

**STUDY GUIDE :  
APPLYING PREPONDERANCE &  
MAKING A FINDING**

**20**-Minutes-to...  
*Trained*

**PRESENTED BY :**

- W. Scott Lewis, J.D., Partner, TNG & ATIXA Advisory Board
- Sandra K. Schuster, J.D., Partner, TNG & ATIXA Advisory Board





## **20-Minutes-to...*Trained*: Applying Preponderance & Making a Finding Table of Contents**

Learning Outcomes-----	Page 2
Discussion Questions-----	Page 3
Case Studies-----	Page 4
Rebecca Tate and Reese Smith	
Skyler	
Victoria and Peter	
Case Study Questions & Answers-----	Page 10
Rebecca Tate and Reese Smith	
Skyler	
Victoria and Peter	
<i>The ATIXA Playbook</i> Excerpt: Models of Proof for Sexual Misconduct Offenses-----	Page 13

*Reviewer recognizes that ATIXA is not providing legal advice or acting in the capacity of legal counsel, and that they should consult their own legal counsel before relying or acting upon any advice or suggestions made by ATIXA's employees, consultants, or representatives in the course of these training modules. While this training may include compliance elements, ATIXA offers no warranties or guarantees as to content, and accepts no liability for how the content is interpreted or implemented by reviewer.*



## **20-Minutes-to...*Trained*: Applying Preponderance & Making a Finding Learning Outcomes**

- Participants will be able to articulate and explain the preponderance of the evidence standard.
- Participants will understand how to apply the preponderance standard to evidence gathered in an investigation.
- Participants will be able to articulate why the preponderance standard is the equitable standard for behavior covered by Title IX.



## **20-Minutes-to...*Trained*: Applying Preponderance & Making a Finding Discussion Questions**

- What are some techniques you can use to “hunt for feathers” as you weigh the evidence in a case?
- How do you assess the weight of evidence once you find it? Does it weigh as much as a feather, or as much as a cinder block?
- When the evidence is 50/50, tie goes to which party and why?
- When all you have is circumstantial evidence, is it fair to find a violation of policy?
- If you believe one party, and not the other, is that enough evidence to establish a preponderance?



## **20-Minutes-to...*Trained*: Applying Preponderance & Making a Finding Case Studies**

### **Rebecca Tate & Reese Smith**

#### Rebecca Tate's Statement

A former student of mine, Reese Smith, is harassing me and I am fearful for my safety. I have told him repeatedly to stop contacting me, but he keeps parking in front of my apartment and just watching it. He also waits for me after my classes and tries to talk to me. Reese and I met when I took a group of students to England on a study abroad trip last year for my Shakespeare class. On these trips, the group is small (around 10 people) and we all get very close to each other after spending days and evenings together.

Reese and I became very close on the trip. It began as flirting on the flight to England and continued in my room one night. One evening Reese came to my hotel room to talk about a writing project for our course. I was winding down after a long day of touring and was enjoying a glass of wine. I offered him one and he accepted. We worked through his outline for his paper and maybe had a few more glasses of wine. One thing led to another and we ended up having sex that night. We continued to see each other over the past year when we could, even at my apartment when my roommates were out. There was a very strong attraction between us. He even took my Renaissance Literature class last spring so that we could see each other more often.

You need to know I have a boyfriend from home and I told Reese about it. I said we needed to keep our relationship casual. Over the summer I was approached by the head of the English Department about applying for a tenure track teaching position. I was fearful the Department would find out about Reese and it would jeopardize my chance for the position. I decided to break it off with Reese last month and told him we could not meet up any more. I thought I had made it clear this was just fun and games, but he went ballistic and threatened to tell my boyfriend.

He wants an explanation, but I don't want to tell him about the job because I'm afraid he will use that to hold over my head. For the past month, he has sent me endless numbers of texts, and e-mails, drives past my apartment, sits in front of my apartment in his car, stands outside my class, and then yesterday I looked out and he was in the English Department office while I was talking with the Dean! I was so upset I couldn't concentrate. You should also know that two tires on my car were slashed.

