

# TITLE

# IX TODAY

Helping colleges, universities  
& schools ensure gender equity

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## ABOUT US

The NCHERM Group, LLC., a law and consulting firm offering systems-levels solutions to create safer campuses, and the Association of Title IX Administrators, which provides networking and professional development for Title IX Coordinators, publish *Title IX Today*, its companion website, [www.TitleIX.Today](http://www.TitleIX.Today), and subscriber e-newsletter.

## THE LEAD | INVESTIGATIONS

# 'Don't lie to me' — Avoid common errors in assessing credibility effectively

By Brett A. Sokolow, J.D., Publisher

Credibility is the process of weighing the accuracy and veracity of evidence. To assess credibility, you have to evaluate the source, the content, and the plausibility of what is offered. When source, content, and plausibility are strong, credibility is strong. Credibility exists on a 100 percent point scale, with the most credible evidence being 100 percent, and the least credible being zero percent. Most evidence lies somewhere in between. Your job is to figure out where, especially when believing one party and not the other is enough to establish that policy has been violated.

If credibility dips below 50 percent, the witness or evidence is less credible than more. That doesn't weight the scale as you are trying to determine where the preponderance of the evidence lies. Evidence has to be more credible than not to weight the scale at all.

Some aspects of credibility are positional/locational. Could witnesses hear what they say they heard? See what they say they saw? Some aspects of credibility are based on credentials/knowledge/expertise, but those factors need to be established, not assumed. Some aspects of credibility are weighted based on neutrality, impartiality, and objectivity. The more loyal witnesses are based on relationships to one party, the more biased their evidence may be.

Neutral witnesses may be more objective than partisan witnesses.

Credibility is best established through corroboration, which is provided through sufficient independent evidence. Corroboration is not merely another witness who agrees with the first, but evidentiary support for what a witness contends, evaluating source, content, and plausibility together. Also, look for subtle bias, which the witness may not even be aware of, including victim-blaming attitudes, group defensiveness, and fear of getting in trouble. Lack of proximity detracts from credibility. What you saw in person is most valuable. What you heard from the responding party about the incident after the fact is less so.

Credibility can also be assessed by triangulation, which means using two (or more) data points to extrapolate or infer that a third data point is more likely than other possibilities. For instance, if X and Y are true, Z is more likely to be true than A, B or C. This is known as abductive reasoning.

Avoid micro-expression analysis and gestic unless you are an expert and have discovered someone's tell for deceit. Otherwise, crossing limbs, looking up to the right, and other so-called telltales are not evidence.

Let's explore credibility assessment in context to get a better feel for it.

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## FROM THE FIELD | LIABILITY

## Case provides reminder to ensure gender neutrality in Title IX processes

By *Cynthia Gomez, Editor*

The case of *John Doe v. Columbia University*, decided by an appeals court earlier this year, should serve as a reminder to ensure that all Title IX policies, procedures, and practices are gender-neutral.

A freshman student-athlete at Columbia University referred to as “John Doe” was accused of sexual assault by a female classmate, “Jane.” According to him, a consensual sexual encounter occurred in the bathroom of her dormitory suite. When the new school year began, former Assistant Director for Gender-Based and Sexual Misconduct Rosalie Siler informed him that Jane had made a report claiming to have been coerced into having sex with him. A no-contact order was issued.

He was found responsible and suspended for violating the school’s policy on non-consensual sexual intercourse. Following an unsuccessful appeal and a second appeal from Jane to reduce the sanctions imposed on him, he sued, alleging that Columbia violated Title IX and state law by practicing sex bias.

Doe claimed that although he was advised of the availability of counseling and psychological services, he was not told of other supports available

throughout the investigation and adjudication process. He further claimed the Investigator had been hostile towards him, disregarded parts of his account, and failed to tell him that he could submit a written statement to the disciplinary panel.

While his disciplinary case was ongoing, students at Columbia had expressed concern that female students’ sexual assault complaints against male students were not being taken seriously. Those concerns reached the press, and included this *New York Post* article headline: “Columbia drops ball on jock ‘rapist’ probe: students.” The Investigator who had handled Doe’s case was named in another publication as conducting “inadequate investigations” and acting favorably towards male students and student-athletes. Doe claimed that her actions in his case were an attempt to swing that perception in the other direction.

