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Agenda

- 01 Title IX's Requirements
- 02 Developing an Investigative Strategy
- 03 Investigative Interviews
- 04 Evidence Collection and Assessment




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Title IX's Requirements

01



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Procedural Requirements for Investigations

- Notice TO BOTH PARTIES
- Equal opportunity to present evidence
- An advisor of choice
- Written notification of meetings, etc. and sufficient time to prepare
- Opportunity to review ALL evidence, and 10 days to submit a written response to the evidence prior to completion of the report
- Report summarizing relevant evidence and 10 day review of report prior to hearing



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Notice Requirements

Notice of the allegations, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview. Sufficient details include:

- the identities of the parties involved in the incident, if known,
- the conduct allegedly constituting sexual harassment under § 106.30,
- and the date and location of the alleged incident, if known.

The written notice must include a statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process.



The written notice must inform the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(iv) of this section.

The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

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Advisor of Choice During the Investigation

- The advisor can be anyone, including an attorney or a witness.
- Institutions cannot place restrictions on who can serve.
- Institutions can create rules and guidelines for participation in the investigation
- No specific training required.



Written Notification of Meetings and Sufficient Time to Prepare

Equal Opportunity to Present Evidence

Evidence Review



Parties must have equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint.

10 days to provide a written response.

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Directly Related Evidence

Regulations do not define "Directly Related" Evidence.

Preamble states it should be interpreted using its plain and ordinary meaning.

Term is broader than:

- "all relevant evidence" as otherwise used in Title IX regulations, and
- "any information that will be used during informal and formal disciplinary meetings and hearings" as used in Clery Act

Includes evidence upon which the school does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

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"Relevant" Evidence

The Department declines to define "relevant", indicating that term "should be interpreted using [its] plain and ordinary meaning."

See, e.g., Federal Rule of Evidence 401 Test for Relevant Evidence:

- "Evidence is relevant if:
- (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - (b) the fact is of consequence in determining the action."

Evidence That is Not "Relevant"

"Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant."

- unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or
- if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent."

"Require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege."

Physical and mental health records and attorney-client privileged communications would fit within scope of the prohibition.

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Who Decides?

Department emphasizes repeatedly in Preamble that investigators have discretion to determine relevance.

- Subject to parties' right to argue upon review of "directly related" evidence that certain information not included in investigative report is relevant and should be given more weight.

Investigators will have to balance discretionary decisions not to summarize certain evidence in report against:

- Each party's right to argue their case, and
- Fact that decisions regarding responsibility will be made at hearing, not investigation stage.

The Investigator



Can be the Title IX Coordinator, although that is disfavored.



Must be trained in accordance with the requirements in the regulations.



Must conduct the investigation in an impartial manner, avoiding bias/pre-judgment, and conflicts of interest.

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Section 106.45(b)(1)(iii)

The grievance process must require that any individual designated by the recipient as Title IX Coordinator, investigator, decision maker, or facilitator of informal resolution not to have a conflict of interest or bias

1. For or against complainants or respondents generally, or
2. An individual complainant or respondent

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Impermissible Bias

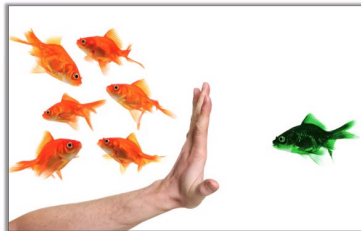
Making a decision, determination, or finding that is based on something other than the evidence and specific facts of the case.

What Constitutes Bias?

Conduct a fact-specific, objective inquiry based in common sense to determine bias.

Includes:

- Decision-making that is grounded in stereotypes
- Different treatment based on a person's sex or other protected characteristic
- A decision based on something other than the facts



Avoiding Prejudgment of the Facts

Requires that the Title IX professional refrain from making a judgement on individual facts, the allegations, or whether a policy violation occurred until they have had the opportunity to consider all of the evidence.

An Impartial Investigation is...

Not influenced by bias or conflict of interest.