## Reese Smith's Statement

I met Becca last year as a participant on a study abroad trip she took to England. She struck me as different from other professors because she was really flirty and hung out with us.

During the trip, she seemed to just be one of the group. One evening I went to her room to talk about a paper I was struggling with. She was super helpful and even offered me a glass of wine. Actually, she and I finished off a couple of bottles. I was pretty loose and when she started rubbing my arm and looking in my eyes and kissed me I didn't know what to think. I was really nervous and didn't know what to say and I knew I should leave, but how could I do that? I was really fuzzy and dizzy. I'm not an academically strong student but Becca assured me she would make sure I did well in college. She even suggested I take one of the classes she was teaching so she could help me. I got an "A" in it.

We hung out together this past year as much as we could. She said she had a boyfriend at home, but she said it was rocky. We even talked about a future together. Then last month, out of the blue she said she wanted to break it off. I couldn't believe it! She won't even tell me what's going on. I keep trying to get her to talk to me, but she just avoids me. I am so frustrated and have tried every way possible to get her to tell me what's going on. I know she cares about me. I'm so confused.

## **Skyler**

Skyler Everett met with the Title IX Coordinator on May 23 and shared the following narrative:

The assault happened last Friday night. A group of us got together at Carmen's place after final exams to celebrate together before we went home. I was having a great time. I started off with some beers and then moved to doing tequila shots – in fact Dakota, my best friend, and I had a competition to see who could do the "salt-slam-slurp" thing the quickest. We had a whole group of people gathering around us and cheering us on. I may have had some other drinks too – I can't remember, but people were passing around Jello shots and test tubes with stuff in them. I may have had some of that. The music was loud and thumping and we were all dancing. There was lots of pot smoking going on and I had a few joints. At some point people started taking off their shirts and I joined in and we were feeling great, then several people got totally naked. I kept on my underwear but no one seemed to be uncomfortable with how much or how little amount of clothes people had on.

Sometime during the evening, it was probably around midnight or so, some guys were playing pool and asked me to join in. I don't remember if it was three guys or more. At one point, I was leaning over to make my shot and one of the guys pulled down my pants. I didn't know what to do so I just laughed and kicked them off, but I was really uncomfortable. I think we played pool for a while and maybe some other people came in. The next thing I knew another guy came up behind me and put his arms around me from behind. He put his penis between my legs and asked me if that was OK. I just froze – I couldn't speak. He proceeded to insert his penis inside me – it hurt but I didn't say anything. The other guys were laughing and saying they wanted in on the action. The next thing I knew I was performing oral sex on several of them. Eventually we all got cleaned up and rejoined the party.

Dakota asked me where I had gone and I just said, "Playing pool for awhile." I didn't want to say what happened – I needed to figure it out. I don't know why I didn't leave, no one made me stay, I liked all the guys and always felt like I was part of the group and now I don't know what's going on. I just feel so guilty, I drank a

ton, got naked and acted like I was “into” it – at least I didn’t specifically say “no” or leave or push anyone away. I’m so confused. It didn’t seem right, but I don’t know. I’m just embarrassed and scared and confused.

## **Victoria and Peter**

Victoria, Reporting Party, Freshman at Vexer College

Peter, Responding Party, Freshman at Vexer College

Hannah, Witness #1, Resident Assistant (RA) at Vexer College

Alice, Witness #2, Freshman at Vexer College & Victoria’s close friend

Around 11:30am on Saturday, December 13<sup>th</sup>, the Title IX Office at Vexer College received an online report from Hannah, an RA on the 3<sup>rd</sup> floor of Hendrix Residence Hall. Hannah’s report stated that Victoria, a freshman resident on Hannah’s floor in Hendrix, had disclosed that she was sexually assaulted the night before, December 12<sup>th</sup>, by Peter, a fellow freshman who lived in Bachman Residence Hall, directly adjacent to Hendrix. The Title IX Coordinator scheduled a meeting with Hannah for 8:00am the following Monday to gather more information.

