

# Putting Facts into Focus: A Title IX Writing Workshop

Course Material  
Sept 21, 2022



Presented by T9 Mastered, LLC  
a joint venture of Public Interest Investigations, Inc. and  
Van Dermyden Makus Investigations Law Corporation



# Putting Facts into Focus: A Title IX Writing Workshop

## Course Materials

September 21, 2022

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## Biographies

**Liz DeChellis Paris** is a Partner with Van Dermiden Makus. She is licensed to practice law in the State of California and is certified as a Senior Professional in Human Resources (SPHR).

Prior to joining Van Dermiden Makus, Liz was employed at UC Davis where she routinely provided policy and contract interpretation to management and staff, responded to grievances and complaints, acted as the University Advocate for administrative hearings, and negotiated contracts with labor unions. Additionally, she conducted investigations and fact-findings and served as a Hearing Officer in student discipline hearings. Prior to law school, Liz worked in Human Resources for various companies, providing advice and assistance with recruitment, hiring, termination, and performance management.



Liz is also an experienced investigator in Title IX sexual misconduct claims. She has investigated cases involving underage Complainants, multiple Respondents, and allegations involving incapacitation and inability to consent. Liz understands best practices in the Title IX arena, and the challenges facing schools and parties when sexual violence allegations surface.

Liz frequently serves as an Appeal Hearing Officer for Title IX cases. In this role, Liz reviews campus responses to Title IX allegations within the framework of the individual school's appeal process. In her deliberations, she considers whether the administration's response to claims of sexual misconduct were compliant with policies meant to provide a safe campus for students. Liz has overseen cases involving dating violence, drug abuse, sexual assault, and incapacitation. She has experience questioning parties using trauma-informed techniques, making admissibility and relevance decisions, and issuing well-reasoned, thorough decisions.

Additionally, Liz has investigated matters at K-12 Districts, including allegations involving discrimination and compliance. Her investigations have included interviews of administration, classified staff, as well as paraeducators.

Liz graduated from McGeorge School of Law in 2012 and earned an undergraduate degree from UC Davis.

**Eli Makus** is the managing partner of Van Dermeyden Makus Law Corporation. After litigating disputes for many years and working as in-house employment counsel, Eli's practice now focuses on conducting impartial workplace and Title IX campus investigations. Eli is experienced in all areas of employment law, including matters involving discrimination, harassment, retaliation, disability accommodations, protected leaves of absence, whistleblower claims, privacy, wage-hour compliance, and reorganization. Eli has conducted and overseen numerous investigations into complaints under Title IX, Title VII and FEHA involving public and private educational institutions. He has also provided advice and counsel regarding complex matters in both public and private educational spaces.



Eli's commitment to promoting and enhancing the quality of workplace and campus investigations is manifested through his work with the Association of Workplace Investigators (AWI): Eli is the current President for the AWI Board of Directors and regularly serves as Senior Faculty for AWI's multi-day Training Institutes around the country. Eli speaks extensively on the implementation of successful internal investigation programs and on investigator training focused on conducting investigations of sensitive matters through a trauma-informed lens. Eli also speaks regularly on new and emerging topics in workplace investigations and on excellence in report writing.

**Keith Rohman** is the founder and president of Public Interest Investigations, Inc., in Los Angeles, a legal investigations firm that has served educational institutions, public-sector employers, corporations, and the legal community since 1984. He has worked as an investigator in both the public and private sectors for more than 30 years.

During his career, Keith has been involved in numerous high-profile cases, including investigations involving the torture of prisoners at Abu Ghraib; the role of Blackwater, Inc., in the mass shooting of Iraqi citizens; the Rodney King case; and the enslavement of dozens of Thai workers in an El Monte, California, sweatshop. Keith has also conducted investigations in death penalty cases in California, Utah, Alaska, Arizona, and Washington.



On campuses, Keith has investigated allegations of rape and other sexual assaults under Title IX at several Southern California campuses. He was the principal investigator for attorneys in landmark litigation filed on behalf of service women and men sexually assaulted in the U.S. military. In the workplace, Keith has conducted third-party investigations into allegations of sexual harassment, sexual assault, discrimination, and retaliation for private- and public-sector employers, including school districts and universities.

Keith is the past President of the Association of Workplace Investigators (AWI), a professional membership association for attorneys, human resource professionals, private investigators, and others who conduct or manage workplace investigations. Additionally, Keith is an Adjunct Professor of Law at Loyola Law School, where he teaches fact investigation. Previously, he was appointed by the L.A. County Board of Supervisors to the Equity Oversight Panel (EOP) of the Los Angeles Sheriff's Department, a civilian oversight board that oversees Internal Affairs investigations.

Keith has appeared as a guest on "CNN" and "Good Morning, America" and has been quoted in *The New Yorker*, *Newsweek*, and the *Los Angeles Times*. His articles have appeared in the *Cardozo Law Review* (Keith Rohman, *Diagnosing and Analyzing Flawed Investigations: Abu Ghraib as a Case Study*, 2009 *Cardozo L. Rev.* de novo 96), *Los Angeles Daily Journal* and the *Daily News*.

**Cathleen Watkins** is a Senior Investigator who has worked for the past 20 years as part of the investigative team at Public Interest Investigations, Inc. (PII), in Los Angeles. Her caseload has focused on conducting third-party investigations into workplace complaints of sexual harassment, sexual assault, discrimination, and retaliation for a range of employers, including corporations, governmental entities, and educational institutions.



