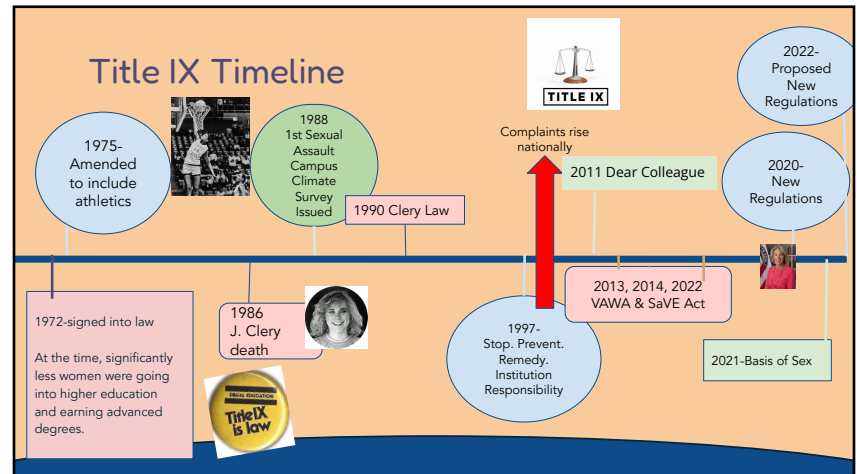
Role of Advocates

- It is expressly NOT the job of a Hearing Board member or Investigator to serve as an advocate for a complainant.
- Your role IS to examine stories very closely, look for inconsistencies, hear both sides openly, and assess credibility of parties and witnesses.
- Thankfully, we DO have people who serve as advocates and everyone in the Luther community has access to their services.

We must separate support and advocacy services from adjudication process.



Title IX Timeline



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)
 - As of June 2021, includes ****gender identity and sexual orientation**
- Sexual harassment, sexual assault, rape, stalking, relationship violence, and domestic violence [***sexual exploitation**]
- Applies to all members of the Luther community, including students, faculty, staff, and guests

denotes ***Code of Conduct** or ****Bias Policy**

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Why is this important at Luther?

	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21	2021-22	2022-23
Reports	25	39	60	94	82*	37*	78	49
Complaints	6	3	11	11	7	5	4	1
Investigations	6	8	11	10	4	3	3	1
Hearings	6	3	10	4	2	1	1	0
Restorative Justice			1			2	1	0

*Reporting believed to be impacted by COVID-19

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Impact of Sexual Violence on those involved

Complainant

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

Respondent

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

Peers supporting students during difficult times

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Student Conduct System

Criminal System

Complainant or Charging party

Prosecutor

Respondent or Charged student

Defendant

Information

Evidence

Violation of student code of conduct

A Crime

Rules, policies, and regulations

The Law

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Student Conduct System	Criminal System
Educational Sanction	Punishment
Conference, meeting, or hearing	Trial
Hearing Board / Panel	Judge or Jury
Found responsible	Found guilty
Found responsible	Convicted

Prohibited Conduct

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Sexual harassment

- Quid pro quo (This for that) – 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

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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

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.
- 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

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.

For the purposes of this definition-

- (i) A course of conduct means two or more acts,
- (ii) Reasonable person means a reasonable person under similar circumstances, and
- (iii) Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling. lx

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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.

To encourage reporting and participation in the process, the College maintains a policy of offering parties and witnesses amnesty from minor policy violations.



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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(er):
Reasonable reciprocation can be implied.

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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

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Quorum Teams:

Team 1:

David T.
Jeff W.
Matt B.
Kaitlyn B.
Lily S.
Neil G.

Team 3:

Laurie B.
Paul H.
Jocelyn D.
Ryan H.
Jaraad A.
Alejandra C.

Team 2:

Derek S.
Madeline J.
Andy T.
Patrick C.
Bekah K.
Hans H.
Jacob K.

