

**STUDY GUIDE :
HONORING AND OVERRIDING
REQUESTS TO NOT INVESTIGATE
REPORTS**

20-Minutes-to...
Trained

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20-Minutes-to...*Trained*: Reluctant Reporter Issues Table of Contents

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20-Minutes-to...*Trained*: Reluctant Reporter Issues Learning Outcomes

- Participants will build confidence in responding to reluctant reporters.
- Participants will recognize that OCR requires response, even where a reporter requests anonymity and that Title IX Coordinators should strongly support their request, except where there is a threat to the community.
- Participants will understand that even under the Proposed Regulations retraction to “actual notice,” administrators face negligence liability where they knew, should have acted, and failed to do so.
- Participants will be able to explain that where there is a reluctant reporter, the initial inquiry should still include whether the report indicates a pattern, predation, threat, weapon or violence.
- Participants will be able to instruct future reluctant reporters on what options are still available to them, even if they prefer to remain anonymous or prefer not to participate in a formal process.



20-Minutes-to...*Trained*: Reluctant Reporter Issues Discussion Questions

- What types of questions can be asked to ensure a reluctant reporter does not wish to move forward?
- What information should the Title IX Coordinator share about the process and confidentiality?
- What factual scenarios might lead the school to move forward, even with a reluctant reporter? How might this change under the Proposed Regulations?
- What other options are available to a reluctant reporter?



20-Minutes-to...*Trained*: Reluctant Reporter Issues Case Studies

Karen and Dr. Yorke

The Title IX Coordinator at Vexler University, a large 4-year public university, recently received a call from Dr. Conway, the associate dean of the College of Arts & Sciences. Dr. Conway explained that one of his college's academic advisors had contacted him after meeting with Karen, a graduate student in the geology department who is expected to graduate with her master's degree at the end of the upcoming fall semester. According to Dr. Conway, the advisor said that Karen had stopped by her office unexpectedly and asked about her academic schedule for the upcoming fall semester, specifically whether she could take GEOL 6315, a course in which she was enrolled for fall semester and needed in order to graduate, with someone other than Professor Yorke, the instructor of record.

When the advisor told Karen that Professor Yorke was the only professor teaching the course that semester, Karen seemed visibly concerned. When the advisor asked Karen why she didn't want to take Professor Yorke's class, Karen said that she "just didn't feel comfortable" being in his class and would not provide any further explanation. In looking at Karen's academic transcript, the advisor noted that Karen appeared to have just finished a course taught by Professor Yorke in the second summer semester, which concluded a week prior to their meeting. Concerned by how adamantly Karen seemed to want to avoid being in a class with Professor Yorke, the advisor referred the concern up to Dr. Conway, who scheduled a meeting with Karen to see if he could help.

Dr. Conway told the Coordinator that when he met with Karen, he told her that there was likely no alternative class, but that he really wanted to understand her concerns related to Professor Yorke and would try to help as best he could. Though initially reluctant, Karen eventually said, "Well, Dr. Yorke was our professor for this summer's field camp, the seminar class, where we camp out in the hill country for a couple weeks and do all types of hiking, mapping, and measuring. I mean, he's a good professor, he really is, I actually had him for another class my first year in grad school and it was fine, but, I don't know, some stuff happened during field camp and I'd just feel more comfortable taking a section taught by someone else, if that's at all possible."

Dr. Conway said he asked Karen if she would feel comfortable telling him more about what happened during field camp, but she was resistant. Dr. Conway said he told Karen, "It doesn't sound like your concerns with Professor Yorke are 'academic' in nature," to which he said Karen responded with a subtle shake of her head. Dr. Conway contacted the Title IX Coordinator shortly after Karen left his office.

When the Title IX Coordinator asked Dr. Conway whether he was aware of any other concerns regarding Professor Yorke, Dr. Conway said, “No, not at all. He’s been with the department for over 20 years, he’s a highly respected researcher in his field, and the students really seem to love him.” He went on to say, “I would describe Dr. Yorke as very hip, very down-to-earth. He’s the ‘cool professor’ in the department, I’d say. He can be very outspoken at times, not afraid to raise eyebrows, but I’ve not necessarily heard of him saying anything super offensive.”

