

University of Maine System Title IX and Student Conduct Investigator Training: Day One

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Day One: What We Will Cover

Applicable Law and Policy Overview & Title IX Changes

University of Maine System Policies & Processes

Guiding Principles for Investigations & Grievance Processes

Conflict of Interest & Bias During the Investigation Process

Understanding Relevance

Consent & Incapacitation

Investigation Preparation & Information Gathering

Questions?

Day Two: What We Will Cover

UMS Policy Reminder

Preparing to Write the Report

Student Conduct Code Investigative Report Template

Title IX Investigative Report Template

The Next Step in the Process: The Hearing

Scenario

Questions

Applicable Laws and Policies



Title IX



Violence Against Women Act (VAWA)



Title VII / Maine Human Rights Act



Applicable Criminal Statutes



UMS Student Conduct Code **and** Title IX Policy

Title IX- New Regulations and Guidance

- In May 6, 2020, the Department of Education released final Title IX rules on sexual harassment.
- Final Title IX Regulations went into effect on August 14, 2020
 - Not retroactive
 - Prior OCR Guidance rescinded
- September 4, 2020, OPEN Center Q&A Regarding the Department's Final Title IX Rule
- Court Jurisprudence
- The Biden administration is currently conducting a comprehensive review of the Title IX regulations in place and has released a Q&A document in June 2021.

Jurisdictional Scope Under Title IX

- Requirement to adopt a grievance procedure applies only to sex discrimination occurring against a person IN the United States
- **Education program or activity** includes locations, events, or circumstances over which the institution exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by an institution.

Sexual Harassment Under Title IX

Conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (Quid Pro Quo);
- (2) 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 (and attempted sexual assault), dating violence, domestic violence, stalking and retaliation.

Two UMS Policies and Processes

1. [UMS Student Conduct Code, Section 501 \(Microsoft Word - 527411-Conduct Code 2021.docx \(maine.edu\)\)](#)

2. Section 402: Sex Discrimination, Sexual Harassment, Sexual Assault, Relationship Violence, Stalking and Retaliation and Title IX Sexual Harassment
[\(https://www.maine.edu/board-of-trustees/wp-content/uploads/sites/12/2021/08/527411-Conduct-Code-2021-with-Cover.pdf\)](#)
 - a. UMS Procedures for Title IX Sexual Harassment
[\(UMS-Title-IX-Procedures-11-09-21-1.docx \(live.com\)\)](#)

Formal Complaints ⑦ Investigation

- Formal complaint triggers investigation
- Detailed written notice must be to provided to parties sufficiently in advance of interview
- Cross complaints
- Consolidation of complaints
 - Mixed allegations (Title IX / Non Title IX)
- Title IX Coordinator signed complaints
- Amended complaints & amended notice of allegations

Dismissal Under Title IX

Mandatory: Under the Final Rule, if the complainant is not participating in or attempting to participate in the University's education program, the alleged conduct would not constitute "sexual harassment," the alleged conduct did not occur within the University's program or activity, or the alleged conduct did not occur in the United States the University must terminate its Title IX grievance process but can still proceed under the SCC/EO process.

Discretionary: Under the Final Rule, the University *may* dismiss the complaint if the Complainant withdraws their formal complaint, the Respondent is no longer enrolled or employed by the University, or the circumstances would prevent the school from gathering sufficient evidence to reach a determination on the merits.

Guiding Principles for Investigations

- If University has “actual knowledge” of sexual harassment, it must respond promptly in a manner that is not deliberately indifferent
- Equitable treatment & process for parties, including supports.
 - Only exceptions under Title IX: presumption of non-responsibility for Respondent and rape shield exclusion for Complainant.
- Burden of gathering evidence and burden of proof is on University, not parties
- Equal opportunity to present witnesses, including experts, and provide inculpatory and exculpatory evidence

Guiding Principles for Investigations

- Conduct objective evaluation of all relevant evidence
- Investigators must be impartial, free from bias and without any conflict of interest
- Promptly conduct investigations and document reasons for delay
- Comply with confidentiality and privacy laws in conducting investigations