### Hannah’s Statement

Hannah said she received a phone call around 10:00am from Jason, a fellow RA in Hendrix who had worked the late shift at the front desk of the residence hall the prior night. Jason informed Hannah that, at around 1:00am on Friday night (early Saturday morning), he saw Victoria walk in the front door of Hendrix appearing visibly intoxicated and looking “misty-eyed,” as though she had been crying. As she walked by the front desk toward the elevators, Jason said he asked her if she was okay, to which she said, “Yeah, I’m fine, long night,” before quickly turning the corner. Jason said he thought Hannah should check on Victoria, which Hannah agreed to do.

Hannah said she knocked on Victoria’s door around 11:00am Saturday morning and that Victoria answered the door “looking rough.” Hannah asked if she would mind coming down to her room to talk for a bit, to which Victoria reluctantly agreed. Hannah said she had planned on having the typical alcohol talk and possibly referring the situation to student conduct, but was surprised by the direction the conversation took.

When Hannah asked Victoria to tell her about the prior night, Victoria said she hung out with some friends in Bachman Residence Hall then came back to her dorm. When Hannah asked if Victoria consumed any alcohol, Victoria said she didn’t remember. When asked how she got back to Hendrix, Victoria said, “I honestly don’t have much memory of last night.” Hannah then explained Vexer’s alcohol policy and shared that Jason had observed her from the front desk entering Hendrix late the prior night, apparently intoxicated. Victoria did not respond, instead sitting silently looking down at her hands. Hannah added that Jason also mentioned that Victoria looked upset and asked if something had happened that night.

Hannah said she could see tears welling up in Victoria’s eyes and that Victoria took a deep breath and said, “I did drink last night, but it wasn’t my alcohol, it was Peter’s. Our friend group was all over at his dorm room in Bachman, then everyone gradually left, and Peter asked if I’d hang around to talk. He was having relationship problems or something. And, I don’t know if there was something in the drinks or what, but I just remember getting really drunk really fast, then everything started to get fuzzy and my memory of the night kind-of goes in and out. The last thing I really remember was sitting on Peter’s bed, in his room, and we’re talking about his

ex-girlfriend or whatever, and then he just starts kissing me out of nowhere. I think I tried to pull away, but he just kept going. Then I just have a flash of memory where he's on top of me. Then I just remember waking up in my room this morning with a really bad headache."

Hannah said she tried not to ask too many questions, but did ask Victoria what she meant by "on top of me," to which Victoria replied, "I guess he was having sex with me, but I just don't really remember a lot." Hannah said she told Victoria that she would need to refer this information to Vexer's Title IX Office, and that when Victoria asked why, Hannah said she told her it sounded like she had been sexually assaulted. Hannah said she explained Vexer's policies on consent and incapacitation, adding that it sounded to her like Victoria did not have the capacity to consent. Hannah said she suggested that Victoria go to the student counseling center and to the hospital for a SANE exam, but that Victoria told her she didn't want to go to either. Hannah said Victoria was still worried about getting in trouble for having consumed alcohol, but that she explained how Vexer's amnesty policy applies to reported incidents of sexual assault. Hannah said after Victoria left her room, she immediately filed the online report to the Title IX Office, as she had been trained to do.

### Victoria's Statement

The Title IX Coordinator contacted Victoria later that Monday afternoon, scheduling a meeting for the following morning to gather some preliminary information and to determine whether Victoria wanted to initiate a formal investigation. At that meeting, Victoria explained that she and Peter are part of the same friend group, and that they and about five other friends had met up in Peter's room in Bachman around 10:00pm that Friday night. When asked about her relationship with Peter, Victoria said, "I guess I would've called him a friend; I mean, we hung out a lot because we were part of the same friend group, but we weren't like close or anything, he's always kind of preoccupied with other girls. He's known for being a player."

Victoria said Peter had a couple bottles of vodka waiting when they got there and had purchased bottles of Gatorade from the food court downstairs with which to mix it. She said, "I don't remember who was mixing drinks, I'm assuming it was Peter, but I just remember someone handing me a red solo cup with a mixture of vodka and Gatorade." Victoria said she remembered finishing one cup and drinking from a second but couldn't remember if she finished it or not.