The Title IX Coordinator met with Karen soon thereafter and, though initially reluctant, Karen eventually told the Coordinator about her interactions with Professor Yorke during field camp. Karen said that they just recently returned from field camp, adding that grades had not been posted yet. Karen described field camp as an extensive, multi-week outdoor graduate course where she and 12 other graduate students in the geology department, a teaching assistant (TA), and Professor Yorke all drove out to the nearby hill country and camped for several weeks, breaking every few days to stay at a local hotel for showers and air conditioning. Karen said days were spent hiking the area, mapping the terrain, and studying various rock and geologic formations, while nights were typically spent finishing assignments and then eating, talking, and singing around the campfire. Karen said it was fairly common for Professor Yorke to break out his acoustic guitar.

Karen said that, on multiple occasions during the daily hikes, Professor Yorke would make comments or ask her questions that made her feel uncomfortable, often when the other students were scattered about taking measurements and few were within earshot. On one occasion, she said Professor Yorke told her, referencing the spaghetti-strap tank top she was wearing, “You might want to pull those straps down onto your arms so you don’t get tan lines.” On another occasion, as she and one of her female classmates were climbing up some rocks and Professor Yorke was climbing up behind them, Karen said that Professor Yorke remarked, “I’m not sure how you ladies do this in such tight shorts. Looks very constricting.” Karen said they just tried to laugh it off, but were decidedly aware of the fact that he was staring at their butts.

Karen said that on the last night of field camp, as everyone sat around the fire, Professor Yorke squeezed into a small space next to her with his guitar, despite there being other places to sit with more room. She said he began to play his guitar and kept urging her to sing with him, saying that “everyone talks about how beautiful your voice is.” Karen said that at first it seemed playful, but he persisted even after she refused several times, and it embarrassed her. Later, as other students started leaving for their respective tents, Karen said Professor Yorke turned to her and asked offhandedly if she was dating anyone. When she said no, he asked her if there was anyone in the geology department she would consider dating. Karen said she just laughed and said, “probably not.”

Karen said a few minutes later, Professor Yorke leaned in, started talking more quietly, and began telling her about his wife and how she doesn’t understand the type of work he does, and how much he enjoys talking to women who understand geology and can have engaging conversations with him about the subject matter. Karen said she just listened and didn’t say much, looking for an opportunity to head to her tent. Karen said, “Finally, Elise came to save me—she was my tent mate. I think she could tell I was uncomfortable and she kind of interrupted Professor Yorke to tell me to come to the tent. I think she made up something about it being cold and needing my body heat.”

Karen said that the following day they packed everything up and started the drive back to campus, with all the students in the van driven by the TA, and Professor Yorke following them in the Suburban carrying all the supplies. Karen said as she sat in the back of the van with a few of her classmates, she received a text message from Professor Yorke. She explained to the Coordinator that everyone had exchanged phone numbers at the

start of field camp and that a group text had been the primary means of communication between Professor Yorke and the students. This text, however, was sent only to her and read, “I can’t get the thought of your face glowing in the firelight out of my mind. I really wish we could have sung together; I would have loved to hear your beautiful voice.” Karen said she did not know how to respond but felt like she should say something, so she replied, “Haha, thanks Professor! Camp was a lot of fun and I definitely learned a lot.” Karen said she still has the text messages on her phone.

When they arrived back on campus, Karen said she could sense that Professor Yorke was looking in her direction as they got out of the van, but that she purposefully averted her eyes, quickly grabbed her belongings, and went to her car and left campus without saying much to anyone. Karen said she has not spoken to Professor Yorke since leaving campus that day and has been very reluctant to tell anyone about the situation. Karen said she thought seriously about reporting her concerns, but feared that it would jeopardize her grade in the class.

She said that since she is graduating soon, she didn’t want to do anything to derail that and thought, rather than making it into a big deal, she would just try to avoid having another class with him. Karen also mentioned that Professor Yorke has a reputation in the geology department, particularly among the graduate students, as being somewhat flirtatious toward female students, adding that since it hadn’t been addressed before, she wasn’t necessarily crazy about being the first person to make an issue out of it.

Anne

Anne Chen, a student at Citron College, was an ardent basketball fan. Last term, she attended a basketball game with a group of friends. At the game, she met three young men who were fraternity brothers. Anne had friendly conversations with the men, who shared a container of rum and coke with her.

The young men invited Anne and her friends back to their fraternity house for a post-game party and to talk about the “big win,” but her friends declined. Anne decided to go with the young men. The party lasted for hours, and a considerable amount of alcohol was consumed by everyone, including Anne.