Team 4:

Janet H.
Jake D.
Bob P.
Captain Mandy Groth
Kris F.
Jessica R.
Brad C.
Advocates

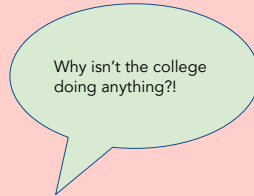
Read Statements-20 mins

1. Familiarize yourself with the Notice of Investigation & Allegations (NOIA)
- 2a. Team 1 & 3 start with Respondent's Statement (Jeff)
- 2b. Team 2 & 4 start with the Complainant's Statement (Riley)
3. Answer the debriefing questions as a team
4. Be prepared to share back to the larger group
5. Now read the other party's statement and clarifications
6. Discuss

Sexual Misconduct Investigation and Adjudication

Complaint

- A report becomes a complaint when:
 - the complainant communicates desire to go through the formal grievance process and signs a Formal Complaint.



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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 will have 10 days to review and respond to initial drafts of investigation summary and 10 days to review and respond to final summary, Code of Conduct they get roughly 2/3 weeks not 20 days
- Timeframe: 3-5 weeks

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Force

Physical Violence:

- Hitting
- Restraint
- Pushing
- Kicking
- etc.



Threats:

Anything that gets the other person to do something they wouldn't ordinarily have done absent of the threat

Intimidation:

An implied threat that menaces and/or causes reasonable fear (weapon)

+

Incapacitation-2 Prong Test



+

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



Wallet Example



Consent Hearing Board 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. Incapacity
3. Consent

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



Hearings

Quorum = 5

- At least:
 - 1 student
 - 1 faculty
 - Director of Student Rights and Responsibilities or staff representative serving as chairperson
 - Students cannot be the majority of representatives

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Notification of charges

- 7 days prior to hearing
- Description of violation
- Time and location of hearing
- Right to assistance of advisor – advisor of choice
- Cross-examination is part of fundamental fairness in due process, students and their advisors are encouraged to ask relevant questions in a hearing

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Hearing

- Before the hearing, an official charge letter is issued detailing the issue(s) to be resolved
- Luther College Hearing Board is comprised of faculty, staff, and students
- Questioning during the hearing
- (Deliberation) Board finds respondent "responsible" or "not responsible" based on the preponderance of the evidence
- (if necessary) Sanctions: up to suspension & expulsion
- (Campus Appeals Board) Both parties have right to appeal

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Rape Shield & Mental Health

Rape Shield: Questions and evidence about the party's sexual predisposition (complainant) or prior sexual behavior are not relevant

UNLESS (deemed ok by Dept. of Education)

1. Offered to prove that someone other than respondent committed the conduct
2. Concern specific incidents of prior sexual behavior with respondent and offered to prove consent

Cannot access, disclose or consider the following

- A party's records from a
- Physician
- Psychiatrist
- Psychologist
- Counselor

Without voluntary written consent.

Will be made clear if submitted then the other party (and board) can address it

Under Title IX, character witnesses may be called, but will be given little weight.

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Hearing Expectations

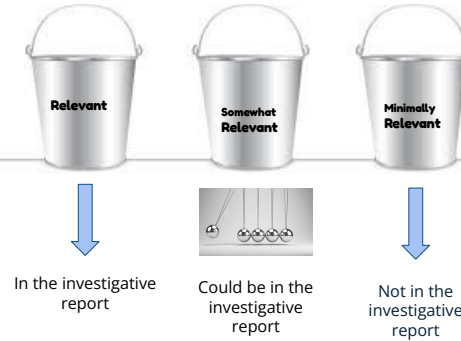
NOT a neutral face



- Tone when questioning (no sarcasm)
- Maintain composure (no fidgeting, do not look shocked)
- Nod along with their narrative (no eye rolling or shaking head)
- **Do not apologize** for the situation to a party or a witness
- Keep eye contact
- Use correct educational language "complainant" vs. "victim"
- Use their language in questioning (you said, " _____," tell me more)
- Recognize, understand and appreciate **ambiguity** and its role in the process

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All information gathered



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Relevant



When [name] was kissing me on the neck, I said, "I don't want to do this, please stop."

When I was kissing [name] on the neck, he said, "that feels so good, don't stop."

Text messages the night of and morning after the incident between the complainant and respondent.



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Somewhat Relevant



Witness testimony of two eating the cafeteria together several hours prior to the incident and party.