The district court dismissed his complaint for failure to state a sufficient claim and Doe appealed. The appeals court found that his alleged facts supported “a minimal plausible inference of bias.” It vacated the lower court’s judgment and remanded the case. ♦

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*That the harassing behavior continued* after the responding party was informed that it was unwelcome, if established, would add credibility to the reporting party's account as corroborative.

*Major inconsistencies in testimony* would likely detract from credibility. Minor inconsistencies usually would not. Even lying is not a 100 percent credibility killer. We all lie. The job of the investigator is to determine why the witness is lying, or what the lie is about.

*A delay in reporting harassment* does not detract from credibility. Individuals may delay reporting because of fear of retaliation, not knowing or trusting the policy, fear of being blamed for causing the harassment, not understanding that it was harassment, etc.

*Changes in the behavior of the reporting party* after the harassment might add to credibility. For example, after being harassed, the reporting party cried or was upset; avoided class, meetings, or certain areas; or experienced deteriorating academic performance.

However, if none of these things occurred, it would not mean that the allegation was not credible, only that the individual who complained perhaps was affected differently, less intensely than others might, or did not express emotions openly.

*Documents such as diaries, calendar entries, journals, notes, or letters describing the incident(s)* can add to credibility, but can also be manufactured after the fact. The adage, "Trust, but verify," applies.

*Telling someone about the harassment* may add credibility, but if accounts provided to others vary meaningfully, that can undermine credibility.

*Other allegations about the respondent* could add to the allegation's credibility.

*The fact that a relationship was at one time or in some aspects consensual* does not detract from credibility, nor is it a

defense against a subsequent charge of sexual harassment. People can be assaulted after consensual sexual acts, or engage in consensual sexual acts after having been assaulted.

*The fact that the respondent did not intend to harass the reporting party* is not a defense. It is the act that is important, not the intent of the person who engaged in the behavior. Exceptions might include accidental or incidental sexual contact, or causing an intimate partner accidental physical harm.

Not knowing that the behavior was offensive and unwelcome is not a defense. The standard is whether a reasonable person would deem the behavior offensive and unwelcome.

The fact that the person who made the allegation(s) did not tell the alleged harasser that the behavior was offensive does not affect credibility. Many people are fearful of doing so.

Motivation to lie, exaggerate, or distort information should be assessed when there are differences in what was reported or questions about veracity or accuracy.

A preponderance can be established simply because you believe one party and not the other, based on assessment of credibility of the party and the evidence provided.

Explanations of why the harassment occurred do not add to credibility. People who have sexually harassed others often acknowledge their behavior but explain and defend it in ways that do not justify their actions and should not add to their credibility. To the contrary, such excuses should be seen as admissions of having engaged in sexually harassing behaviors.

The information in this article is covered in-depth in the ATIXA whitepaper, "The 7 Deadly Sins of Title IX Investigations," at [https://atixa.org/wordpress/wp-content/uploads/2012/01/7-Deadly-Sins\\_Short\\_with-Teaser\\_Reduced-Size.pdf](https://atixa.org/wordpress/wp-content/uploads/2012/01/7-Deadly-Sins_Short_with-Teaser_Reduced-Size.pdf). ♦



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## KEY TAKEAWAYS

- » When investigating Title IX-related reports, it's important to evaluate the source, the content, and the plausibility of the information being offered to determine how credible it is.
- » Evidence has to be more credible than not to weight the preponderance of evidence scale at all.
- » Corroboration and triangulation may be useful tools in assessing the credibility of information and/or witnesses.
- » Consider the possible motivations of those offering evidence or corroborating information. ♦

## COMPLIANCE CORNER | POLICIES &amp; PROCEDURES

## A ton of feathers: Missing the small stuff can add up to big compliance issues

By Jennifer L. Ball, Ph.D.,  
Contributing Editor



JENNIFER L. BALL, PH.D.

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### KEY TAKEAWAYS

- » The seemingly small, administrative details involved in Title IX compliance do matter, so pay attention to them to ensure efficacy and consistency, and to avoid major compliance issues.
- » OCR is focusing more on inconsistencies in policies and the publication/dissemination of information, so work to eliminate any that might exist at your institution.
- » Failing to perform regular electronic “cleaning” of your Title IX site and other institutional pages containing related information can lead to confusion, misinformation, and noncompliance. ♦

When I want to make a point to a group about the importance of small details and how they can add up, I ask them how much a ton of feathers weighs. After some laughter and a few odd looks, someone invariably supplies the answer: a ton. I then explain that when we ignore little things, like sexist comments or minor unwanted contact, it can add up to a big thing like sexual harassment. Title IX compliance has many moving parts. As we work with our limited resources to meet our compliance responsibilities, it can sometimes be easy to overlook some of the finer details of compliance. However, if we miss enough of these, they can add up to a major non-compliance issue.