Anne eventually accompanied the three men to their upper floor room for further conversation, and to listen to music. She continued to drink alcohol there, and became so intoxicated that she occasionally “passed out” for several minutes at a time. Anne contends that she was raped by the three men while she was not fully conscious.

Anne left the fraternity house early in the morning to return to her dorm. She did not call the police or seek medical attention. Ten days later, she described the incident to a friend, who convinced her to file a report with the Dean of Student’s Office at the college. During follow-up interviews, two of the three men denied having any sexual contact with Anne. The third admitted having sex with her, but stated that it was “definitely consensual,” and that Anne was fully conscious during that time.

All three men were charged with sexual assault. A lawyer representing all three men wrote to the dean, stating that the charges by the college must be dropped because there were pending criminal charges, and that would place the men in double jeopardy. Anne does not want to testify at the conduct hearing if it means that she will have to confront the three men, but she is willing to submit a written statement.



20-Minutes-to...*Trained*: Reluctant Reporter Issues Case Studies Question & Answer

Karen and Dr. Yorke

For Discussion:

- What information should be shared with Karen about her options to remain anonymous?
 - The school can honor her request unless the report indicated a pattern, predation, threat, weapon, or violence.
 - The school would want to investigate her report that other graduate students find Prof. Yorke flirtatious to assess whether there is a pattern or predation.
 - Karen should be informed that retaliation is prohibited and is a separate violation of policy.
- How could the Title IX Coordinator determine pattern or predation without using Karen's name as a reporter?
 - The Coordinator could review records to determine if there have been other reports.
 - The Coordinator could ask Dr. Conway further questions about any rumors or rumblings occurring within the department about Prof. Yorke.
 - The Coordinator could ask Karen for names of other students who might come forward.
- If Karen decides not to move forward, what information should the Title IX Coordinator share with her?
 - That the process will still be there for her if she changes her mind in the future.
 - That they can attempt to move her to another class, if another class is available, or work with her academic program to determine alternative options.

Karen and Dr. Yorke

For Discussion:

- Can the college proceed if Anne decides not to participate in the proceeding?
 - A decision-maker could facilitate questioning between Anne and the responding students and Anne would not be required to confront the three men directly. Her written statement should be provided to the three men and they should have an opportunity to question Ann through the decision-maker.
 - Under the Proposed Regulations, if Anne does not appear at a live hearing that would allow the responding students to cross-examine her – and credibility is a central issue to the case – and

evidence and statements provided by Anne would need to be excluded from the decision-makers evaluation.

- What policy information might be helpful to encourage Anne to participate in the process?
 - Anne should be informed of retaliation policies that would prohibit any adverse action against her because of her report.
- What safety considerations should be made?
 - The Coordinator should do a pattern, predation, threat, weapon, violence analysis.
 - The Coordinator should review records to determine whether there have been other incidents with any of these students.
 - The Coordinator should also determine what supportive measures should be put into place. Here, if the men have been released from jail, an interim suspension may be necessary for Anne and the community's safety.



ATIXA's One Policy, One Process Model When a Reporting Party Does Not Wish to Proceed

N.B.: All text offered in [brackets] throughout this document is optional language. All gray highlighted text must be customized by the end-user or deleted if not needed. Please find and replace the word "Institution" throughout with the name of your college or university.

As used in this document, the term "reporting party" refers to the person impacted by the alleged discrimination. The term "responding party" refers to the person who has allegedly engaged in discrimination. The term "report" and "allegation" are used interchangeably and denote information provided to the Institution regarding conduct that may have violated this policy.

5. Retaliation

Retaliation is defined as any materially adverse action taken *because of* a person's participation in a protected activity. Protected activity includes reporting an incident that may implicate this policy, participating in the resolution process, supporting a reporting or responding party, or assisting in providing information relevant to an investigation.

Acts of alleged retaliation should be reported immediately to the EEO/Title IX Coordinator and will be promptly investigated. Institution is prepared to take appropriate steps to protect individuals who fear that they may be subjected to retaliation.

Examples of Retaliation:

- Student-athlete A alleges sexual harassment by a coach; the coach subsequently cuts the student-athlete's playing time in half without a legitimate justification.
- A faculty member alleges gender inequity in pay within her department; the Department Chair then revokes his approval for her to attend a national conference, citing the faculty member's tendency to "ruffle feathers."
- A student from Organization A participates in a sexual misconduct investigation as a witness whose testimony is damaging to the responding party, who is also a member of Organization A; the student is subsequently removed as a member of Organization A because of their participation in the investigation.

