

Investigating Discrimination Complaints



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What is an Investigation?

To make an official inquiry into a matter



What is being investigated?

Possible violations of the Adelphi University Policy and/or Code of Conduct

<https://operations.adelphi.edu/catalog/anti-discrimination-harassment-and-retaliation-policy/>

[Code of Conduct for Adelphi University](#)

Impact of Language

Complainant/victim/survivor/reporting party/accuser

Respondent/offender/accused/responding party/perpetrator

Believe or feel vs. experience, story vs. account

Word against word vs. “he said/she said”

Investigation, review, assessment

DEFINITIONS

Advisor - A person chosen by a party or appointed by the University to accompany the party to meetings related to the resolution process, to advise the party on that process, and to conduct cross-examination for the party at the hearing.

Complainant - an individual who is alleged to be the victim of conduct that could constitute harassment or discrimination based on protected class; or retaliation for engaging in a protected activity.

Complaint (formal) - a document filed/signed by a complainant or the Title IX Coordinator alleging harassment or discrimination based on a protected class or retaliation for engaging in a protected activity against a Respondent and requesting that the recipient investigate the allegation.

DEFINITIONS

Final Determination - A conclusion by the preponderance of the evidence that the alleged conduct occurred and whether it did or did not violate University policy.

Finding - A conclusion by the preponderance of the evidence that the conduct did or did not occur as alleged

Formal Grievance Process - means Process “A”, a method of formal resolution designated by the recipient to address conduct that falls within the policies and which complies with the requirements of the Title IX regulations (34 CFR Part 106.45)

DEFINITIONS

Notice - An employee, student, or third party informs the Title IX Coordinator or other Official with Authority (OWA) of the alleged occurrence of harassing, discriminatory, and/or retaliatory conduct.

Process “A” - The *formal* grievance process

Process “B” - The *informal* alternative resolution procedures, the Adelphi University process under state law

Respondent - an individual who has been reported to be the perpetrator of conduct that could constitute harassment or discrimination based on a protected class; or retaliation for engaging in a protected activity.

DEFINITIONS

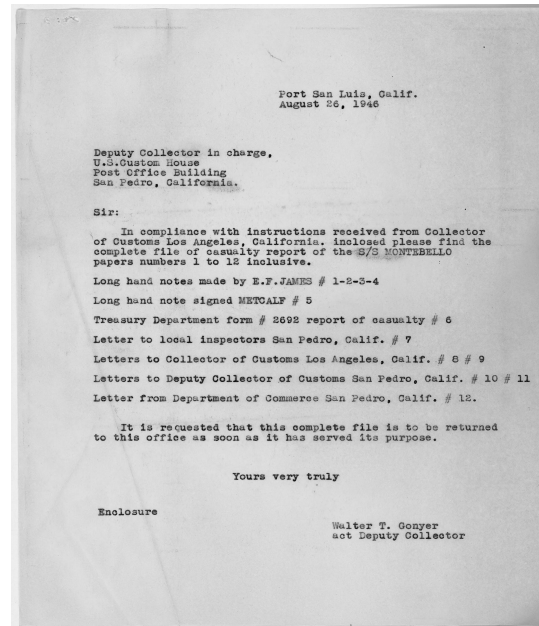
Resolution - the result of an informal or formal grievance process

Sanction - a consequence imposed by the Recipient on a Respondent who is found to have violated the University policy.

Sexual Harassment - the umbrella category of sexual offenses including sexual harassment, sexual assault, stalking, dating violence and domestic violence

What tools do we have?





Evidence - something that tends to prove or disprove the existence of an alleged fact

Best evidence - evidence of the *highest quality* available as measured by the nature of the case rather than the thing being offered as evidence.
Evidence which proves itself

Ex: the original document, photograph, recording, the contract, audio recordings - voicemail messages, video recordings, etc.

Relevant Evidence - probative and “material”. Evidence that is logically connected to the fact or issue it is intended to prove or disprove.



Types of Evidence

Physical - real, material, tangible things such as photos, medical records, injuries, clothing, bedding, security monitoring video, and communication records such as telephone, email, voicemail, texts, and social media

Circumstantial - evidence based on inference and not on personal knowledge or observation also known as indirect evidence. Facts from which one may infer intent or motive.