A review of some recent Office for Civil Rights resolutions letters, as well as a look at my own institutional to-do list, revealed some suggestions to help you avoid finding yourself with a ton of feathers.

For one, be careful that you aren't myopic in policy reviews. We all know to review our sexual misconduct policy annually, but what about related policies and statements? Consider this: What happens when you go to investigate a report involving a student and staff member, and the student investigation process and the staff investigation process don't match up?

Remember to review related policies as well. OCR cited the University of New Mexico for being out of compliance because it “had in place 17 overlapping, and often conflicting, policies related to sexual harassment and sexual assault.” Don't

forget to review policies that may relate only to certain departments or students. While that may seem daunting, a simple email to Administrative Assistants, Directors, or Department Chairs with a short survey attached can help by having others do the work for you. Another option is to enlist an intern gather this information for you.

Second, make sure that your policy doesn't hide your notice of nondiscrimination and that it is widely available. The recent resolution letter involving Frostburg State University makes reference to having a notice of nondiscrimination, an anti-harassment/anti-retaliation statement, and a sexual misconduct policy. The resolution agreement lays out very clear expectations of what to include in all three documents. The anti-harassment/anti-retaliation statement may be new for some, making that specific section of the resolution agreement worth reading, as it lays out what a concise statement to a varied audience on university resources and response to Title IX-related issues looks like.

OCR has different publication requirements for each of those documents. The anti-harassment/anti-retaliation statement is to be published in the campus newspaper and sent to specific constituencies, while the notice of nondiscrimination is to be inserted into promotional materials. Of note in the Frostburg agreement is OCR's direction on policy and distribution: “ensure that the old policies are not available anywhere on the university's website to the extent practicable, and that all references to them have been removed

from current university publications.”

Websites can pose an issue in dealing with rogue information. My institution’s website is compromised of approximately 10,000 individual web pages. Tracking down old information can seem less than practical. This is where IT, interns, and a set protocol for reviewing the website can come in handy. First, perform a search on your website and find all references to Title IX, gender discrimination, sexual harassment, sexual assault, sexual violence, and the many associated descriptors your institution may use. Then, find out who owns the pages on which you found these references. Have a discussion with those stakeholders about how to make sure that information stays relevant and consistent across pages. Once you all agree to a protocol for doing this, write it down and follow it. Since information on your Title IX site may change with future policy revision and the emergence of best practices, it may be wise to have institutional pages that reference or relate to Title IX simply contain a link to your office’s website, rather than having content that has to be updated each time your Title IX policies, procedures, or practices change.

Third, don’t forget that your Title IX policies must address all gender-based discrimination and sexual harassment, not just sexual misconduct. In a listserv post, ATIXA Executive Director Brett A. Sokolow recently reminded that, “In every allegation of sexual misconduct, you also have to make a finding with respect to sexual harassment/hostile environment. OCR regulates sexual misconduct/violence only because this is a form of sexual harassment.”

Fourth, language matters. Is it consistent throughout your policy and across policies? Are important terms well defined? Is content accessible?

Cutting and pasting, as well as decentralized policy revision, can lead to inconsistencies in terminology, missing or broken links, and a lack of timely revision. How can you use a policy if you are not sure if you are the victim, the survivor, the complainant, or the reporter, or if you can’t find related information? Such flaws in the University of New Mexico’s policies caused OCR to conclude that “a UNM student, particularly one seeking help and guidance after experiencing a traumatic assault, would likely have found the university’s policies to be daunting and inscrutable.”

Review and define the roles of the Title IX Coordinator and any Deputies. While this may be a task that we avoid for a myriad of reasons, it is a necessary one. Recent resolutions reaffirm OCR’s 2015 guidance to make sure the Title IX Coordinator is given the positional ability and authority to fulfill the institution’s Title IX duties. The Frostburg resolution specifically directed Frostburg to “develop specific statements of the roles and responsibilities of each Deputy Coordinator that clearly delineate the scope of each Deputy Coordinator’s duty and their subordinate roles to the Title IX Coordinator.”