6. Confidentiality and Reporting of Offenses Under This Policy

All Institution employees (faculty, staff, Coordinators) are expected to report actual or suspected discrimination or harassment to appropriate officials immediately, though there are some limited exceptions. In order to make informed choices, it is important to be aware of confidentiality and mandatory reporting requirements when consulting campus resources. On campus, some resources may maintain confidentiality and are not required to report actual or suspected discrimination or harassment. They may offer options and resources without any obligation to inform an outside agency or campus official unless a reporting party has requested this information be shared. If a reporting party expects formal action on their allegations, reporting to any employee can connect them with resources to report crimes and policy violations, and these employees

will immediately pass reports to the EEO/Title IX Coordinator (and/or police, if desired by the reporter), who will take action when an incident is reported to them. The following describes the reporting options at Institution:

a. Confidential Reporting

If a reporting party would like the details of an incident to be kept confidential, the reporting party may speak with:

- On-campus licensed professional counselors and staff
- On-campus health service providers and staff
- [On-campus Victim Advocates]
- [On-campus members of the clergy/chaplains working within the scope of their licensure or ordination]
- [Athletic trainers] (if licensed and privileged under state statute, and/or working under the supervision of a health professional)
- Off-campus (non-employees):
 - Licensed professional counselors and other medical providers
 - Local rape crisis counselors
 - Domestic violence resources
 - Local or state assistance agencies
 - Clergy/Chaplains
 - Attorneys

All of the above-listed individuals will maintain confidentiality except in extreme cases of immediacy of threat or danger or abuse of a minor. Campus counselors [and/or the Employee Assistance Program] are available to help free of charge and may be consulted on an emergency basis during normal business hours. Institution employees listed above will timely submit anonymous statistical information for Clery Act purposes unless they believe it would be harmful to their client, patient, or parishioner.

When a Reporting Party Does Not Wish to Proceed

If a reporting party does not wish for their name to be shared, does not wish for an investigation to take place, or does not want a formal resolution to be pursued, they may make such a request to the Title IX Coordinator, who will evaluate that request in light of the duty to ensure the safety of the campus and to comply with federal law.

The Title IX Coordinator has ultimate discretion over whether the Institution proceeds when the reporting party does not wish to do so. Note that the Institution's ability to remedy and respond to a reported incident may be limited if the reporting party does not want the institution to proceed with an investigation and/or the resolution process. The goal is to provide the reporting party with as much control over the process as possible, while respecting the Institution's obligation to protect its community.

In situations involving pattern, predation, threat, minors, weapons, and/or violence, or when the allegations involve serious or pattern employee misconduct, the Institution may be unable to fully honor a request for confidentiality and/or informal resolution.

In cases in which the reporting party requests confidentiality and the circumstances allow the Institution to honor that request, the Institution will offer interim supports and remedies to the reporting party and the community, but will not otherwise pursue formal action. If the reporting party elects to take no action, they can change that decision later if they decide to pursue a formal process at a later date. With formal reports, a reporting party has the right, and can expect, to have allegations taken seriously by Institution, and to have the incidents investigated and properly resolved through these procedures.

Privacy and Sharing on a Need-to-Know Basis

Formal reporting still affords privacy to the reporter, and only a small group of officials who need to know will be told, including but not limited to: [Office for Institutional Equity, Division of Student Affairs, Integrity and Compliance Office, Institution, Police, and the Threat Assessment Team].

Information will be shared as necessary with investigators, Hearing Panel members/Decision-makers, witnesses, and the responding party. The circle of people with this knowledge will be kept as tight as possible to preserve a reporting party's rights and privacy. [Additionally, anonymous reports can be made by reporting parties and/or third parties using the online reporting form posted at www.Institution/ERPAllegationForm, or the reporting hotline at ###-###-####. Note that these anonymous reports may prompt a need for the institution to investigate.]



ATIXA Tip of the Week January 11, 2018

Reluctant Reporters

By Anna Oppenheim, Esq. and Brett A. Sokolow, Esq., President, ATIXA

When it comes to reluctant reporters, questions regarding best practices abound, and with good reason. By and large, Title IX administrators want to respect the wishes of the reporting party and simultaneously do the right thing, for both the parties involved as well as the educational community as a whole. Title IX administrators can feel torn, however, when trying to balance a desire to respect the wishes of the reporting party while still protecting the community and fulfilling the Title IX mandate to stop, prevent, and remedy discriminatory conduct. This tip is intended to help Title IX administrators with the decision-making framework of whether to proceed formally despite the reluctance or unwillingness of the reporting party to participate.