Guiding Principles for Investigations

- Parties and witnesses must receive timely notices sufficiently in advance of meetings, interviews and hearing
- Under Title IX, parties have opportunity to review, respond to, and reference evidence that is “directed related” to the allegations even if not relied upon by investigator/ decisionmaker (at conclusion of information gathering stage)
- Parties may be accompanied to interviews by advisor of choice (potted plant rule applies)

Guiding Principles for Investigations

- Investigators must not seek information or records protected by a legally held privilege (attorney/client, medical, or psychological records) without express, written consent of the party holding the privilege
- Complainant's prior sexual history must not be explored except under limited exceptions (rape shield exceptions)
- Credibility assessments must not be based on a person's status as a Complainant, Respondent or witness, or based on sex stereotypes

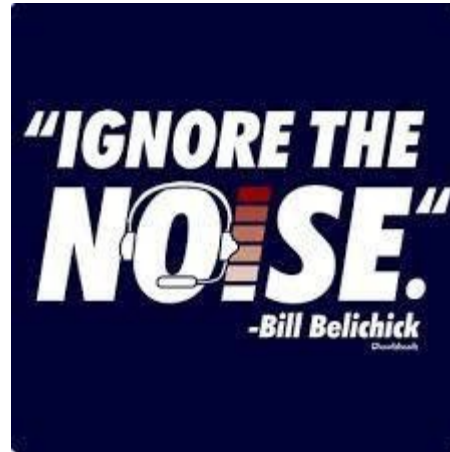
Conflict of Interest or Bias

- Investigators should recuse themselves if they cannot be impartial in a given case
- Whether there is a conflict of interest or bias will be judged on an objective standard of whether a reasonable person would believe that conflict/bias exists
- Bias/conflict of interest is a grounds for appeal

Conflict of Interest or Bias

- Investigators/decision-makers must not pre-judge the facts or hold a bias in favor/against complainants and respondents generally or in a particular case.
- Decisions must be based on evidence and the individual facts and circumstances presented in each particular case, not stereotypes, generalizations, or assumptions
- Being a University employee, being a particular gender, past advocacy work in the field of sexual violence, statistical outcomes does not necessarily establish bias or a conflict of interest

How Do We Conduct Unbiased Investigations?



How Do We Conduct Unbiased Investigations?

- Recognize that anyone (regardless of sex, gender identity or expression, sexual orientation, race, color, religion, national origin, age, disability status) can be a Complainant or a Respondent
- Do not make assumptions- seek clarification and try to understand the parties' perspectives.
- Use the parties and the witnesses' words, not your own
- Use inclusive language in your interviews and communications
- Be aware of your biases, known or implicit, and educate yourself to check against them and gain cultural competency
- Beware of confirmation bias – rigorous search for evidence and open-minded exploration of motives and theories
- Consider any plausible explanations of behaviors fairly and objectively with other evidence.

Understanding Relevance

- Investigator has discretion to determine the relevance of evidence received.
- Evidence is relevant if it tends to ***prove or disprove*** an issue in the complaint
 - Makes a material fact more or less probable than it would be without the evidence
- Relevant evidence includes both “inculpatory and exculpatory” evidence
- Evidence may be relevant even if it is sensitive, embarrassing or “prejudicial”
 - Investigators have more discretion in non-Title IX cases to exclude evidence as non-relevant (e.g. character evidence)

Privileged/ Health Records

- Ensure that the investigator does not access, consider, disclose, or otherwise use a party's records that are made or maintained by a health or mental health professional unless the investigator obtains voluntary, written consent to do so.
- Ensure that the investigator does not seek information that is protected by a legal recognized privilege unless the party waives the privilege.