Ex: Evidence of the accused giving different versions of the events

Evidence of the accused preparing for the incident

Evidence of the accused's state of mind

Direct - Based on personal knowledge or observation and if true is probative without inference or presumption.

Documentary - written material which is generated during the course of normal business activity



Testimonial - given orally by parties and witnesses. Offered to prove the truth of the matter asserted.



Witnesses

Direct - Those who observed or who might have observed or who have knowledge of the incident

Outcry - Those who know details of the incident from the parties from the period immediately thereafter

Indirect - Those who were later told about the incident by the reporting or responding party

After-the-fact - Those who observed the reporting party's reactions or changes in behavior by either party

Elements of a Prima facie case

Discrimination:

1. Membership in a protected class
2. Adverse action - some harm occurred
3. Discriminatory animus - the discriminator knew of the complainant's protected status
4. Causation - the harm that occurred was the result of the adverse action

Investigation Chart

Elements	Source	Source	Source	Source
Membership in a protected class	Complainant is a brown woman			
Adverse action	complainant broke out in hives coming to work	Photos		
Discriminatory Animus	Colleague made racial jokes and said racially charged things	Recording	Text messages	Google chat
Causation	The complainant only breaks out on the way to work	Witness	Photos b4 work and then at work	

<https://www.youtube.com/watch?v=i-BCnhUsJ4s&t=8s> (OCR
New Title IX Regulations)

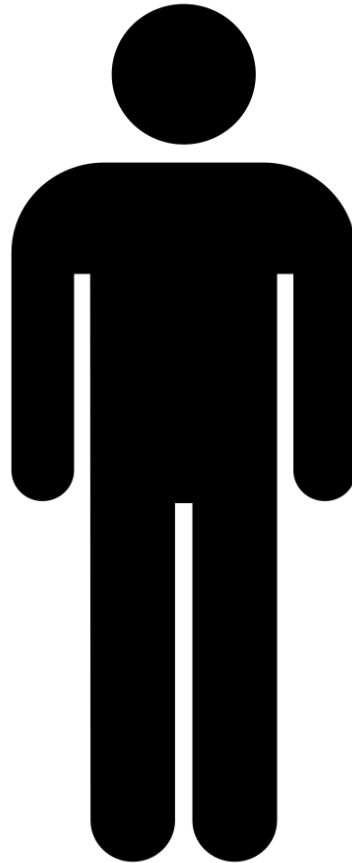
Quid Pro Quo:

- a. an employee of the university,
- b. conditions the provision of an aid, benefit, or service of the university,
- c. on an individual's participation in unwelcome sexual conduct

Sexual Harassment:

- a. unwelcome conduct,
- b. determined by a reasonable person,
- c. to be so severe, and
- d. pervasive, and,
- e. objectively offensive,
- f. that it effectively denies a person equal access to the university's education program or activity

Who is the ***REASONABLE PERSON***?



The reasonable person is a hypothetical person used as a legal standard to determine whether someone acted with negligence specifically a person who exercises the degree of attention, knowledge, intelligence, and judgment that society requires of its members for the protection of their own and of others' interests.

The reasonable person acts sensibly, does things without serious delay, and takes proper but not excessive precautions.

Sexual Assault/non-consensual sexual intercourse

Any sexual act

directed against another person,
without the consent of the Complainant,
including instances in which the complainant is
incapable of giving consent