Victoria said, "I just remember snippets of what happened. I think we'd been there for a several hours, probably, then everyone started to head back to their dorms, and I remember Peter kinda whispering to me that he wanted me to stay after because he wanted to get my thoughts on his girlfriend situation, or something. Like I told Hannah, I don't know if Peter put something in my drink or what, but it definitely hit me fast, just out of nowhere, I was out of it. I remember stumbling and slurring my words, and then just having a lot of difficulty concentrating while he was talking to me. Then I must have blacked out because I have this flash of being in his bedroom, sitting on his bed, and he's going on-and-on about this girl. Then I have another flash of him abruptly kissing me, and then I like, push him off, I think, and then I have another flash, I guess sometime later, where I'm on my back, I think still on his bed, and he's on top of me, raping me."

Victoria said she had no recollection of leaving his room or of how she got back to Hendrix, explaining that the next thing she remembered was waking up in her room on Saturday morning feeling awful. Victoria told the Title IX Coordinator that Hannah came to her room later that morning and that Hannah had informed her that another RA apparently saw her walking through the front doors of Hendrix late that night appearing drunk and upset, adding that she thought this was further proof of how intoxicated she was that night. The Coordinator informed Victoria that there are interior surveillance cameras observing the entrances of all the residence



halls on campus, and that they would acquire and review that footage. Victoria said that, after talking with Hannah, she felt like what happened was not okay and wanted to pursue a formal investigation.

### Peter's Statement

Peter met with the Title IX Coordinator the following Thursday and the Coordinator informed him that the College was looking into a situation involving Victoria that occurred on the night of Friday, December 12<sup>th</sup>. Peter explained that Victoria was a good friend of his who he had met during freshman orientation, along with many of the others in their friend group. Peter said that he always thought Victoria had a crush on him, adding that her close friend Alice—who is part of their friend group and who was at the party in his room that night—had told him a few months prior that Victoria was interested in him, but that she considered him “emotionally unavailable” because of his on-again-off-again relationship with his now ex-girlfriend, Krista.

Peter explained that one of his older fraternity brothers had given him two bottles of vodka so that he could host his friends that night, and that he bought approximately 10 bottles of blue Gatorade as a mixer. He said everyone arrived around 9:00 or 9:30pm and that they “just hung out playing drinking games with a deck of cards” in the common area of his suite-style dorm room. Peter said he had also purchased a stack of red solo cups and that everyone mixed their own drinks throughout the night. Peter admitted that he got very drunk that night, adding that he thought everyone was pretty drunk by the end of the night, Victoria included.

Peter said everyone started leaving his room shortly after midnight, but that Victoria stuck around. Peter said he went to his room to lie down because “the room was starting to spin,” and that Victoria came with him and began asking him questions about his relationship with Krista while sitting on the edge of his bed. Peter added that he and Victoria had talked about Krista on a few prior occasions, and that he “always liked getting a girl’s perspective on all of it.” Peter said they talked about his relationship issues for about 5-10 minutes and that, at one point, Victoria made the comment, “I don’t know why you put up with her shit, I know I would treat you much better than that if I were your girlfriend.” Peter said that, as she said this, she moved her hand to his genital area and began caressing his penis over his sweat pants. Peter explained that he did not have any romantic interest in Victoria, but that he “didn’t necessarily have an issue with her wanting to get frisky.” Peter said Victoria then lowered his waistband, pulled his penis out, and began performing oral sex on him. Peter said while she did this, he tried to reciprocate by putting his hand down her pants and fingering her.

Peter said this continued for about 5-10 minutes, at which point Victoria stopped and asked what was wrong, referencing the fact that he had still not achieved an erection. Peter said he “probably said something like, ‘Sorry, whiskey dick.’” Peter said Victoria seemed to get upset and asked tearfully, “Is it me?” Peter said he “tried to let her down gently,” but that she kept pressing, so he finally said something like, “I’ve just never had feelings for you like that. I can’t help it if I’m not turned on.”