“Rape Shield” Exclusion

- Evidence of complainant’s prior sexual behavior is not relevant unless:
 1. Offered to prove that someone other than the respondent committed the alleged misconduct or
 2. Offered to prove consent from prior sexual behavior between the complainant and respondent
- For example, prior sexual behavior may be relevant to explain:
 - Presence of a physical injury
 - Pattern of communication/behavior between parties regarding consent
- Prior sexual behavior is not relevant to explain:
 - General predisposition toward engaging in sexual activity

Consent

- Consider prior/post relationship history to understand total context and how consent communicated between parties
- Consider both verbal and nonverbal means of communication in determining whether consent given to particular sexual activity
- Look at sexual activity as a whole to understand total context
- May be sufficient evidence of lack of consent to some acts, and not others
- Consider objective circumstances of the sexual activity as well as the parties' subjective feelings about it
- Consider circumstances of decision to disclose/report
- Consent cannot be obtained by force, intimidation and coercion
- Key inquiry: what would reasonable person in Respondent's position have understood from other party's express words and actions as to whether valid consent was given.

Effect of Alcohol

- Alcohol can interfere with the creation of memory, but not necessarily render a person incapacitated.
 - **“Blackouts”**
- Differing perceptions about alcohol consumption
- To determine intoxication v. incapacitation issues, investigators and adjudicators must seek/understand detailed information about:
 - Alcohol consumption
 - Food/water consumption
 - Tolerance levels
 - Observations by others, if possible
 - Other evidence of incapacity (texts, video, etc.)

Intoxication vs. Incapacitation

- Incapacitation is a state far beyond drunkenness or intoxication.
- Signs of **intoxication** include, but are not limited to:
 - slurred speech
 - weaving or stumbling while walking
 - Impaired fine/gross motor skills
 - exaggerated emotions
- Signs of **incapacitation** include, but are not limited to:
 - inability to speak coherently
 - confusion of basic facts (day of week, birthdate, etc.)
 - inability to walk unassisted
 - Unconsciousness

Incapacitation

Key Inquiry: Whether Respondent knew/should have known that Complainant was incapacitated and *took advantage of* Complainant's incapacity to engage in sexual activity

Role of the Investigator

- Burden on investigator, not parties to collect information
- Impartial, objective fact finder
- Does not go outside of prescribed role in process
- Seeks to obtain both inculpatory and exculpatory information
- Provides equal opportunity to parties to present information, identify witnesses, suggest sources of evidence, provide clarification and respond to conflicting information
- Independently identifies relevant witnesses and evidence
- Follows facts, not assumptions
- Does not have a bias or conflict of interest
- Does not prejudge facts or gather evidence just to “confirm” theories
- Asks questions in neutral, non-judgmental fashion
- Reaches well-supported conclusions based on objective evaluation of evidence, makes credibility assessments, and considers weight and persuasiveness of testimony, evidence and arguments presented.
- Understands “relevance” and exceptions

Investigation Planning

- Check student/participants calendars/schedules prior to scheduling interviews
- Determine location of the party/ witness interviews and provide written notice to parties in advance of interview
- Consider timing and order of the interviews and allow sufficient time in between
- Consider who will be present during interviews
- In person v. virtual interviews
- Recording of interviews

Investigation Preparation & Information Gathering

- Obtain relevant policies and map out elements need to prove
- Consider known facts and identify potential sources of information
 - Personnel records, student records, incident report/ disclosures, witnesses, electronic evidence (emails, texts, social media), phone records, documents, security video, card swipe records, physical site visit, forensic evidence
 - Publicly available evidence (e.g. social media)
- Develop a working timeline of events and prepare outlines
- Maintain log of investigation - procedural history
- Prepare to address common process questions

Outreach to Parties/Witnesses

- Use parallel communications for parties (updates)
- Identify and address barriers to participation by:
 - Communicating care through tone and word choice
 - Using inclusive language
 - Addressing disability accommodations and interpreter services
 - Encouraging the use of available supports/resources
- Non-responsiveness
 - Make at least 3 attempts at outreach using at least 2 different modes before concluding that someone is intentionally not responding.
 - Think about other avenues/people for outreach.

Interview Opening Statement

- Thank the person for coming.
- Brief explanation of matter
- Mention note taking/recording.
- Explain process of the investigation.
- All information only disclosed on a “need to know” basis.
- Expectations of confidentiality, candor, cooperation, no contact.
- Discuss prohibition of retaliation.
- Explain amnesty policy.
- Explain guidelines regarding advisor’s participation.
- Ask: Questions?