On college campuses, Cathleen has investigated complaints involving faculty and staff regarding allegations of sexual misconduct, racial discrimination, gender bias, and disability claims. Under Title IX, Cathleen has conducted investigations of numerous student complaints of sexual assault. Following such investigations, she has attended hearings on these matters and provided additional information to adjudicators, faculty panels, and Title IX officers.

Additionally, Cathleen has investigated cases involving misuse of public funds, whistleblower allegations, environmental violations, and matters involving top-level management and boards of directors. Cathleen has trained and supervised staff investigators and managed several large-scale investigative projects, including PII's work, as part of a federal court order, to monitor the treatment of disabled inmates in the Orange County jails. She has also managed an investigative team assigned to conduct investigations of complaints of workplace discrimination and retaliation brought by employees of the County of Los Angeles.

Together with [Keith Rohman](#), Cathleen developed "The Truth Matters"® training, a seminar for in-house investigators. She has also designed and presented customized training for investigators and their managers on addressing allegations of sexual harassment, racial discrimination, gender bias, and other workplace issues. Cathleen is presently the Program Director for T9 Mastered, working on the program's curriculum, marketing, and business development.

Cathleen has a bachelor's degree from the University of Southern California. She is licensed as a private investigator in California.






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## The New Regulations: A Quick Overview

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### New Regs Snapshot

- Effective: August 14, 2020
- Applicable to students, staff, and faculty
- Investigator and “Decision-Maker” cannot be:
  - The Title IX Coordinator
  - The same person



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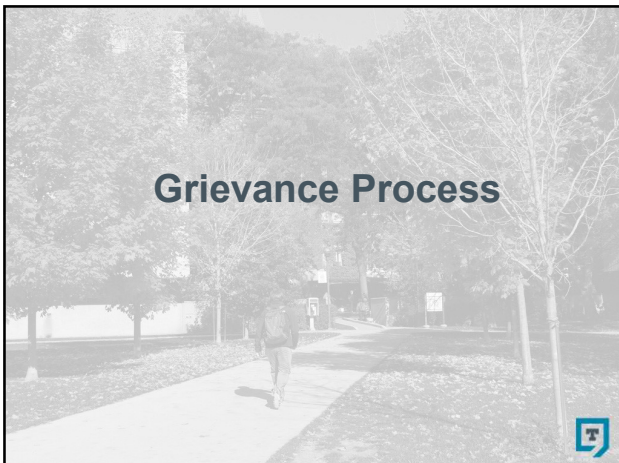
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## Grievance Process

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## Grievance Process per the New Regulations

- Presumption that Respondent is not responsible
- Standard of Evidence
- Evidence Review process
- Live Hearings required



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## Evidence Review Process

- Both parties must have an equal opportunity to inspect, review, and respond to any evidence gathered that is directly related to the allegations, even if there is no intent to rely on it in making a determination
- This must occur **prior** to the conclusion of an investigation
- Parties have an equal opportunity to refer to this evidence during the Hearing



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## Live Hearing Process

- Required by the 2020 Rule for higher ed
- Each party's advisor must be permitted to ask the other party and any witnesses relevant questions, including challenges to their credibility
- Questions must be conducted "directly, orally, and in real time"
- Adjudicator can determine questions are not relevant and cannot be asked, but must provide an explanation
- Parties may choose their advisor, but must have one; School must provide an advisor if needed



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## Responsibilities of the Investigator

- Define the scope of the investigation based on Complainant interview / policy
- Gather evidence
- Identify and interview witnesses
- Document all steps taken
- Coordinate Evidence Review Process with parties
- Testify in Hearing (potentially)



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## Investigation Report Requirements

- Allegations;
- Material facts;
- Evidence presented and considered;
- Additional relevant information received and gathered during the Evidence Review period;
- Description of all material disputed and undisputed facts.



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## Responsibilities of the Adjudicator

- Adjudicator can rely on Investigation Report
- Ensure the Hearing is conducted in accordance with school policy
- Make credibility assessments
  - Look for inconsistency in statements, etc.
- Make a determination regarding responsibility



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## Hearing Decision Report Requirements

- Allegations;
- Procedural steps;
- Factual Findings;
- Policy Findings;
- Analysis for each;
- Sanctions;
- Appeal process.



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## Sexual Harassment Definition



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## Sexual Harassment per the New Regulations

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

- Quid pro quo (employee Respondents only);
- Unwelcome conduct (full definition follows); or
- Specific defined acts (full definition follows)



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## Sexual Harassment: Unwelcome Conduct

Conduct on the **basis of sex** that is determined by a **reasonable person** to be so:

- Severe;
- Pervasive; **and**
- Objectively offensive
- That it effectively denies a person equal access



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## Sexual Harassment: Specific Acts

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

- Sexual Assault**, as defined by Clery Act;
- Dating Violence**, as defined by VAWA;
- Domestic Violence**, as defined by VAWA;
- or
- Stalking**, as defined by VAWA



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## Ten Steps to Writing a Report



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## Ten Steps To Effective Report Writing

- Step One: Know The Purpose And Your Audience
- Step Two: Define Scope
- Step Three: Using Templates, Build the Outline
- Step Four: Write Opening Sentences
- Step Five: THINK About Your Writing
- Step Six: Create the Evidence Section
- Step Seven: Using Credibility Factors, Write a Robust Findings and Analysis
- Step Eight: Consider Using Visual Aids
- Step Nine: Maintain Your Independence
- Step Ten: Close It Out



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## Step One: Know The Purpose And Your Audience



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## The Purpose of Most Investigations

### **To advise the decision-maker of the following:**

1. Did the alleged conduct, more likely than not, occur?
2. [Or] Did the alleged conduct more likely than not occur for an improper purpose?
3. If so, was it a violation of rules or policies?