Consent - permission to engage in sexual activity

Knowing - able to understand **AND**

Voluntary - affirmative, conscious **AND**

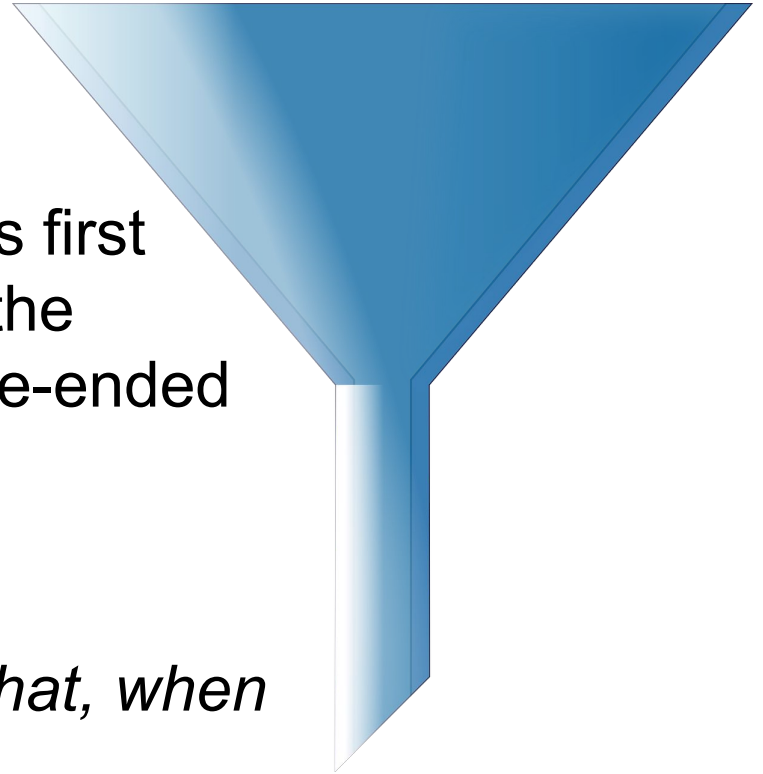
Clear - able to be understood, by words
OR actions

Asking the Questions

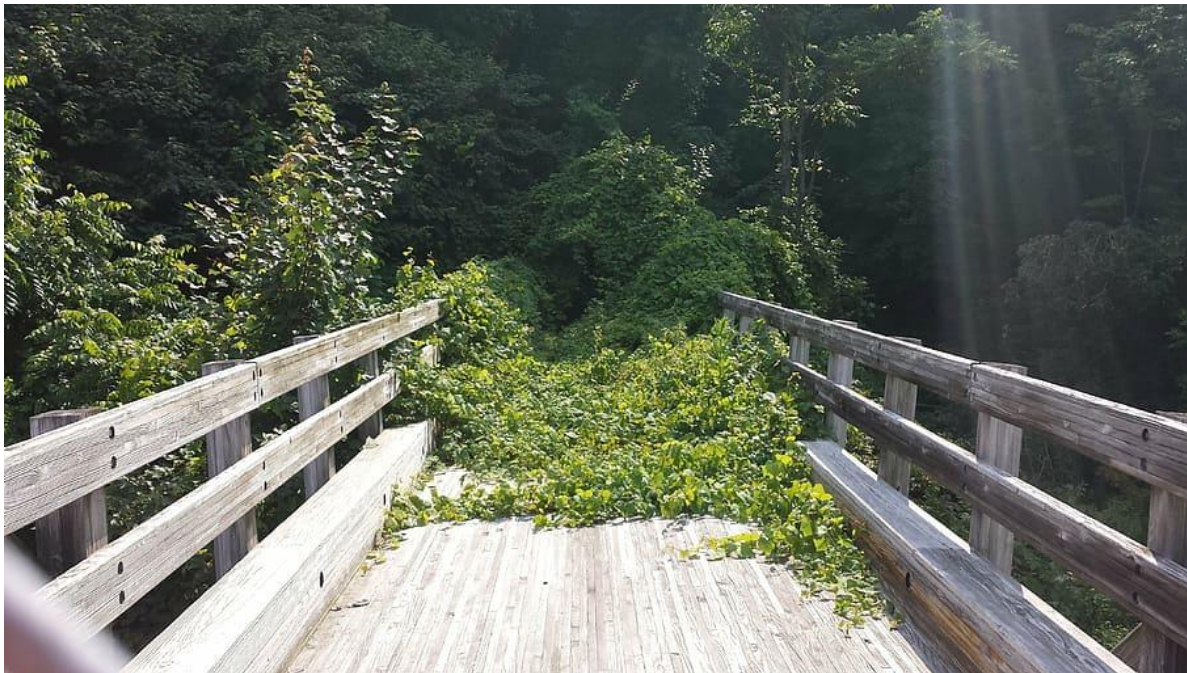
Ask broad open-ended questions first then narrow the questions from the answers given, finish with a close-ended question