Basic Interviewing Techniques



- Build a rapport—don't interrogate.
- Be comfortable with silence.
- Be sympathetic in neutral manner.
- Listen to understand and do not assume
- Plan out questions, but let conversation evolve naturally.
- Start with open-ended questions, versus starting in chronological order.
- What are you able to tell me about your experience ⑦ Who, what, where, when, how?
- Avoid “leading” questions (*i.e.* questions that presume an answer).
- Establish a timeline.
- Make sure to ask the difficult questions!
- Get clarification, especially in relation to terms.
- Become comfortable with being uncomfortable, with terms repeating terms, talking about difficult subject matter, etc.
- Ask: Anything else?
- Opportunity for follow-up.
- Avoid asking for opinions, speculation, or character evidence.

Building Rapport & Trauma-Informed Interviewing Techniques

- “Are you feeling ready to get started?”
- Pronouns
- Safety and security– comfort over convention
- Sense of Control: “This is your interview– you get to set the pace, take breaks, ask questions as they come up, etc.”
- Listening, listening and more listening
- Funnel approach to questioning
- Asking questions in a non-threatening way: “help me understand...” “I heard you say x but then later you said y, and these seem to conflict– can you help me to reconcile?”
- Be transparent in questioning
- Avoid paraphrasing
- Curious and non-judgmental tone
- Focus on sensory details
- Pay attention to emotional cues and responses

Complainant Interview

- Reluctant complainants ⑦ what to do?
- Open-ended, non-judgmental questions
- Do not ask about prior sexual history (except as relevant/permitted).
- Consider impact of parents, advisors, other persons in room
- Handling conflicting statements (reconciliation)
- Handling difficult disclosures (explain why you need to know)
- Interview for clarification – don't interrogate.

Complainant Interview

- What are you able to tell me about your experience?
- What are you able to tell me about
 - What you saw?
 - What you heard?
 - What you tasted?
 - What you smelled?
 - What you touched/felt?
- What are you able to tell me about how that made you feel?
- What are you able to tell me about what you thought was going to happen?
- What are you able to tell me about what your thought process was when
- Can you tell me more about ?

Complainant Interview

- What are you able to tell me about any specific moments that stand out in your mind?
- What are you able to tell me about your physical reactions to this experience when it happened?
- What are you able to tell me about your emotional reactions to this experience when it happened?
- What are you able to tell me about impact on your life and behavior now compared to before? Eating? Drinking? Sleeping Other routines?
- Clarify the Who, What, When, Where, How, Why after giving open opportunity to share
- Anything else you'd like to share that we haven't talked about?

Potential Effects of Trauma

- Individuals experience trauma in different ways.
- Trauma can be caused (or triggered) by different events in a person's life.
- Scientific theories about the potential effects of trauma should never be used to determine responsibility for misconduct in a specific case.
- Memories for traumatic incident are no more or less likely to be inaccurate than memories for a non-trauma event.
- Don't necessarily assume that potential trauma presentation is related to incident at hand.

Evaluating Non-Stereotypical Behaviors in Parties

- Appearing or communicating in “normal” way to others (including Respondent) after an incident
- Seeking out contact with Respondent after an incident
- Delays in reporting
- Not yelling, physically resisting, or leaving room during incident
- Appearing “flat”, angry, frustrated, hostile
- Recanting or displaying ambivalence about investigation process
- May not remember details in clear, linear, chronological order

Do not rely on stereotypes, biases, assumptions to draw conclusions about what happened.

How to Apply Trauma-Informed Investigation Training

- Gather information in our investigations and adjudications in a non-judgmental manner
- Utilize trauma-informed interview techniques in questioning of all parties and witnesses
- Seek clarification from individuals about their specific behaviors instead of making assumptions or generalizing
- Consider any plausible explanations of behaviors fairly with other evidence

Respondent Interview

- Acknowledge difficulty of conversation, importance of being accurate/truthful
- Follow same structure and approach to questioning as Complainant interview
- Allow Respondent to give statement in own words, uninterrupted.
- Seek exculpatory evidence, information and/or leads, other witnesses, etc.
- Ask Respondent to explain inconsistencies with known evidence & provide opportunity for Respondent to explain evidence disclosed by Complainant and witnesses
- Explore sensory and peripheral details disclosed by Complainant.
- Explore motive, bias, interest
- Identify where there is agreement/dispute about what occurred