### **To allow the decision-maker to determine:**

1. What is the appropriate response?
  - A. Unsubstantiated
  - B. Responsive action
    1. What is the appropriate level of action to remedy past behavior?
    2. What is necessary to prevent it from occurring in the future?



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## Types of Reports

Oral Reports

Executive Summary

Operational or Other Issues

**Investigative Report**

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## Identify Your Audience

- Put yourself in the shoes of the reader
- Ask yourself:
  - Where am I going with this?
  - Why should the reader care?

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## Identify Your Audience

- Who is reading this and what is their purpose?
  - Parties? (Report of Evidence)
  - Rely upon? (Decisionmaker)
  - Challenge, critique? (Representative or party)
- Are there multiple audiences?
- What is the same, what is different?
- Redactions or non-identifying information?

RIGHT SIZE!

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## Standard Practices

- **Prompt**

- The investigation must be necessary, and initiated and conducted in a timely manner reasonable under the circumstances.

- **Impartial**

- The investigator must be trained and experienced; remain fair and impartial and avoid an appearance of or actual bias and have no stake in the outcome.

- **Thorough**

- The investigation must be properly planned, to: identify, gather, review and analyze all relevant evidence; reach a reasoned conclusion supported by the evidence, including credibility assessments.



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## Step Two: Define Scope



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## Identifying Scope

- **Frame the scope based on the allegation**

- Practice: Write in form of question to ensure you answer it
- Use the complainant's words, quoting as necessary, and reframe to mirror policy language
  - "Sexually assaulted"
  - "Stalked"
  - "Bullied"
  - How are you characterizing their complaint?

- **Did you answer the scope question?**

- **Consistency between scope and findings**



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### Inconsistency Between Sections

- Introduction: James alleged Sherry engaged in harassing, stalking and inappropriate conduct.
- Evidence: During his interview, James said Sherry was “demeaning,” “threatening,” “disrespectful” and “derogatory.”
- Findings: I find that Sherry engaged in unprofessional, bullying and sexually aggressive conduct.



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### Step Three: Using Templates, Build the Outline



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### Template Structure: Elements

- Introduction
- Summary of Findings
- Methodology / Investigative Process
  - Procedural history and Hearing details for Hearing Decision
- Factual Background
- Evidence
- Analysis and Findings



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### Template: Introduction

- Why does it matter?
  - Sets the stage for the reader
  - Gives them an overview of what to expect
- What should be in there?
- Date of initial contact
- The complaint
- The parties
- The allegations (also known as Scope)
- Policies implicated
- Get to the point – “at a glance”



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### Template: Methodology (Investigators)

- Date of initial contact
- The complaint
- Witness list, including dates of interviews
- Information about representation
- Information about memorializing evidence
- Documentary, physical and demonstrative evidence
- Justification for delays (if any)
- Interim actions (if any)
- Witness advisories
- Rationale as to witnesses interviewed
- Investigative standard



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### Template: Methodology (Adjudicators)

- Still includes:
  - Date of initial contact
  - The complaint
  - Witness list
  - Documentary, physical, and demonstrative evidence
  - Justification for delays (if any)
  - Interim actions (if any)
- Also includes:
  - Procedural history of investigation
  - When parties were contacted for the Hearing and any Hearing-related processes
  - Reasons for not including witnesses who were approved to appear
  - Communications from parties, including question lists, witness requests, etc.



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## Evidentiary Standard

- Preponderance of the evidence
  - More likely than not
  - Evidence on one side outweighs, or is more than, the evidence on the other side
  - Greater than 50/50 chance the proposition is true
  - Quality, not quantity
- Clear and convincing
  - Highly probable (depends on the individual school's policy)
- Beyond a reasonable doubt
  - Never (criminal standard)
- The “Truth”
  - So we could sleep at night



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## Evidentiary Standard

### DON'T DO THIS!

- “Allegation is found to be true...”
- “It is proven that...”
- “Clear evidence that accused engaged in misconduct...”
- “No evidence that this occurred...”
- “Possibly substantiated...”
- “The investigation revealed enough evidence that ...”
- “Found evidence that it is highly possible...”
- “It has been concluded that...”



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## Template: Factual Background

- Anything that sets the stage but does not fit in other sections
- Relevant background
- Student or employee status
- Grades, course information
- Prior claims
- Key events
- Relevant policies
- Witness perceptions of parties
- Job recruitment and panel interview information



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### Template: Evidence

- Complaint / Allegations
- Response
- Witness statements / testimony
- Documentary and other evidence considered



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### Template: Analysis and Findings

- Factual Findings + Analysis
- Policy Findings + Analysis (if within scope)
- NO legal determinations



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## Step Four: Write Opening Sentences



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## Opening Sentences

- Cannot overstate the importance
- Tells the reader what to expect
- Tells the reader why they should care
- Summarizes witness perspectives



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## Opening Sentences

### I. Factual Background

The following facts provide relevant background and context to Wesley's allegations.