Witness testimony that the complainant wanted to be in a serious relationship with the respondent.

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Minimally Relevant



Complainant discloses he was sexual abused as a child.

Respondent discloses this is so hard because she can't tell her dad because he is really sick right now and her mom is already stressed.

Witness testimony saying the respondent is the most upstanding citizen they know.

Witness testimony saying the respondent is a cheater in all their romantic relationships.

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Credibility determinations

Is the individual's account consistent or does it have different narratives?

Is there a possibility of a hidden agenda (ex: best friend of a party is a witness)

Did the parties rehearse statement together? Does it seem influer

Did the individual cooperate during the process?

Does the individual's statement make sense? Plausible?



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Complainant Credibility (credible or less credible)

- Complainant shares they didn't want any of their friends interviewed
- Complainant shares that they are meeting with a counselor
- Complainant shows no emotion when talking about the alleged sexual assault
- Complainant did not file report with law enforcement

(Taken from TrainED)



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Respondent Credibility (credible or less credible)

- Respondent provides short, careful answers to all your questions
- Respondent says there were text messages between the complainant and the respondent but they must have been deleted somehow
- Respondent is very angry at complainant for bringing the complaint and calls complainant a liar
- Respondent has an attorney advisor

(Taken from TrainED)



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Reasonable Person Standard



- Objective (or objective-ish) standard
- Hypothetical person exercising average judgement, skill, care
- Always sober
- Used in deliberation, based on investigation and hearing testimony

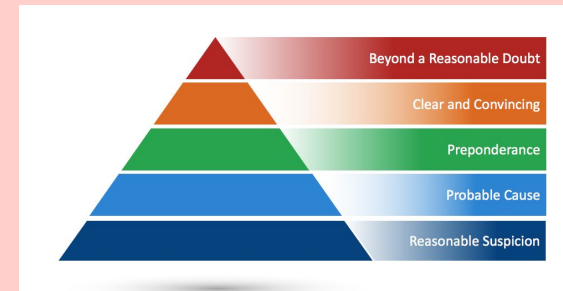
Reports are taken from the Complainant's perspective but HB is to review as a reasonable person!

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The Preponderance of Evidence Standard



*"More likely than not"
50% and a feather*



Presumption of Innocence

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Deliberation

Riley v. Jeff (15 mins)

+ "Department of Education personnel won't second guess your responsibility determination just because they would have come to a different conclusion. Assuming you followed the required procedures, your decision is entitled to deference."
Parker, Poe, Adams & Bernstein LLP

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THE Takeaway

Was the policy violated, Y/N?

And if so,

What are the appropriate sanctions?

...based on the preponderance of the evidence
and
the information available to us at this time

Factors considered when sanctioning

- The nature, severity of, and circumstances surrounding the violation(s)
- The Respondent's disciplinary history (has been found responsible)
- Aggravating and mitigating factors
- The Respondent's role and level of responsibility at the College
- Institutional precedent for how similar infractions have been addressed
- Institutional responsibility to stop, prevent, and remedy
- Any other information deemed relevant by the Hearing Board



Complainant's
ability to
continue their
education

Community
needs to
stop, prevent,
remedy the
harassment

Respondent's
educational
needs and
development
(often
reflection)

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STUDENT

- Unilateral No Contact Directive
- A Mental Health or Substance Abuse Evaluation
- Probation
- Residence Hall Suspension
- 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

Practice Sanctioning

Practice there is a responsible finding, what are appropriate sanctions (5 mins)

Criminal process

- Criminal process runs entirely independent of Luther conduct process
 - More power to compel evidence
 - Higher standard of proof
 - Takes much more time
- If asked by police or prosecutor, we would put Luther investigation on hold
- Only happens if/when complainant requests the involvement of law enforcement

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Campus Appeals Board

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Campus Appeals Board

The Campus Appeals Board does not substitute its own judgment for that of the original hearing body, nor concern itself with the possibility that others might have arrived at a different judgment.



You are not conducting a *de novo* review.

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Campus Appeals Board Example

K!

A. Deviations from designated procedures within the investigation or adjudication processes, which could have affected the outcome
College Policy says: The College believes the burden is on the institution to determine based on the information available to the Board was the policy violated, and if so, what is an appropriate sanction.