Explain Difficult Questions

What you say	What the interviewee hears
Are those the clothes you were wearing when this happened?	The investigator thinks it's my fault because of what I was wearing.
Were you drinking or doing any drugs?	I am in trouble/to blame for alcohol and drug consumption.
Did they physically hurt you or threaten you with a weapon?	I knew the person and they didn't hurt me or use a weapon. The investigator thinks I consented.
Why didn't you tell anyone about what happened?	The investigator thinks I am lying because I didn't immediately tell someone/report

Conclusion of Interviews with Parties

- Other parties they would like for you to speak to and what direct information the interviewee things they will have.
- Questions for other party/witnesses
- Opportunity/need for follow-up
- Safety planning/interim actions
- Next steps, manage expectations
- Exchange contact information, details
- Talk to them about how you will provide updates throughout the investigation and their preferred method of contact.
- Work with advisor/ intake/ Title IX Office to ensure parties understand resources and how to obtain supportive measures.
- Explain parameters of no contact and retaliation.
- Questions?

Continued Investigation of Parties' Accounts

- Seek clarification of facts and information to help determine elements of the alleged violation or other additional evidence (who, what, where, when, how).
- Seek information about parties' behavior and communication.
- Exhaustive search for corroboration (even minor details)
- Explore motive, bias, interest.
- Explore circumstances of parties' disclosures about the incident
- Identify witnesses, electronic evidence, other sources of evidence.

Witness Interviews

- Explore witness's relationship to the parties
- Ascertain the source of the witness's knowledge
- What to do about tampering of witness testimony
- Follow the same open-ended approach with narrowed follow-up questions
- Give enough information to illicit relevant information but be circumspect about what is shared
- Ask witnesses about parties' motives

Corroboration

= Sufficient independent evidence to support the facts at issue

- Corroboration \neq second witness who agrees with the first.
- Corroboration = evidentiary support for what a witness contends after evaluating source, content, and plausibility.

Inculpatory / Exculpatory Evidence

- Communications between parties (pre and post incident)
- Behavior of the parties (pre and post incident)
- Statements against interest/ admissions
- Disclosures about the incident

Consider any explanations and fairly weigh.

Credibility Assessments

- Credibility is different than “honesty” – evaluate credibility of information, not people
- Evaluation of source, content, and plausibility of evidence presented.
- Specificity v. vagueness in accounts.
- Corroboration through witness testimony and evidence
- Evaluate motive and bias and apply common sense.
- Inconsistencies – major vs. minor
- Demeanor

Motive / Bias

- Understand parties and witnesses' relationship(s) to one another.
- Understand Complainant's decision to disclose/report when they did.
- Be curious and explore theories of potential motive (those offered by the parties and those revealed by the evidence).
- Understand the difference between a false report v. good faith report that is not supported by evidence.

Demeanor

- Trauma, shame, blame, fear, etc.
- Cultural/background differences
- Disability
- High Emotions

Demeanor should not be the sole factor that “tips the scales.”

Top 10 Common Errors Made During Investigations

1. Making an automatic assumption about the veracity of a Complainant's account or Respondent's responsibility
2. Drawing conclusions from evidence/testimony without allowing party/witness chance to explain
3. Allowing confirmation bias to influence the direction of your investigation
4. Allowing the pressure that a party or their advisor is putting on you sway your decision or timeline
5. Allowing an advisor to take over an interview
6. Not asking detailed/specific questions in addition to open ended questions
7. Not conducting thorough follow up/ "reconciliation" interviews
8. Going outside of your ascribed role (e.g. making findings of responsibility)
9. Making credibility determinations based on assumptions, stereotypes or scientific theories about trauma
10. Failing to interview potential witnesses / follow up about available information

Difficult Investigation Issues

- Interviewee volunteers highly sensitive information
- Disappearing and unavailable evidence
- Prior complaints & pattern evidence
- Cross complaints
- Concurrent law enforcement investigations
- Retractions

Questions?