To inform how Title IX administrators have responded to reluctant reporters, our field has utilized, at least in part, research conducted by David Lisak, a well-known clinical psychologist who has spent his career studying interpersonal violence. Lisak, whose work has been broadly published and featured in numerous documentaries, including *The Hunting Ground*, has promulgated the contention that the vast majority of rapes and attempted rapes (over 90%) on college campuses are committed by a very small percentage (4%) of the male student population.

Understandably, Lisak's research and interpretations thereof have been transmuted into certain appropriate responses to a reporting party who is reluctant to proceed with a formal investigation. According to Lisak, a select few individuals account for the majority of campus rapes, with many of these individuals committing multiple acts. Accordingly, campuses and Title IX administrators must constantly be on the lookout for the possibility – and, according to Lisak's claims, the probability - of a pattern of misconduct.

When a reporting party is reluctant, the initial threshold for proceeding with an investigation is to assess with a preliminary inquiry whether there is a credible risk to the reporting party and/or the community. Otherwise, the best practice is to respect the reporting party's wishes and offer appropriate remedies, but not to pursue a formal investigation or discipline. To assess the risk to the community, the Title IX administrator considers (among other factors), whether violence, threat, predation, weapons, minors, or pattern indicate a credible risk (not just a speculative potential for harm).

Often, Title IX administrators sit on or consult with behavioral intervention teams, which are well-positioned to help assess this potential. Where the risk is more than speculative, and the potential harm is substantial, the Title IX administrator will feel more compelled to act formally, rather than to respect the wishes of the reporting party. However, there may still be practical limitations on what a school can do to act if the reporting party refuses to participate, or even recants the allegations. One concern for the Title IX administrator is whether they can act formally even if they feel compelled to do so. Will proceeding garner enough evidence, when the key witness is not-participatory? Will proceeding against the wishes of the reporting party be harmful to them? Subject them to retaliation? Coerce them into participating when they are not emotionally prepared to do so?

To date, many administrators have approached the question of harm to the community with a fairly low threshold. If the risk is speculative, some administrators would rather be safe than sorry. Thus, if violence is alleged, the school moves to a formal footing for the investigation. However, violence may not be credibly alleged. Or, the violence may be relatively minor. The term violence itself is somewhat subjective. The larger point is not whether a single risk factor is present, but whether the allegations present the credible possibility of further harm. Some violence may do so, but not all. Behind the low threshold has always been the Lisak data, impelling us to worry about the high risk of the potential predator.

Yet, more recent research may refute Lisak's work and at least calls into serious question the predatory premise of his findings. Kevin Swartout, from Georgia State University, along with a group of researchers, published a study in *JAMA Pediatrics* suggesting that sexual assaults on campus are not, as Lisak proposed, conducted by a small percentage of individuals but instead are carried out by a larger percentage of young men who don't neatly fit into the profile of a serial rapist. To be sure, this conclusion is difficult to digest, as it proposes there isn't a discrete group of evil-doers on campus, and suggests instead that individuals have various motivations for their actions and may or may not engage in patterns of misconduct. But when faced with the predicament of reluctant reporters, what this research suggests is that unless there are other signs, a report of sexual misconduct does not necessarily raise the specter of a pattern with the same degree of alarm as Lisak's findings do. Of course, Lisak has responded to Swartout's findings, and there is a debate over the validity of both studies. With the difference in repeat perpetration findings ranging from 25%-63% depending on which study you read, administrators may want to look carefully at the literature, the articles about each study, and the recency of the data to determine which is the more credible source and methodology.

Accordingly, while Title IX administrators need to be ever vigilant regarding the credible risk to the reporting party and the educational community, current research may cause us to rethink the low threshold or assumptions of repeat perpetration that undergirds decisions with respect to pursuing situations with reluctant reporting parties. This may impact decision-making on interim suspensions, to an extent, when they are based on safety concerns. It should also provoke us to be more willing to utilize our school's BIT and/or threat assessment capacity to assess actual risk, rather than speculating as to whether a situation poses a significant threat of harm.