Hearing Outcome: Board found responsible based on overwhelming witness testimony for the complainant's narrative during the incident and events following.

Appeal Claim: Respondent claims investigators told her she was responsible for gathering her own witness statements (co-workers) to support her claim that she was working at the local gas station at the time of the incident. The respondent working 30 hours per work and being a full-time student, she was not able to gather the statements to submit on her behalf.

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Campus Appeals Board Example



B. A conflict of interest or the bias with the Title IX Coordinator, investigator, or member of the Hearing Board sufficient to have affected the outcome

Hearing Outcome: Board found not responsible based on a sober key witness stated the Complainant consented to the sexual activity with first-hand direct observation.

Appeal Claim: *Complainant claims the key witness testimony should have not been considered by the Board because the witness is a cousin of the respondent.*

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Campus Appeals Board Example



B. A conflict of interest or the bias with the Title IX Coordinator, investigator, or member of the Hearing Board sufficient to have affected the outcome

Hearing Outcome: Board found respondent responsible based statements from the parties with key information reaffirmed by the respondent denoting nonconsensual activity prior to consent.
Appeal Claim: *Respondent claims she was only found responsible due to her race/ethnicity and also because she is a muslim at a predominately white christian school. {Her hearing board was comprised of only caucasian board members}*

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Campus Appeals Board Example



C. To consider new information or other relevant facts not brought out in the original hearing, sufficient to alter a decision, because such information and/or facts were not known or available to the person appealing at the time of the original hearing

Hearing Outcome: Board found responsible for egregious sexual misconduct based on parties' statement, conflicting statements within the respondent's testimony impacting credibility and witness testimony.

Appeal Claim: *Respondent submits social media screenshots of a gloating complainant that she won her sexual misconduct case. The tone is vengeful in nature. Respondent claims all of it was done to "ruin him" and she did the process out of revenge motives.*

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Luther Title IX Team (no LCHB by design)



Bob Palmer
Dir. of Campus
Safety



Janet Hunter
Case Manager
Deputy TIX
Coordinator



Nan Hibbs
Chair



Jake Dyer
Investigator/RJ



Kris Franzen
Investigator



Amanda Bailey
Athletics Deputy TIX
Coordinator



Matt Bills
Deputy TIX Coordinator
for employees



Kasey Nikkel
Title IX Coordinator



Ashley Benson
Appeals Chair



Andy Torgerud
Campus Responder

Questions?

Self-Care

- The LCHB role requires you to maintain a level of confidentiality – this means that you should not discuss incidents with friends, classmates, and even other LCHB members that didn't hear that case.
- You can, however, discuss any incident and your thoughts and reflections with faculty and staff that serve on the board or Nan|Kasey.
- We are here to support you, and we are happy to help you process through any part of the role.
- Also remember that Counseling Services is available to all students, including LCHB Members. (Telus) EAP and College Ministries are available to all employees.
- Some cases you may encounter in your role may be particularly challenging and difficult, and it is healthy and normal to seek an outlet for working through the challenges of this demanding work..

THANK YOU!

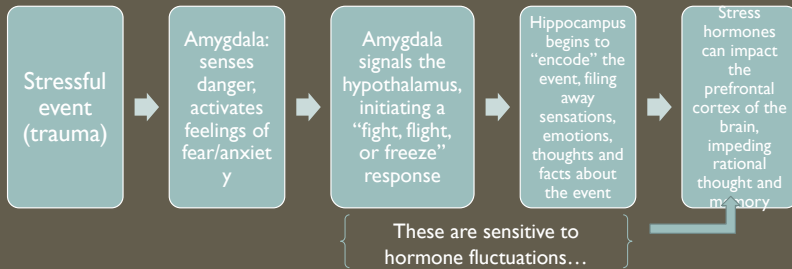
TRAUMA-INFORMED INTERVIEWING

Mariah Smith, M.S., tLMHC
Director of Parent and Family Engagement

TRAUMA-INFORMED PRACTICES

The Substance Abuse and Mental Health Services Administration (SAMHSA) defined trauma-informed practices as those that **realize the impact of trauma** and potential paths for recovery, recognize the signs and symptoms of trauma, **respond by integrating knowledge about trauma into their approach**, and resist retraumatization (SAMHSA, 2014).