#### A. December 11, 2021 Complaint

On December 11, 2021, Wesley submitted an online complaint, alleging Lesley groped him at a fraternity party the day before. [Details]

#### B. Lesley's Response to Complaint

Lesley denied being at the party on December 10, 2021, and further denied groping Wesley on any occasion. She believes he has an improper motive in reporting this. [Details]

#### C. Other Information Considered

The witnesses uniformly stated that Wesley and Lesley do not get along, and that there has been "friction" between them since June 2020, when they both ran for Student Union President. [Details]



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## Opening Sentences

### II. Wesley's Allegations

#### A. "Groping"

Wesley alleged that Lesley groped him at a fraternity party on December 10, 2021. [Details]

#### B. Spreading False Rumors

Wesley alleged that after he rejected Lesley at the fraternity party, she began telling others in his social circle that he cheated on his Calculus test. [Details]



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## Opening Sentences

### III. Lesley's Responses

#### A. "Groping"

Lesley denied "groping" Wesley at the December 10, 2021 fraternity party, and stated she has "never" touched Wesley. [Details]

#### B. Spreading False Rumors

Lesley acknowledged telling others that she believed Wesley cheated on his Calculus test, but stated the statement was not "false," as she believed he engaged in the actions as alleged. [Details]



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## Opening Sentences

### IV. Witness Statements

#### A. "Groping"

The witnesses generally did not support Wesley's allegations. Four witnesses were present at the party, and stated they spent "most of" the night with Lesley, and did not see her "grope" Wesley. Two witnesses were not present, but said they considered it uncharacteristic of Lesley to "grope" someone, especially in a public setting. One witness stated he found it "highly likely" that Lesley groped Wesley, but noted that he was not present at the party, and described himself as "best friends" with Wesley. [Details]

#### B. Spreading False Rumors

The witnesses uniformly agreed Lesley stated Wesley cheated on his Calculus test. The witnesses also uniformly stated they did not know if the allegation was true or false.



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## Step Five: THINK About Your Writing



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## "Building" the Report

- Documents
- Interviews
- Physical Evidence
- Demonstrative Evidence
- Analysis begins only after collection of all evidence / conclusion of the Hearing
- No cramming
- "The Adjudicator" → "We" → "I"



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## Statement Origins

Statement origins:

- Is it clear if the statement was written or said verbally?
- Is it clear when the statement was made?
- Is it clear to whom the statement was made?



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## Statement Origins

- "Wesley stated he is a stellar student."
  - To whom and when did he state this? To his roommate? To the investigator? Consistently to both?
- Jeri stated that she "would have nothing to gain from telling Wesley she was not at the party because everyone knows she was there."
  - To whom and when did she state this? If from a document, cite attachment.



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## Neutral Language

- Brushed, touched, grabbed, forced
- Rarely, sometimes, frequently, regularly, routinely
- Respondent, complainant, witnesses
- Parrot witnesses' terms, but use quotes (She said, "We were getting it on." She explained this meant....)
- Use anatomical language ("inserted his penis into her vagina," "touched her breast and twisted her areola")



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## KISS

- Active voice
- Brevity + Simplicity
- Apps to check your work
- Buddy System

"The most valuable of all talents is that of never using two words when one will do."  
-Thomas Jefferson

"If I had more time, I would have written a shorter letter."  
-Various versions attributed to many, including T.S. Eliot, George Bernard Shaw, Winston Churchill



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## Passive Voice

- What is it?
  - Using the "to be" verb, usually in the form of "was"
  - It emphasizes the action, not the thing / person responsible for the action
- Why do we want to avoid it?
  - It creates questions for the reader
  - It demonstrates holes in your investigation
- How do you know you are doing it?
  - "by Zombies"



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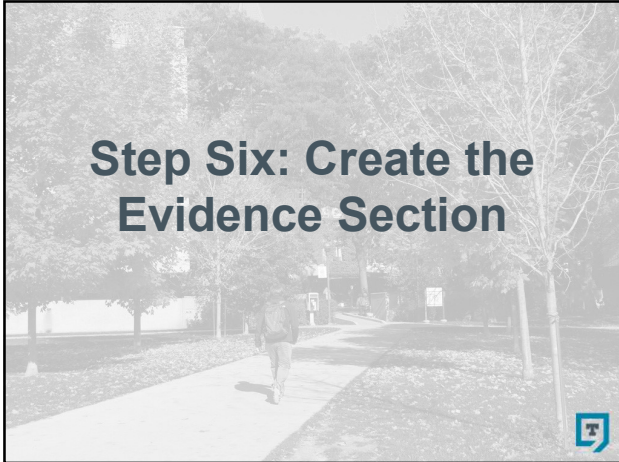
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**Structuring the Evidence Section**

- **By Individual**
- **By Event**
- **Chronological**





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**Organization of Issues – By Individual**

- **Complainant's Allegations**
  - Sexual Assault
  - "Roofied"
- **Respondent's Response**
  - Sexual Assault
  - "Roofied"
- **Witness Statements and Documentary Evidence**
  - Sexual Assault
  - "Roofied"



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## Organization of Issues – By Event

- Sexual Assault
  - Complainant's Allegations
  - Respondent's Response
  - Witness Statements and Documentary Evidence
- "Roofied"
  - Complainant's Allegations
  - Respondent's Response
  - Witness Statements and Documentary Evidence



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## Organization of Issues – Chronological

### 9:05 p.m. on July 14, 2017:

Sara claimed that at 9:05, she was playing beer pong and ... [detail]