Open-ended questions - who, what, when where, why, how

These questions give the interviewee the opportunity to narrate, tell a story - **Do not interrupt**

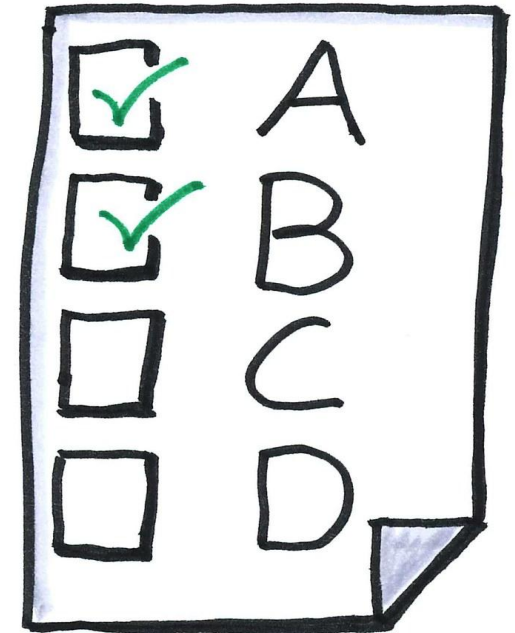


Close-ended questions - can be used effectively to verify and pin down key points or to get a party or witness to commit to a statement.
Generally, requires a “yes” or “no” response.



Multiple Choice Questions

When interviewees are given a choice they will often give the investigator the answer they believe the investigator wants to hear



The *responding* party will likely give the response that is **least** indicative of a violation

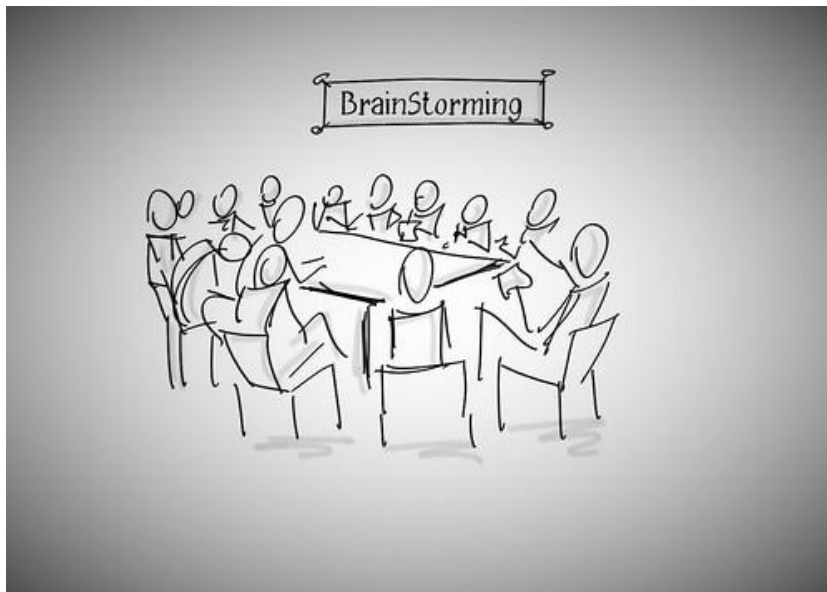
Multiple Questions

Asking more than one question at a time can cause confusion for the investigator and the interviewee and can also lead to incomplete or overlapping information.



Silence is Golden

Allow the interviewee time to think about a response without undue pressure.



If clarification is needed let them ask for it. **Do not assume** the person does not understand.