Committed to decisions based on an objective view of the facts and evidence as you know them and as they evolve.

Truth seeking, not "your truth" confirming.

Developing an Investigative Strategy

Essential Steps of an Investigation

- Notice of Formal Investigation
- Initial Interviews
- Evidence Collection
- Evidence Review
- Additional Evidence Collection/Follow Up Interviews
- Report Writing

Understand the Scope of the Investigation



Review the formal complaint



Ask questions if unsure

Identify the Claims and What Needs to be Proven

- What will the decision maker be asked to decide?
- What does the formal complaint allege?
- What are the elements of each act of prohibited conduct alleged?

Rape. The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

1. Did Respondent penetrate Complainant's vagina or anus?
2. Without Complainant's affirmative consent?

Rape. The penetration, no matter how slight, of the vagina or anus, with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

1. Did Respondent penetrate Complainant's vagina or anus?
2. Without Complainant's affirmative consent?
 1. What is the ground for lack of consent
 1. Did respondent fail to seek and obtain Complainant's affirmative consent?
 2. Did Respondent force Complainant?
 3. Did Respondent coerce Complainant?
 4. Was Complainant incapacitated and therefore incapable of consent?

Stalking. Engaging in a course of conduct directed at a specific person that would cause a reasonable person to: Fear for the person's safety or the safety of others; or Suffer substantial emotional distress.

1. Did Respondent engage in a course of conduct?
2. Was that course of conduct directed at Complainant?
3. Would Respondent's conduct cause a reasonable person to either
 1. Fear for their safety or the safety of others, or
 2. Suffer substantial emotional distress

The Process

Developing an Investigative Strategy



Investigation Timeline

Prior History

- Between the Parties
- Of the Parties

Incident

- Consent
- Type of Contact
- Injuries

Pre-Incident

- Communications
- Interactions
- Conduct

Post Incident

- Behaviors
- Communications

Investigative Interviews

Interview Objectives



Connect

- Build rapport
- Build trust
- Empower



Listen

- Allow interviewee to share their experience



Clarify

- Understand what you have heard
- Seek additional information



Evidence Preservation

- Text Messages
- Photographs
- Names and contact info for witnesses

Prior to the Interview



Secure an appropriate meeting location



Allow for enough time to conclude the meeting



If interviewing a party, inform them of their right to have an advisor present.



Prepare for the meeting

Areas of focus?
Other evidence?
Go back review what you have



Provide Written Notice of the Meeting

Advise the parties/witnesses that you will be collecting evidence

Set Expectations

What they should expect of you

- That you are neutral
- That you will listen, what they are saying is important to you
- That you will keep the information they share private
- What you will do with recording/notes
- That you may have to ask difficult questions
- Patience, respect, and appreciation
- This will not be their only opportunity to speak with you

What you expect of them

- Honesty
- That they will seek clarity if needed (give them permission to do so)
- That they wont guess or fill in blanks

Investigative Interviews



Start the interview by eliciting a narrative...



Next, ask questions that are intended to clarify and more deeply explore the information and details provided by the person in their narrative.

Do Ask:

- Interview for clarification
- Help me understand
- Can you tell me more about...?
- Is there anything else you can share about...?

Avoid:

- Interrogation
- Questions that blame
- Questions that imply doubt
- Leading questions

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Capture the Entire Experience

- Ask about the physical and emotional reactions to the incident.
- Conclude with very open-ended questions:
 - What was the most difficult part of this experience for you?
 - Is there something that stands out that you just can't stop thinking about?
 - Is there anything more that you would like me to know?

The Before

At some point during the interview, it is also important to explore the prior history, if any, between the complainant and the respondent.








And The After

It is also important to explore the events following the incident. Oftentimes, the best evidence is produced after the incident.