STRESS RESPONSE PRIMER¹



PREVAILING THEORY ON TRAUMATIC MEMORY/RESPONSE: DR. REBECCA CAMPBELL

- Cascade of neurotransmitters and stress hormone
- “Tiny post-it notes”²
- Accurate, but disorganized fragments of memory
- Primary aim of Dr. Campbell’s assertions²

ADDING TO THE DISCUSSION: DR. RICHARD MCNALLY’S ASSERTIONS³

- Memory is always a reconstruction
- Aversive or traumatic events actually strengthen memory
- Encoding versus retrieval failure

“All of our memories are reconstructed.”

Each time we recall an event, it is being reassembled, and sometimes changed by the very process of recall.²

TAKEAWAYS

- Memory can be tricky; accuracy can be difficult to determine.
- Everyone’s response to trauma and stress is subjective.¹
- Gaps and inconsistencies in memory are “never, on their own, proof of *anyone’s* credibility, innocence, or guilt.”⁵
- There are no clear answers.

SO, WHAT CAN WE DO?⁴

- Maintain neutrality
- Avoid "start from the beginning" type statements.
- Focus on what they DO remember and develop that.
- Apply a "screen shot" versus timeline approach to asking questions.¹
- Interview for clarification
- Familiarize yourself with neutral language
- Utilize the same interview approach with both the complainant and the respondent

RESOURCES

1. Ohrt, J. H., Clarke, P. B., & Conley, A. H. (2019). *Wellness counseling: A holistic approach to prevention and intervention*. American Counseling Association.
2. Yofee, E. (2017, September 8). The bad science behind campus response to sexual assault. *The Atlantic*.
3. McNally, R. J. (2005). Debunking myths about trauma and memory. *The Canadian Journal of Psychiatry*, 50(13), 817-822.
4. Nolan, J. J. (2019). *Fair, equitable trauma-informed investigation training*
5. Hopper, J. (2018, January 22). Sexual assault and neuroscience: Alarmist claims vs. facts. *Psychology Today*. <https://www.psychologytoday.com/blog/sexual-assault-and-the-brain/2018/01/sexual-assault-and-neuroscience-alarmist-claims-vs-facts>

Avoiding Bias in Decision-Making

Hearing Board Training
Fall 2023

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What is Bias?

- Bias is a prejudice in favor of or against an idea, person, or thing
 - Innate or learned
 - Explicit or implicit
 - Productive or counterproductive
- Biases are a natural part of human cognition
- Result: errors, both random and systematic

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Cognitive Biases

- **In-group / out-group bias:** the human tendency to favor individuals in the social identities we belong to
- **Patternicity:** the human tendency to perceive meaningful patterns within random data
- **Status quo bias:** the human tendency to prefer the current state of affairs
- **Self-serving bias:** the human tendency to credit our successes to our own selves and attribute our failures to outside factors

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Cognitive Biases

- **Anchoring:** the human tendency to rely on the first piece of information you get
- **Confirmation bias:** the human tendency to interpret new information in ways that conform to our existing beliefs
- **Halo effect / horn effect:** the human tendency to allow positive or negative feelings about an entity to affect feelings about individual parts of that entity
- **Attribution bias:** the human tendency to attribute our own behaviors to external factors and others' behavior to internal factors

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Explicit Bias

- Sexism, racism, ageism, homophobia, classism, etc.
- Can also arise from well-intentioned beliefs
 - "It is our generations responsibility to believe women" #MeToo
 - "The system is broken, they were only accused because of the color of their skin."
- May be based on protected class or any other characteristic

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Implicit Bias

- Implicit bias is the unconscious attribution of particular characteristics to a member of a specific social group
- Several ways to measure this; see [Harvard Implicit Association Test](#)
- Just because people have implicit biases does not mean that their behavior will effectuate those biases
- Implicit biases arise from our identities and experiences

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Combatting Bias

Good news: the impact of cognitive and implicit biases can be mitigated

1. Recognize implicit & cognitive biases and take action to correct them
2. Use structured decision-making practices
3. Avoid stressed decision-making

Recognize Beliefs and Social Identities

- What beliefs do you have that you need to actively combat?
- How do your social identities affect how you interact with the world and the parties?
- How do the social identities of the parties affect how they interact with the world?