By contrast, Prof. Jack recalled that .... [detail]

Three witnesses stated that at this time... [detail]

### 9:25 p.m. on July 14, 2017:

Sara said she went to the bathroom at this time. She provided a text she stated she sent from the bathroom, stating [detail]

Prof. Jack remembers that between 9:30 and 10:25, he was talking to Jen. He did not see Sara during this timeframe. [detail]



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## Step Seven: Using Credibility Factors, Write a Robust Findings and Analysis



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## Analysis

### Credibility Assessments

- Not a determination of a "liar" - instead assess factors (but we all lie, sometimes everyday)
- "Truth" from the witness' perspective
- Manner of questions affect answers
- Malleability of memory



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## Analysis

### Credibility: What it Is and What it is Not

- An assessment of the facts using credibility factors
- Factual and credibility analysis = one and the same?
- Credibility includes a party's believability
- Does a credibility analysis make someone a "liar?"
- Are we seeking the truth?



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## Credibility Factors

- |                          |                           |
|--------------------------|---------------------------|
| • Inherent Plausibility  | • Past Record             |
| • Direct Corroboration   | • Consistent Statements   |
| • Indirect Corroboration | • Inconsistent Statements |
| • Lack of Corroboration  | • Reputation              |
| • Material Omission      | • Demeanor                |
| • Motive to Falsify      | • Comparators, Statistics |



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## Credibility – How We Use It

### Inherent Plausibility

- Is the testimony believable on its face?
- Could it have occurred as reported?
- What is the extent of the witness' opportunity to perceive any matter about which he or she testifies?
- What is the extent of the witness' capacity to perceive, to recollect, or to communicate?



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## Credibility – How We Use It

### Direct Corroboration

- Does the party have actual knowledge?
- Is there witness testimony or physical evidence that corroborates the party's testimony?
- What is the extent of interviewee's opportunity to perceive matters about which he or she testified?

### Indirect Corroboration

- Is there witness testimony or documentary evidence that demonstrates contemporaneous reporting of events?



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## Credibility – How We Use It

### Lack of Corroboration

- Is there witness testimony or physical evidence that is inconsistent with statements made during the interview?

### Material Omission

- Did the person omit material information?
  - In narrative? (Recall trauma-informed for Complainant)
  - In response to inquiry? (Quality of answers depends on quality of questions)



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## Credibility – How We Use It

### Motive to Falsify

- Did the person have a reason to lie?
- Does the person have a bias, interest, or other motive?
  - Examine relationships
  - Explore potential biases
  - Consider reasons for self-protection
  - Carelessness of expression vs. lying
  - Give weight to admissions against interest / admissions of lying(?)
  - Mistaken belief vs. untruthfulness



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## Credibility – How We Use It

### Past Record

- Does the Respondent have a history of similar behavior in the past?
- Does the Complainant have a relevant history?
- What weight do we give this in the present matter?
- Best predictor of future behavior is past behavior
- Consider:
  - Cumulative behavior
  - In scope behavior
  - Out of scope behavior



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## Credibility – How We Use It

### Comparator Information

- Are there similarly situated individuals?

### Statistics

- What do the numbers show?



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## Credibility – How We Use It

### [In]consistent Statements

- Did the witness tell the same version of events to others, in writing in all material respects?
- Recall Trauma Effects (courtesy of Dr. Ingram):
  - Memory loss, lack of focus, emotional reactivity, lack of accurate and detailed information, non-linear stories, and multiple versions of a story can all be signs of trauma
  - Trauma victims have interrupted memory process
  - Trauma victims reluctant to recall experiences that evoke negative feelings
  - Lack of linear memory is often a sign of trauma



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## Credibility – How We Use It

- Trauma Effects, continued:
  - Inconsistency by trauma victim is the rule
  - The more confused the victim, the more likely they experienced trauma
  - Additive stories with more details over time does not harm credibility
  - Wildly varying stories more challenging
  - Inconsistent statements do not equal a lie
  - Weigh material vs. immaterial inconsistencies appropriately
  - Inconsistent statements are not only the norm, but sometimes strong evidence that the memory was encoded in the context of severe stress and trauma (Strand, 2013)



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## Credibility – Proceed With Caution

- Reputation. Does the interviewee have a reputation for honesty or veracity, or their opposites?
- Attitude. Did the person cooperate when participating in the interview and/or providing information?
- Demeanor. Did the person seem to be telling the truth or lying (and why)?



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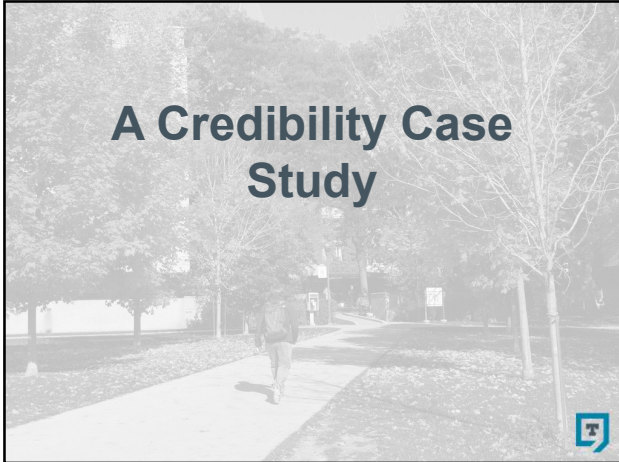
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**Case Study: Title IX Complaint**

- 10/23/21 – Alleged sexual assault occurs in student housing
- 10/24/21 – Complainant reports to the police
  - Incapacitated
  - Submits to rape kit at the hospital
  - Nothing comes of police report
- 5/2/22 – Complainant reports to the Title IX Office
- 5/5/22 – School issues a mutual no contact order

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**Case Study: More Facts...**

- In Complainant's investigative interview, she told the investigator:
  - In October, Respondent and some of his friends had supplied her with alcohol, encouraged her to drink, and then Respondent sexually assaulted her in a co-ed bathroom in student housing
  - She waited to report after learning Respondent's identity because he was the star quarterback of the football team and she was afraid of backlash

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## Credibility Factors: Corroboration

Confirmation or support from other sources, including witnesses, documentation or physical evidence.