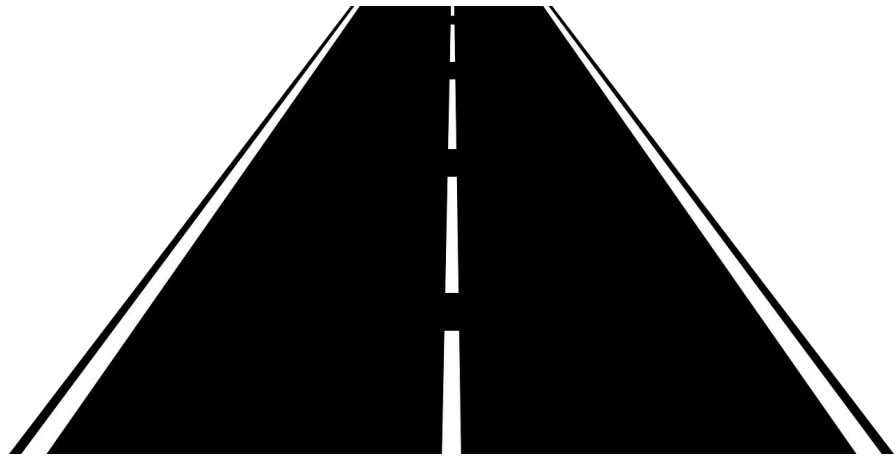
Practice empathy

Treat the parties the way you want to be treated.

Listen without judging

Avoid staff development and the parenting trap

Stay in your lane!



Credibility

1. **Inherent plausibility** - Is the testimony believable at face value? Does it make sense? Are there materials to back up the story?
2. **Demeanor** - Did the person seem to be telling the truth?
3. **Motive to falsify** - Did the person have reason to lie? Does the person feel threatened for any reason?

Credibility

4. **Corroboration** - Is there a witness or physical evidence that **validates** the party's testimony?

5. **Past Record** - Did the alleged subject have a "history" of similar behavior in the past?

**** Rape Shield Laws** - Statutes that prohibit or restrict the use, in rape or sexual assault cases, of evidence about the victim's past sexual conduct.





Keep Bias Out

Studies show that people who know they have biases and admit them show **less** implicit bias.

Preferences and stereotypes can affect the way we interact with people.

Unconscious bias/implicit bias - beliefs that reflect attitudes and stereotypes that inform our subconscious information processing.

Confirmation bias - the tendency to interpret new evidence or information as confirmation of one's existing beliefs or theories.

Memory bias - factors that influence how well we remember, or don't remember, or how quickly we are able to recall certain events. *TAKE NOTES*

“Like Me” bias/affinity bias - investigator tends to favor information received from witnesses who are, in some respect, “like” the investigator.

Priming - a phenomenon in which our reactions to stimulus are affected by our exposure to another stimulus without conscious guidance or intention.
Ex: *Nurse* is recognized more quickly following the word *doctor* than following the word *bread*.

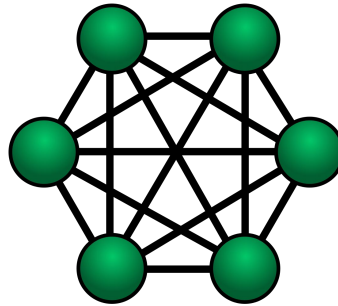


<https://mediasonar.com/2019/07/24/cognitive-biases-investigations/>

<https://online.suny.edu/scicasebook/wp-content/uploads/Is-it-Bias-Chart.pdf>

RELEVANCE

Relevance is the fact, quality or state of being relevant; relation or pertinence to the issue at hand.



Relevant - logically connected and tending to prove or disprove a matter in issue; having appreciable probative value - that is, rationally tending to persuade people of the probability or possibility of some alleged fact.

Relevant evidence is evidence that has a tendency to prove or disprove a fact

AND

That fact *MUST* be of consequence in determining the action

Will the evidence help the decision-maker(s) in some small way to reach a good decision, either by itself or in conjunction with other evidence?

The Difference between Relevance and Irrelevance

<https://www.youtube.com/watch?v=Nn4qRE8uYL8>



Common Relevancy Issues:

Remoteness in time or place: reduces relevancy - events taking place at times or locations distant from the event at issue are of little or no relevancy

An act of domestic/intimate partner violence between the complainant and her partner if it occurred two weeks before she reported than if it was three years before and they had been to counseling in the meantime.

It is more relevant if the responding party's car was driving slowly down the complainant's street than if it had been seen driving slowly down a street a mile away

Prior Similar events: the similarity of a prior event affects relevancy. Prior events involving different people or objects are of little or no relevancy

Prior acts of domestic violence between the responding party and the complainant are more relevant than prior acts of violence between the defendant and a previous partner

Previous times when the respondent threatened the complainant are more relevant to show the need for protection than incidents when the respondent threatened others

Tangential issues - not all issues are equally at issue. Evidence that tends to prove tangential issues is less relevant

DNA Evidence is more relevant if the respondent claims mistaken identity than if they claim self-defense.