Peter said Victoria got really upset and that he had to “go into damage control” for 10-15 minutes, but was eventually able to talk her down, adding that he “figured she was just drunk and being emotional.” Peter said he thought Victoria left his room sometime around 1:00am, after which he made himself a sandwich, grabbed his computer, and started watching Netflix while lying in bed. Peter said that about an hour later, he got a text message from Victoria that read, “I’m still so drunk,” to which he responded, “Yeah, me too.” She replied, “Talk tomorrow?” to which he responded, “Of course.” When the Coordinator asked to see the text messages, Peter willingly provided his phone. The Coordinator noted the timestamps on the text messages as being: 2:14am, 2:15am, 2:21am, and 2:21am, respectively.

### Alice's Statement

Alice met with the Title IX Coordinator the following week and said that she was confused by the Coordinator's email, adding that she had no idea why she had been asked to meet. When the Coordinator told Alice that the College was looking into a situation that occurred on Friday, December 12<sup>th</sup>, Alice said she wasn't aware of anything that happened that night. When the Coordinator said that it involved Victoria and Peter, Alice said, "No way am I getting in the middle of their drama." When the Coordinator asked Alice to elaborate, Alice asked if she had to answer the Coordinator's questions. After some back-and-forth, Alice ultimately refused to answer any questions or to provide any additional information and expressed her desire not to have any involvement in an investigation.

#### Video Surveillance Footage

The Title IX Coordinator retrieved and reviewed the surveillance footage from cameras observing the entryways of both Bachman and Hendrix Residence Halls, which showed Victoria leaving Bachman at 1:07am and entering Hendrix at 1:21am. In both videos, Victoria appears to sway slightly as she walks and does not walk in a straight line. The details of her face are difficult to make out due to the cameras' low resolution.



## 20-Minutes-to...*Trained*: Applying Preponderance & Making a Finding Case Studies Question & Answer

### Rebecca Tate & Reese Smith

#### For Discussion:

- What Title IX policies are potentially implicated by this situation?
  - Sexual Harassment
  - Stalking
  - Intimate Partner Violence

Work in pairs to list the pieces of evidence obtained from the investigation above. On which side of the scale does each piece belong? Can a piece of evidence belong on both sides? After weighing all the evidence, have you reached a preponderance? If you designate a number for all of the evidence obtained, what percentage do you have?

- What questions do you have?
  - Possible questions:
    - Do Rebecca and Reese have the text messages exchanged?
    - What do other study abroad participants have to say about Rebecca's behavior on the trip?
    - Does Rebecca acknowledge telling Reese to take one of her classes?
    - Where was Rebecca's car when the tires were slashed?
    - Reese said that Rebecca discussed the future. What details did she and they discuss? Does Rebecca acknowledge that they discussed the future? Do the two accounts of this discussion align with one another?

### Skyler

#### For Discussion:

- Do you feel, based on the information provided that Skyler is experiencing sexual based trauma? Why? Why not?
  - While not determinative of trauma, it's important to recognize that freezing is a legitimate physiological response to trauma and may be indicative of trauma.
- Have you reached a preponderance?
  - Obtaining more information – from Skyler, the responding parties, and any possible witnesses – would help you corroborate Skyler's to determine whether you have reached a preponderance.
- What do you want to ask Skyler?
  - Possible Questions:
    - Does Skyler remember anyone who was around that evening who may have seen Skyler playing pool?
    - Skyler stated that they froze. Does Skyler remember communicating with any of the individuals in any way? Does Skyler remember how they felt/what they saw/heard/smelled during the sexual interactions?
    - Did the responding parties ejaculate?
    - Did the individual who put his penis into Skyler use a condom?
    - If any of the responding parties ejaculated, what happened to the ejaculate?
    - Skyler stated that they got cleaned up. What does this mean?