- **Direct corroboration – tangible information**
  - Physical evidence - documents, video, database records
  - Witness statements
- **Indirect corroboration – communication about event**
  - Documented the event
  - Told someone about the event
  - Timing?



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## Case Study: New Facts

A witness comes forward with the following information:

- Complainant seemed more withdrawn after the weekend of 10/23/21.
- Complainant quit working as a Team Trainer in November 2021, before the end of the football season.
- Between 10/23/21 and when she quit, Complainant only interacted with Respondent for her job duties, but would laugh and joke with other players.



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## Case Study: Sample Analysis

That a witness observed a change in Complainant's demeanor closely following the weekend Complainant alleged Respondent sexually assaulted her, indirectly corroborates Complainant's account. It may be that Complainant was stressed for other reasons unrelated to her interactions with Respondent. However, the observations that she was noticeably more stressed following the weekend of 10/23/21, and also removed herself from a job which would help her in her medical school applications, corroborates Complainant's allegations that something about Respondent made her uncomfortable. Further, I did not identify any motive of the witness to fabricate or exaggerate their account. While not dispositive, considered in light of other information, the witness' account supports Complainant's allegations.



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### Credibility Factors: Opportunity and Capacity to Observe

Crucial question: “How do you know . . .?”



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### Case Study: And Then There Were More...

Another woman has raised concerns about Respondent:

- She met Respondent at a party.
- When the woman asked Respondent if she could examine him as part of her job as a physical therapist in training, Respondent said, “Only if I can examine you next.”
- Respondent made sexual comments to her after she asked him to stop.
- Respondent and his friends supplied her with alcohol and encouraged her to keep drinking, but she had a friend pick her up.



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### Credibility Factors: Indirect Corroboration

- Through the use of similarly-situated witnesses.
- Best predictor of future behavior is past behavior.



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## Credibility Factors: History / Past Record

### Relevant but not conclusive

- Beware of bias
- Give appropriate weight
- Inquire and follow up



Reach your own conclusions



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## Case Study: Sample Analysis

While the other woman did not directly observe Respondent's conduct towards Complainant, she described her own similar experiences with Respondent, which tends to, in part, corroborate Complainant's allegations. That Respondent engaged in similar past conduct makes it more plausible that he likewise engaged in the conduct Complainant described, as far as supplying her with alcohol and encouraging her to drink excessively.



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## Case Study: Telling the Account

Complainant began to tell people about what transpired with Respondent once he was drafted to the NFL in April 2022:

- Told her parents and close friends.
- Made a report to the school at the urging of her parents and best friend.
- Told her TikTok followers in a video she posted, identifying Respondent and his new team.



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### Credibility Factors: Consistency and Inconsistency

- Concentrate on significant issues and events.
- Allow witnesses an opportunity to explain.
- Keep in mind – memory is malleable and influenced by external and internal factors.



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### Case Study: “He raped me and the police didn’t care”

Complainant acknowledged:

- She did not tell anyone about what happened until the weekend Respondent was drafted to the NFL.

The school obtained:

- The police report Complainant filed the day after the alleged assault, the details of which were very similar to the details she provided in her Title IX complaint.



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### Case Study: Sample Analysis

On the one hand, Complainant not telling anyone close to her about Respondent’s conduct could undermine her account that he engaged in nonconsensual sexual conduct towards her. On the other hand, I find Complainant’s statement to the police to be consistent with her statement to the Title IX office, which gives weight to Complainant’s account as the statements were made over six months apart.



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## Credibility Factors: Plausibility



“Reasonableness of witness’ testimony in context”



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## Credibility Factors: Motive to Lie

- Who has a motive to lie to the investigator?
- Context, Relationships, and History
- Motive to Lie ≠ Lie



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## Case Study: What Does Complainant Have to Gain?

In his interview, Respondent denied Complainant's allegations, and proffered the following motives for Complainant's claims against him:

- A payout from his NFL team and/or the school
- A chance to gain popularity and influencer status on TikTok and other social media platforms in the wake of the #MeToo movement
- A woman who was embarrassed he did not return her feelings for him



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## Sample Analysis – Part I

I considered Complainant may have a motive to exaggerate or misrepresent her claims based on the timing of her complaint to the school coinciding with Respondent's being drafted to the NFL. However, Title IX processes do not result in financial gains to the Complainant, nor do criminal processes. Had Complainant filed a civil lawsuit against Respondent, the school, and/or his new team, Complainant's financial motives may have held more weight, but as it stands, Complainant had no financial stake in the outcome of the Title IX investigation, nor was Respondent an NFL player when she reported his conduct to the police.