Circumstantial Evidence - the relevancy of circumstantial evidence depends on the degree of similarity

A fingerprint found at the scene with 18 points of similarity to the respondent's print is more relevant than a smeared print with only 5 points of similarity

Disparate Treatment

Disparate Intent - The practice of intentionally dealing with persons differently because of their race, sex, national origin, age, or disability. To be successful there must be proof that the discriminator acted with discriminatory intent or motive.

Disparate Impact - The adverse effect of a facially neutral practice that nonetheless discriminates against persons *because of* their race, sex, national origin, age, disability and that is *not* justified by business necessity. Discriminatory intent is irrelevant in a disparate impact claim. (a/k/a adverse impact)

Retaliation - Adverse action taken against a party, witness or other participant in response to a complaint of discrimination.

What are the elements of a retaliation complaint ?

<https://www.youtube.com/watch?v=GWa3XroMv5M>

(Doe v. Rhodes)

Impartial - unbiased, disinterested, having no opinion about the case at the start and basing the determination on competent evidence

Objective - based on or related to externally verifiable phenomena as opposed to an individual's perceptions, feelings, or intentions.

Fairness - Impartial; just; equitable; disinterested, free of bias or prejudice

Equity - Fairness, impartiality; evenhanded dealing

Due Process - The conduct of proceedings according to established rules and principles for the protection and enforcement of private rights including notice and the right to a fair hearing before a body with the power to decide the matter.

<https://www.youtube.com/watch?v=48UwobtiKDI>
(Due Process)

https://www.youtube.com/watch?v=YA5S2_A3UAY
(USDOE - OCR)

https://www.youtube.com/watch?v=YA5S2_A3UAY&t=319s(
OCR - How to Report Sexual Harassment)



Decision Tree - Is this a Title IX Investigation?

<https://online.suny.edu/scicasebook/wp-content/uploads/Decision-Tree.pdf>

<https://online.suny.edu/scicasebook/wp-content/uploads/Is-it-Bias-Chart.pdf>

Case Study: Professor Bean

Jay, an openly gay student, comes to you to complain that Prof. Bean, his tenured English professor, has made comments in class that make Jay “feel unsafe”. Specifically Jay alleges that Prof. Bean made the following comments:

- After the new Title IX regs. came out Prof. Bean brought up the transgender letter and the fact that it had been repealed by the Trump administration and said, “Things would be much easier if we just followed that letter and the common sense from Washington - you are either a man or a woman. Period.”
- When a student wore a gay pride shirt to class, Prof. Bean said, “I get not being ashamed of who you are having sex with, but is ‘proud’ really the word you should use?”

- He assigned all the students in class to write their persuasive essays on “trying to convince me that people should be able to use whatever bathroom they want to.”

There are about 26 students in the class, and Jay brought with him Georgina, Isaiah, Jeremy and Kennedy. He tells you that all the students will back him up and that he has heard that Bean is not like in the department as well.

He also says he knows a student who was born biologically male, but identifies as a female. He says she is not comfortable even going to the English department offices because she also feels “unsafe”.

Jay requests that he be assisted with withdrawal from Bean’s class as do the other 5 students.

Further, Jay shares that a month ago, while walking across campus with Kennedy, he heard another student use the word “faggot”. He cannot identify the other student, but thinks he is in student government.

He also heard from Georgina that, at a recent social function, a group of students made fun of the LGBTQ group on campus. As a result of this, he says he feels even more “unsafe”.

Jay threatens to go to the media/OCR/hire an attorney if you do not follow through.

<https://www.youtube.com/watch?v=XzSJ4uNspq8>

(Title IX and the First Amendment)

Elements of Sexual Harassment:

- a. unwelcome conduct,
- b. determined by a reasonable person,
- c. to be so severe, and
- d. pervasive, and,
- e. objectively offensive,
- f. that it effectively denies a person equal access to the university's education program or activity

LIVE HEARINGS

Title IX: https://www.youtube.com/watch?v=yQ4-S5_Jahw

Adelphi University Office of Student Conduct and
Community Standards - Amanda Wright

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SOURCES

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