Structured Decision-Making Practices

- Develop consistent, objective methods for evaluating cases
 - Timelines, agree/disagree, internal consistency
 - Don't rush – repeated consideration
- Hearing Board Chair & Title IX Coordinator are responsible for ensuring that policies are clear and keeping discussion focused on specific policy-defined questions
- Be rigorous about credibility assessments
- Articulate both what your conclusions are and on what evidence you base those conclusions
- Remember: Hearing Board's task is the case in front of it

Avoid Stressed Decision-Making

Sources of Stress	Countermeasures
Fatigue	Rest
Hunger	Eat
Emotion	Take breaks
Decision fatigue	Move
Interpersonal conflict	Debate civilly

Questions

Luther College Title IX Investigator Training

Fall 2023

Investigators

- 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 (*implying guilt*) and exculpatory (*implying innocence*). Even “minimally relevant” is NOW “relevant” but given little weight.

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. It is our burden to give our best effort to gather it.



Your Role:

1. The gatherer of all relevant facts of the case
2. The organizer of all relevant evidence of the case
3. The summarizer of all facts and evidence
4. The observer referring back to TIXC or Case Manager for well-being



- **Complainants want to know their process is taken seriously with the utmost care.**
- **Respondents want to know that responsibility is not predetermined.**



The Burden to gather witnesses

Parties may recommend witness names to investigators, questions to consider, any applicable evidence to those witnesses. However, it is the investigators' job to ask for the phone numbers/email addresses of the witnesses.

It is the investigators' job to reach out in writing (protection with documentation) to prove we did due diligence in trying to connect with them (and eliminate an appeal opportunity) We will attempt to connect TWO TIMES, it would benefit you to put deadlines in the request. *EX: We will be proceeding with or without your participation. To provide a statement please reach out to me no later than 9/28/23.*

Witnesses **cannot** be anonymous



Burden of evidence collection examples

Party says: My roommate called the police and gave a statement right after I gave my statement to the police so there should be two reports.

Investigator: Great, we would like to get a copy of that, do you remember the name of the officer and we can place a call... *Pro-tip offer to call law enforcement together*

Not-If you could find that and submit it we can add it to the report.

Note-this does vary a little by officer and they may request the party not share due to ongoing investigation.

Party says: I have been meeting with Joelle Nielsen at LCCS for months, I told her my concerns with the other party, she probably has it in her notes.

Investigator-Let's call Joelle together, however, you will need to review the ROI agree to and sign with Joelle so you understand your rights, however, with new Title IX regulations not all party's records can be included so the Title IX Coordinator will have to review this request prior to adding to the investigation file.

Not-Great, I know Joelle will send it over

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 parties to write their own statement (We WILL have an institutional statement as well)
- 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.

Investigations continued

- Document delays that were due to the parties (didn't provide witness name, etc.)
- Provide regular status updates to the Title IX Coordinator throughout the investigation **so she can provide timely communication**
- Parties may freely discuss the allegations (**no silence clause**)
- Parties may review and respond to all evidence.
- Investigators may be questioned by Board or Advisors in a live hearing
- An advisor may be present at all meetings **but can't speak for their party**

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Review and Respond

Sending Investigation File:

- Investigator is the organizer of the materials (labeled, who, what, when)
- TIXC sends through Google "commenter"-tracking purposes
- Sent to party and advisor
- Should contain watermarks (last name)

Receiving Investigation Responses:

- Denote date and time of submission
- New clarifications denoted in **brackets**
- Or added as a clarification at the back of original statement

*Clarifications should only make it into the investigative report summary if deemed relevant, but **must** be considered.*

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 **chosen name** after the initial paragraph statement.