Last year, OCR indicated that it was interested in these areas: recruitment, admissions, counseling, financial assistance, athletics, sex-based harassment, treatment of pregnant and parenting students, discipline, single-sex education, employment, and retaliation. In 2016, it added transgender issues to that list. When is the last time you thought about how to audit your campus on these issues? You don’t have to go it alone. At my institution, we created a sub-committee of our main Diversity and Inclusion Committee to review all inclusion, equity, nondiscrimination, and accessibility policies. Committees

with the Title IX Coordinator at the helm are a recommended method of review and oversight.

In addition, it’s worth remembering that record-keeping is about more than maintaining good investigation files. Have a good incident management system in place. Don’t forget that correspondence is part of your records. Make sure emails don’t just hang out in your inbox. Organize them by the cases they reference.

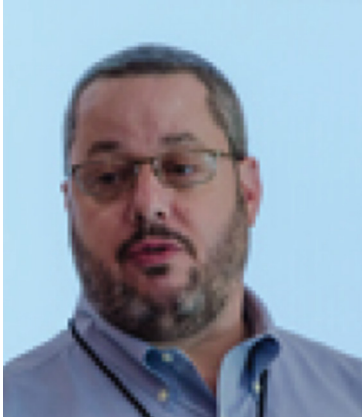
Training is yet another area to consider. Keep an organized calendar of all training and programming events. If you are using an online training program, use its tracking functions for record-keeping.

Likewise, keep track of your post-resolution actions and annual review efforts. While these types of records may not be housed in the same file repository, you need them all to demonstrate compliance and to create institutional memory.

Also, how are you auditing your grant-funded research programs to make sure they are meeting Title IX’s requirements? How are you training grantees in Title IX?

Let me finish with a word about related compliance mandates. State laws should be integrated into your process if they relate to gender-based harassment, discrimination, or violence. We need to understand our state laws as they relate to not only Title IX, but to Section 304 of the Violence Against Women Act and the Clery Act as well, and how we’re doing in terms of compliance to those two related laws. Review the latest updates to “The Handbook for Campus Safety and Security Reporting.”

While it can seem overwhelming to track and review so many moving parts, it is vital to ensuring institutional compliance and will help your office and its efforts run more smoothly. ♦



JASON LAKER, PH.D.

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### KEY TAKEAWAYS

- » Understanding the realities of how students communicate about sex and consent is essential for providing relevant programming and using the correct lens for conducting inquiries.
- » Adopting mainstream ideas about “hook-up culture” in programming disregards many students’ reality.
- » The LGBTQ and kink communities may hold wisdom and knowledge that could be useful for a “consent playbook.”
- » Engage students in dialogue about consent to foster healthy relationships and better communication. ♦

## Pay attention to reality of how students communicate sexual consent

By Amy Murphy, Ph.D., Contributing Editor

Jason Laker, a Professor of Counselor Education at San Jose State University and Affiliated Research Faculty in the Center for Research and Education on Gender and Sexuality at San Francisco State University, recently discussed current innovations in consent education with us. Also an Affiliated Consultant with The NCHERM Group, he explained how Title IX administrators can better inform their prevention efforts.

### Q Tell me about your research with consentstories.org?

A The term “consent” gets used a lot, particularly in terms of policy making and legal definitions, but there is little to no research about how it actually happens in lived experience. People don’t really know how others communicate in intimate contexts about sex and consent. Consent stories are vignettes about how people actually communicate or negotiate agreement to sexual activity.

We recruited a cohort of cisgender, heterosexual college students (because the dominant scripts privilege binary, heterosexual identities) in their first year in college. The phrase “it just happened” came up multiple times during the first series of interviews. People go through these experiences on autopilot, progressing to a higher stage of intimacy without fully realizing it. So, “it just happened” is an accurate depiction from their lived experience. Using the analogy of a football game TV commentary, we then asked participants to rewind and go frame by frame through what occurred. With this method of interviewing and with the understanding that we were studying communication

rather than sex, students were able to share more about how they and their partners communicated what they did or didn’t want to do.

One woman indicated that when her boyfriend wants to have sex, he nuzzles under her cheek. If it’s yes, she turns to him. If it’s no, she pushes him away. Another student said he was lying on top of his girlfriend making out, and gently tugged her sweatpants leg a couple of times. She removed them, and they had sex. This is the actual “realpolitik” of how people communicate what they want. In both examples, the behaviors described are clear, legal, and comport with student conduct codes and human psychology. These can be shared for capacity-building, social action theatre, case studies, and giving students options for communicating about sex.