## Victoria and Peter

### For Discussion:

- Which policies are implicated by this report?
  - Sexual Harassment
  - Non-Consensual Sexual Contact
  - Non-Consensual Sexual Intercourse
- What are the key issues/questions here in reaching a preponderance of evidence that a policy has been violated?
  - What actually happened.
    - The accounts are notably different, in significant part due to Victoria's assertion that she is unable to remember what happened. Have you reached a preponderance of evidence supporting that:
      - Sexual intercourse occurred?
      - Oral intercourse occurred?
      - Sexual touching occurred?
    - Remember that for each activity, you need a preponderance of evidence supporting that it occurred. Only then can you proceed to determine whether what occurred is a policy violation.
  - Consent
    - Is there a preponderance of evidence to support a determination that Victoria was incapacitated?

- If you determine that she was, in fact, incapacitated, is there a preponderance of evidence to support that a reasonable person, in Peter's position, would know that she was incapacitated?
- If she wasn't incapacitated, is there a preponderance of evidence to support a determination that consent was provided?

## MODELS OF PROOF FOR SEXUAL MISCONDUCT OFFENSES

This next section, and the bulk of this *Playbook*, features models of proof for eight different forms of sexual misconduct: NCSI/NCSC, sexual harassment, sex discrimination, gender discrimination, sexual exploitation, stalking, retaliation, and IPV. The definitions are drawn from the ATIXA model policies,<sup>22</sup> though you can create models of proof for your own policies, to the extent they differ from the ATIXA models. Creating a model of proof is simply the process of taking a definition of an offense and breaking it down into its constituent elements – those components that must be proven in order to show a violation by a preponderance of the evidence. Then, you use the checklist as a guide when you analyze a potential policy violation, to ensure that your assessment of the facts tracks precisely with the requirements of your institutional policy.

*“The models of proof are designed to help you move past your gut assessment of the facts, and to a fully analytical assessment by matching facts to policy elements. People trust their gut assessments, but our gut is informed as much by our biases as our lenses of clarity, and we all have both.”*

Below, we have created a model of proof for each of these eight offenses, and then offered an extensive discussion about how to analyze each element of the policy. In some sections, we have offered the discussion in rubric form, where we think it will be helpful to fit the elements of a policy into a specific rubric to facilitate ease of – and accuracy of – the analysis you will provide. The models of proof are designed to help you move past your gut assessment of the facts, and to a fully analytical assessment by matching facts to policy elements. People trust their gut assessments, but our gut is informed as much by our biases as our lenses of clarity, and we all have both. While the concept of neuroplasticity – the brain’s ability to adjust, reorganize, or adapt – has put an end to dualistic thinking about left and right brains, there are “right brain” dominant functions that feel evidence and give us our “gut” reactions. Then, there are “left brain” controlled logical and analytical processes that help us to weigh, quantify, and parse information. In any investigation of sexual misconduct, the parties are owed the best of your thinking, including both by your gut and your logical mind.

### Preponderance of the Evidence

Finally, before we embark on the eight policy models of proof, it is useful to offer a brief reminder about the preponderance of the evidence here, to prime your mind before you read further about applying the policies. Preponderance of the evidence is the equitable standard of proof for a behavior covered by Title IX.<sup>23</sup> The preponderance has been alternately described as the greater weight of evidence (picture the scales of justice, tipped slightly one way or the other), as what is

<sup>22</sup> <https://atixa.org/resources/model-policies/>

<sup>23</sup> It is sometimes referred to as a burden of proof, mistakenly. The burden of proof is the legal obligation on the institution to show whether its policies have been violated. It meets its burden by using the preponderance of the evidence as the standard of proof.

more likely than not, 50.01 percent, or 50 percent plus a feather. In this sense, Investigators and final decision-makers are feather hunters, trying to find any feathers provided by the evidence and weight them on the scale – and on either side of the scale. A feather can weigh as much as a real feather, or as much as a cinder block, depending on the nature of the evidence, but it must be there, or there is no policy violation. The question is not what happened, but what can be proven or shown by the evidence. If the evidence is 50/50, the tie goes to the responding party. Every time. Preponderance is not a high standard, and thus it must be respected steadfastly. You may feel deep down that the responding party did what was alleged, but you can't hold the individual accountable based on your gut feeling. It's not what you feel, but what is proven by more than 50%, with reliable, relevant, and credible evidence.