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- Recipient **must** ensure that "all relevant questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decisionmaker)." (Preamble, p. 30331)

Questioning: Rape Shield & Mental Health

Rape Shield: Questions and evidence about the party's sexual predisposition (complainant) or prior sexual behavior are not relevant

UNLESS (deemed ok by Dept. of Education)

1. Offered to prove that someone other than respondent committed the conduct
2. Concern specific incidents of prior sexual behavior with respondent and offered to prove consent

Cannot access, disclose or consider the following

- A party's records from a
 - Physician
 - Psychiatrist
 - Psychologist
 - Counselor

Without voluntary written consent.

Will be made clear if submitted then the other party (and board) can address it

Under Title IX, character witnesses may be called, but will be given little weight.

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Questioning Force-explore "safety"

Physical Violence:

- Hitting
- Restraint
- Pushing
- Kicking
- etc.



Threats:

Anything that gets the other person to do something they wouldn't ordinarily have done absent of the threat

Intimidation:

An implied threat that menaces and/or causes reasonable fear (weapon)

Questioning Incapacitation-2 Prong Test

PRONG #1:

- WHO-able to provide the name of Respondent
- WHAT-able to articulate the sexual acts
- WHEN-able to articulate the date and time
- WHERE-able to articulate the location
- WHY-able to identify the circumstances surrounding the evening
- HOW-able to identify body positions and exchanges of narrative

Prong #2 "Reasonably should have known"



Questioning 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



Consent Hearing Board 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. Incapacity
3. Consent

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



Sexual Harassment (SPOO) for Hostile Environment

Severe, Pervasive & Objectively Offensive

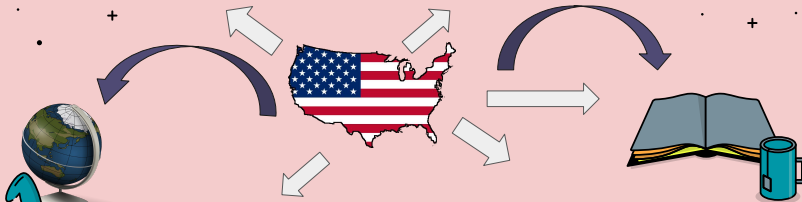
Based on the totality of circumstances and evaluated subjectively and objectively

1. Degree to which the conduct affected the complainant's ability to access the institutions program or activity
2. The type, frequency, and duration of the conduct
3. The parties' ages, roles with the institution, previous interactions and other relevant factors
4. Location of the conduct, the context in which it occurred and the control the recipient has over the respondent
5. Other sex-based harassment in the institution's educational program or activity



(§106.2)

Jurisdiction: Sexual Misconduct v. Title IX



A recipient may respond to alleged sex-based discrimination that occurs outside of the United States and off-campus and outside the educational program or activity if there is an alleged *hostile environment back home in the educational institution's education program or activity and the initial conduct "contributed" to that in-program hostile environment.

(§106.2, §106.5)

Personal device: Luther's or theirs???



Reasonable Person Standard



- Objective (or objective-ish) standard
- Hypothetical person exercising average judgement, skill, care
- Always sober
- Used in deliberation, based on investigation and hearing testimony

Reports are taken from the Complainant's perspective

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Interview Expectations

NOT a neutral face



- Tone when questioning (no sarcasm)
- Maintain composure (no fidgeting, do not look shocked)
- Nod along with their narrative (no eye rolling or shaking head)
- **Do not apologize** for the situation to a party or a witness
- Keep eye contact
- Role correct educational language "complainant" vs. "victim"
- Be specific with correct body anatomy language (penis, vagina, etc.)
- Use their language in questioning (you said, " _____," tell me more)
- Use sensory questions to generate more content if stuck

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The "tough" interview for the statement-What do you do?

1. Aggressive Advisor-taking over the show, attempting to answer questions- NOT A POTTED PLANT
2. Victim Blaming-why are you asking what I was wearing, why are you asking what alcohol and drugs I took
3. Fear of Retaliation-party or witness expresses significant concern of safety or adverse treatment
4. Emotionally charged-defensive, angered answers, swearing, visibility frustrated, sobbing, indirect suicidal statements



All information gathered



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Relevant



When [name] was kissing me on the neck, I said, "I don't want to do this, please stop."