### Q How do students’ pre-college experience impact our work?

A We often treat students like they just hatched at orientation, despite the fact that they bring at least 18 years of experience. In our study, we address the idea that “the college experience” is a cultural phenomenon and institution — an elevated, mythical, and big moment in people’s lives. Consider the phrase, “when you get out in the real world.” In and of itself, it implies that college is a dream or fantasy without consequences, which can create a cultural “set-up” for students about what they expect or perceive in the college environment.

While we cannot ignore students’ “college experience,” we must also take into account their experiences and learning about sexuality before coming to college. My collaborator, Dr. Erica Boas’ research focuses on early learning

of sexuality during childhood, particularly in terms of the discomfort, silence, and shame arising from adult reactions to children's curiosity about sex. Her dissertation focused on elementary school, and it is striking how enforcement of what is or isn't appropriate can impact our feelings and beliefs about our bodies and sexual selves. These continue to impact us into adulthood. We need to understand more about that if we want to improve sexual agency and positivity.

### Q How does the "hook-up culture" come into play?

A Students of this generation have the same or fewer partners and instances of sex as their parents did. It's also the case that the existence of "hook-up culture" is dependent on identity. For instance, people of color face judgments in which their decisions are ascribed to their races. Men and women face different judgments as well, such as being called a "player" or a "slut." Further, to be part of a "hook-up culture" on campus, you have to be very present in the social culture. Students who have to work multiple jobs and/or because of their own family culture live at home are often less involved in the social culture and the "hook-up culture." By understanding these nuances, we can be more intentional in our programming, counseling, and support efforts, and in our responses to situations.

### Q What can your research teach Title IX administrators?

A Understanding how students communicate sexual consent can add nuance and sophistication to Title IX inquiries. Even if dealing with a case that already happened, an investigation requires a framework or lens for conducting the inquiry. If your lens is based on outdated, reductionist, or inaccurate knowledge, your inquiry will be flawed. With an updated awareness of what goes on in students' lives

in regards to consent and the diversity of ways in which people communicate and interpret intentions, your analytical framework for your investigation will be more robust. We have trained Title IX Coordinators on this model, with positive results.

### Q Can you tell us about your work with the LGBTQ and kink communities?

A Queer people have had to, by necessity, come up with clever ways to flirt in case the prospective partners react poorly (e.g., taking offense at being approached by someone of the same sex). They have to be creative to stay safe. These consent stories may be more intricate. In the kink culture, you are expected to be very clear about your intentions — which toy, which body part, and what boundaries are among the details typically communicated. Our hypothesis is that both of these groups hold wisdom and community/cultural wealth that could be beneficial in terms of a consent playbook.

### Q What should we keep in mind related to consent policies?

A Policy and law receive 95 percent of the attention regarding the issue of consent. However, a policy or law will not prevent coercion or assault. Taking something complex and making it granular is certainly helpful to lawyers, prosecutors, and judicial affairs professionals, but this is not necessarily serving students. While it is very important for institutions to have as clear a policy as possible and follow it, students also have a great deal of knowledge and wisdom about this topic. So, my advice is to focus less on policy and more on dialogue. Share consent stories and ask students what they think to involve them in dialogue and get them thinking. This, in turn, can help to foster healthier attitudes and better communication around sexual activity. ♦

### About the Author

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## Foster inclusiveness with these 3 strategies



NATASHA STEPHENS

As a new Title IX Coordinator at an institution, it is important to foster an inclusive environment, in which individuals across campus want to be involved with your office and in which collaboration is valued, explains Natasha Stephens, the Title IX Coordinator at Wichita State University. Here, she explains some ways to foster inclusiveness and raise the visibility of your office and Title IX issues:

1. We asked members of our campus community to take part in our Title IX Campaign. It was the

first step in forming and building relationships with others on campus, but also an opportunity to learn what the campus community viewed as being important about Title IX.

2. We invited members of the campus community to create and submit a flyer and logo with a tag line to visually capture the essence of Title IX. The entire campus voted and a winner was selected.

3. A Title IX Student Forum was launched in the Spring of 2016. We already had a standing Title IX Committee with faculty and staff represented, but wanted to better involve students. Since, students have elected to meet on a monthly basis. As an ad-hoc group with support and

partnership from our Student Government Association, it will work to provide information and spread the word about the forum as a place for all students to discuss, plan, program, and advocate for Title IX issues on campus.

These are just a few ways in which we at Wichita State University are working to not only foster an inclusive campus environment, but to also increase education and awareness of Title IX. ♦