Additionally, the other woman has no known similar motive. She could conceivably have been motivated to report based on "benefits she observed Complainant receiving from her report, but no such benefits were apparent. On the contrary, Complainant has been threatened and has had to leave the school in the months following her posting the public TikTok video, which would seemingly dissuade anyone else from coming forward.



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## Sample Analysis – Part II

I considered the possibility Complainant's allegations against Respondent were motivated by her desire to use Respondent's fame as a first round draft pick to boost her own popularity on social media. On one hand, the timing of Complainant sharing the video the weekend after the NFL draft lends itself to Respondent's argument. Complainant not telling anyone what happened between her and Respondent, including her family and close friends, also makes Respondent's argument more plausible.

On the other hand, I note Complainant identified Respondent in the police report she filed the day after the alleged assault, it was consistent with the statement she made to the Title IX Office six months later, and she submitted to a rape kit, a highly invasive examination, before she knew whether Respondent would be drafted. I also found Complainant's explanation for the timing of her report – that Respondent would now have increased fame, money, and access to women – plausible.



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## What Does Respondent Have to Gain?

- The respondent almost always has a motive to lie.
- How much weight do we give the respondent's denials?



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## How Are Remote Credibility Determinations Different?

- In some ways, no affect
  - Objective credibility factors
  - No reliance on micro expressions
- Remote:
  - Less rapport, less information
  - Confidentiality, environment, witnesses, representative
  - Informal, background, environment
  - Technology frustrations not impact credibility, but maybe memory
- In-person: Masks, 6-feet distancing



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## Back to the Ten Steps



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## Findings

- Sustained: An allegation is sustained when an investigation reveals a preponderance of the evidence in support of the allegation
- Not sustained: An allegation is not sustained when an investigation reveals there was not a preponderance of the evidence in support of the allegation



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## Findings

**Unable to determine or “insufficient evidence” ....**

**Ever acceptable?**

- That is why they are paying / hiring you!
- Almost always have some factors to tip



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## Findings

- Findings supported by:
  - Factual analysis, resulting in factual findings
    - Credibility analysis, organically arises in factual analysis
  - Policy analysis, resulting in policy findings



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## Is this statement a finding?

**Complainant posted a TikTok video identifying Respondent as her rapist on April 30, 2022.**



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**Is this statement a finding?**

**Witness 1 provided text messages of Respondent telling her he had plenty of alcohol to share and she only needed to bring “good vibes.”**



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**Is this statement a finding?**

**Respondent wrote in his statement that Complainant had gone to the bathroom with him willingly.**



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**Is this statement a finding?**

**Complainant’s claims are substantiated.**



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**Is this statement a finding?**

**The conduct more likely than not occurred because Complainant did not receive any benefit from reporting Respondent.**



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**Is this statement a finding?**

**Witness 1 was unreliable because she and Complainant worked together as Team Trainers and were friends.**



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**Enumerate Findings**

- Are they sufficiently detailed?
- If saying “Not Sustained” –
  - Are you saying the conduct did not occur?
  - Or did the conduct occur, but not for an improper purpose?
- How does credibility factor in?



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## Analysis

What is it NOT?

- Not a fact regurgitation

So then what is it?

- Credibility Assessments: applying the facts to credibility factors
- Weighing the evidence
- Neutral v. Advocacy Writing



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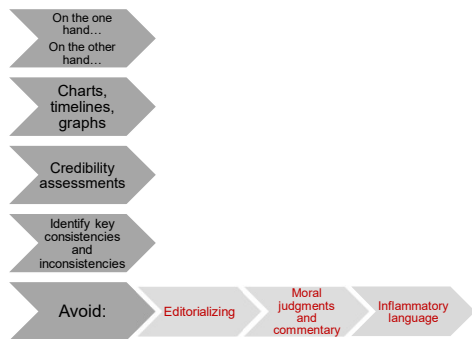
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## Analysis



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## Analysis: Weighing the Evidence

### Above All – Be Fair!

- Acknowledge facts and evidence against your conclusion
- On the one hand, on the other hand....
- Considered factors that weighed against this finding....



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## Analysis: Weighing the Evidence

### Circumstantial Evidence

Allows a fact to be inferred:

- John heard someone call Sara a “total slut”, but did not see who it was. The sound came from the area where Matthew sits in history class.
- John saw Matthew had posted an article shaming women for having pre-marital sex on his Facebook page

### Direct Evidence

If believed, directly proves a fact:

- Personal observation: John observed Matthew call Sara a “total slut”.
- Authentic recording: John recorded Matthew calling Sara a “total slut”.



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## Analysis: Weighing the Evidence

- Evidence in litigation must be:

- Relevant
- Reliable
- Admissible

- Evidence in investigations must be:

- Relevant
- Reliable
- Hearsay okay



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## Analysis: Weighing the Evidence

### Relevant:

- Does it bear on a disputed issue that is important to deciding the question at hand?