When I was kissing [name] on the neck, he said, "that feels so good, don't stop."

Text messages the night of and morning after the incident between the complainant and respondent.

Investigation Report Summary summarizes relevant evidence.

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Somewhat Relevant



Witness testimony of two eating the cafeteria together several hours prior to the incident and party.

Witness testimony that the complainant wanted to be in a serious relationship with the respondent.

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Minimally Relevant



Complainant discloses he was sexual abused as a child.

Respondent discloses this is so hard because she can't tell her dad because he is really sick right now and her mom is already stressed.

Witness testimony saying the respondent is the most upstanding citizen they know.

Witness testimony saying the respondent is a cheater in all their romantic relationships.

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Conflict of Interest Prejudgement "Assumptions" Bias

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Conflict of interest

- Decorah is small, Luther is smaller
- Relationship or future relationship with parties involved
- Examples: was their case manager for hospitalization (recuse)
- A party is rommmates with your Luther child, a current Luther student (recuse)
- Once served as orientation leader but just attended a 1x training (remain)

- Just because you know someone doesn't mean you can't hear the case
 - "In a University setting, prior contact among the faculty and students is likely; that fact alone does not indicate bias or partiality." - Holert v Univ. of Chicago

- Could the outcome of this case impact me?
 - Invested because of the athletic team, choir, research project, work-study student, fellow club officer

- Hearsay/Preconceived reputation

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Prejudgement "Assumptions"

- "Classic bar fight with two drunk kids"
- Replacing facts with your own personal experience that has similarities with the case
- "Students always lie when they are caught"

everything is never as it seems.

Parker Poe Adams & Bernstein LLP

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Anchoring and Presumption of Innocence

"Anchoring" is the tendency to be overly influenced by the first piece of information that we hear

- Subconsciously interpret newer information from the reference point of our anchor information
- Reluctant to make changes to our perceptions, even if the situation calls for it
- Consider: our decision-making process
- ~~Proposition: read respondent's narrative first~~

By law, we have a presumption of non-responsibility.

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Bias

"It is our generation's responsibility to believe women." #MeToo

"Women have sex, regret it, then lie about sexual assaults."

"Men are sexually aggressive and therefore likely to perpetrate sexual assault"

"Student athletes on our campus have been entitled to get whatever they want, now we will make sure that stops."

"One frivolous accusation can ruin a young man's life."

"The system is broken, they are not responsible, they were only accused for the color of their skin."

Parker Poe Adams & Bernstein LLP

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Conflict of Interest & Bias - Parties

Complainants and Respondents have opportunity to:

- View list of investigators & object to anyone (with rationale)
- View list of Hearing Board Members & object to anyone (with rationale)
- Request the Title IX Coordinator recuse due to bias
- Appeal under grounds of conflict of interest & bias that sufficiently proves it would have changed the outcome

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Role of Advocates

- It is expressly NOT the job of a Hearing Board member or **Investigator** to serve as an advocate for a complainant.
- Your role IS to examine stories very closely, look for inconsistencies, hear both sides openly, and assess credibility of parties and witnesses.
- Thankfully, we DO have people who serve as advocates and everyone in the Luther community has access to their services.

We must separate support and advocacy services from adjudication process.

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Elements of Policy Violations in the investigations

Notice of Investigation and Allegations (NOIA) Example is:

Fondling:

Allegation 1) Toni alleges Tina grabbed her breasts without consent on August 15, 2022 in Ylvisaker Hall after mutual consensual kissing.

Allegation 2 and 3) Toni further alleges that Tina then placed her one hand on Toni's groin and the other had on her buttocks.

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Toni and Tina continued

First look at our policy definition of fondling. Form questions based on policy!

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.

1. Intentional touching? yes
2. Without consent? !? (also should be ensuring the Complainant is not a minor or incapacitated)
3. Touching of the private body parts of another person? yes
 - a. Breasts "with an s"
 - b. Groin
 - c. Buttocks
4. With what of respondent's body parts? Can we decipher which hand where and the accurate sequence of events?
5. For the purposes of sexual gratification?

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A note about trauma

Signs of trauma ≠ policy violation

No signs of trauma ≠ no policy violation