### Reliable:

- Credibility factors
- Personal knowledge
- Authenticity of documents



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## Step Eight: Consider Using Visual Aids

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### Benefits of Visual Aids

- Easier for the reader to follow
- Helps encourage the reader to actually READ your report
- Helpful summarization tool

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	Complainant's Perspective	Respondent's Response
Initial Kiss	"I remember him leaning in to try and kiss me. I said, 'Don't do that, you're married. What are you doing?'"	"I don't recall that in the same way. I think she might have been a bit surprised and not sure. But she asked me if I was sure, and I said, 'Yes.'"
Discussion After Kiss	"I said things like, 'You're married.' We talked a lot about the ongoing project, and how it was going to be weird. [...] I remember trying to talk to him about his wife. [...] He said something along the lines of, 'I'd rather spend the night with an attractive 20-year-old.' He kept saying that it was just for fun, no big deal."	"That is not exactly what I recall. I remember saying this was just for fun, and I was okay with it. When she started to show doubt, when she brought up the project and said, 'We have to work together, I don't want to do anything more...' that was later in the evening. I don't remember saying 'attractive 20-year-old.'"
Moving to the Bed	"He picked me up and put me on the bed. I was saying, 'No, no, we shouldn't do that, things are going to be weird at work.' [...]"	"I don't remember her saying that at that point. It could be similar to what she said when I thought she was being doubtful, and things stopped. I don't remember if she said anything at that point, sorry."
Kissing on the Bed	"He said, 'This is just for fun,' and started kissing me and my neck. He said, 'I like your tattoo.' [...] He came up to my face and said, 'Just one kiss, just one kiss.' I said, 'Fine,' his face was right there, so I kissed him."	"In terms of the conversation, I'm not sure. We were kissing. I was kissing her on the neck. We were kissing each other, I do remember that. She was kissing me on the lips and on the face. I don't think she was kissing me on the neck or anywhere else."

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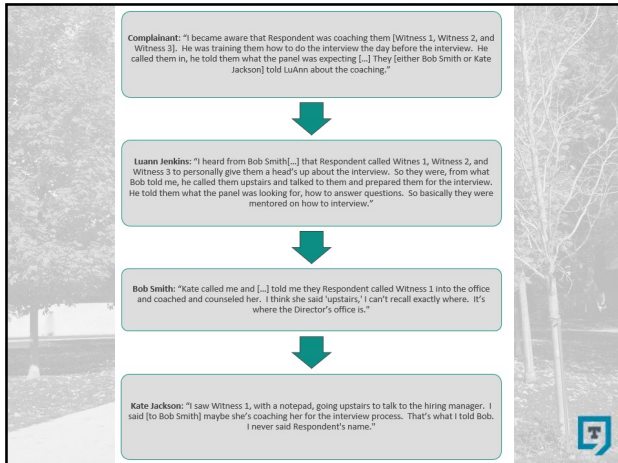
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**Complainant:** "I became aware that Respondent was coaching them [Witness 1, Witness 2, and Witness 3]. He was training them how to do the interview the day before the interview. He called them in, he told them what the panel was expecting [...] They [either Bob Smith or Kate Jackson] told LuAnn about the coaching."




**LuAnn Jenkins:** "I heard from Bob Smith [...] that Respondent called Witness 1, Witness 2, and Witness 3 to personally give them a head's up about the interview. So they were, from what Bob told me, he called them upstairs and talked to them and prepared them for the interview. He told them what the panel was looking for, how to answer questions. So basically they were mentored on how to interview."



**Bob Smith:** "Kate called me and [...] told me they Respondent called Witness 1 into the office and coached and counseled her. I think she said 'upstairs,' I can't recall exactly where. It's where the Director's office is."



**Kate Jackson:** "I saw Witness 1, with a notepad, going upstairs to talk to the hiring manager. I said [to Bob Smith] maybe she's coaching her for the interview process. That's what I told Bob. I never said Respondent's name."




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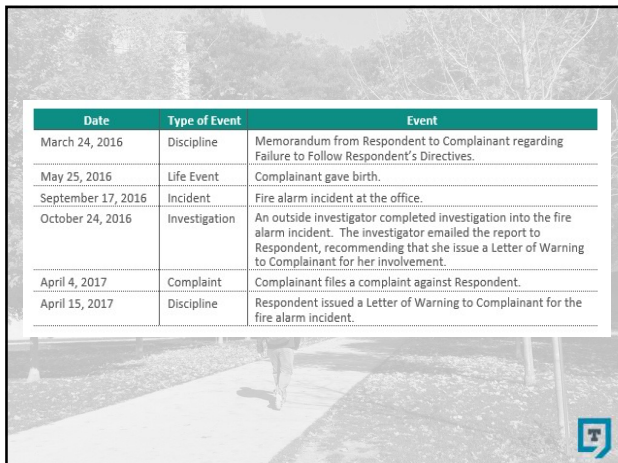
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Date	Type of Event	Event
March 24, 2016	Discipline	Memorandum from Respondent to Complainant regarding Failure to Follow Respondent's Directives.
May 25, 2016	Life Event	Complainant gave birth.
September 17, 2016	Incident	Fire alarm incident at the office.
October 24, 2016	Investigation	An outside investigator completed investigation into the fire alarm incident. The investigator emailed the report to Respondent, recommending that she issue a Letter of Warning to Complainant for her involvement.
April 4, 2017	Complaint	Complainant files a complaint against Respondent.
April 15, 2017	Discipline	Respondent issued a Letter of Warning to Complainant for the fire alarm incident.




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## Step Nine: Maintain Your Independence




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## Maintaining Independence

- Oral debriefs – document, do after completion
- Draft reports – draft watermark, retain, for technical review only
- Redlined reports – save changes after client / supervisor / stakeholder review
- Final reports



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## Step Ten: Close It Out



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## Close It Out

- Findings to appropriate person as outlined in school's policy
- Maintaining the file
  - Confidentially
  - Timeframe
  - Know your policies and processes



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