- The parties' psychological reactions
- Changes in behavior
- Witnesses to the psychological reaction
 - "Has anyone expressed concern about you since the assault?"
- Communication/contact between the complainant and respondent

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Throughout the Interview

-  Explain your questions, especially the difficult ones. How much did you drink? What they hear: this is your fault because you were drinking.
-  Do not ask leading questions.
-  Watch your tone.
-  Do not rush.
-  LISTEN!!!!!!!
-  Pay attention to and document information that might lead to additional evidence.
-  Document questions asked. Especially when a response is not provided.

At the Conclusion of the Interview

-  Discuss submission of evidence.
-  Explain statement review process.
-  Explain next steps in the process.
-  Keep the lines of communication open.
-  Review available support and prohibition against retaliation.

After the Interview: Actions

-  Memorialize the Interview in writing. Notes
Summary
Transcript
-  Provide opportunity for the party or witness to review it.
-  Provide opportunity for party or witness to provide a response.
-  Incorporate the response.

After the Interview: Reflection

-  Reflect.
-  Is there something you missed or forgot to ask?
-  Do you need clarity on any of the information shared?
-  Has this interview revealed additional evidence that you want to explore or collect?
-  Has evidence of additional policy violations been shared?

Follow Up Interviews

Seek clarification

Explore inconsistencies

Explore contradictory evidence

Explore difficult issues

Opportunity to respond



Follow Up Interview Approach

1

Explain the purpose of the follow up.

2

Set the stage for the topics you will be covering.

3

Do not avoid asking the hard questions.

The "Hard" Questions

Details about the sexual contact/language

Seemingly inconsistent behaviors

Inconsistent evidence/information

What they were wearing

Alcohol or drug consumption

Probing into reports of lack of memory

How to Ask the Hard Questions

Lay a foundation for the questions.

- Explain why you are asking it
- Share the evidence that you are asking about, or that you are seeking a response to

Be deliberate and mindful in your questions:

- Can you tell me what you were thinking when....
- Help me understand what you were feeling when...
- Are you able to tell me more about...

Evidence Collection and Assessment

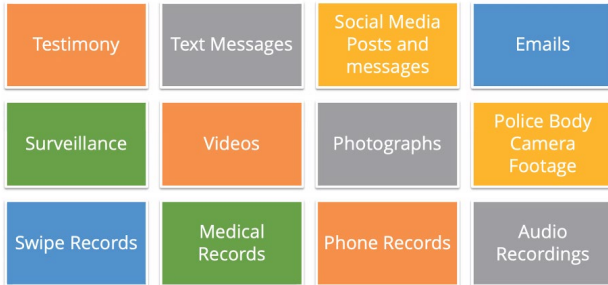
Evidence

“Something (including testimony, documents, tangible objects) that tends to prove or disprove the existence of an alleged fact; anything presented to the senses and offered to prove the existence or non-existence of a fact.”

Black's Law Dictionary



Evidence



Evidence Collection



Identify the items of evidence that you would like to obtain.



Develop an intentional strategy for obtaining that evidence.



Overcome barriers to evidence collection.



Considerations about collecting certain types of evidence.



Evaluating the Evidence

Is it relevant?

Evidence is relevant if it has a tendency to make a material fact more or less likely to be true.

Is it authentic?

Is the item what it purports to be?

Is it credible/reliable?

Is the evidence worthy of belief?

What weight, if any, should it be given?

Weight is determined by the finder of fact!

A Thorough Investigation Permits the Decision Maker to Assess



Relevance



Credibility



Reliability



Authenticity



Weight

Assessing Relevance

Why Does it Matter?

Unsure about the relevance about a particular item of evidence? Ask the person who has proffered it.

Character Evidence

Polygraph evidence

Opinion Evidence

Opinion Evidence

When might it be relevant?

How do you establish a foundation for opinion evidence so that the reliability of the opinion can be assessed?

Opinion Evidence: Try it!

You are investigating an allegation that Casey had sex with Taylor when Taylor was incapacitated. You interview several witnesses, one of whom made the following statement:

"I got to the party pretty late, and Taylor was already lit."

"Taylor was wasted. Like totally messed up. There is no way they could have given permission for sex"

Assessing Authenticity

Investigating the products of the Investigation



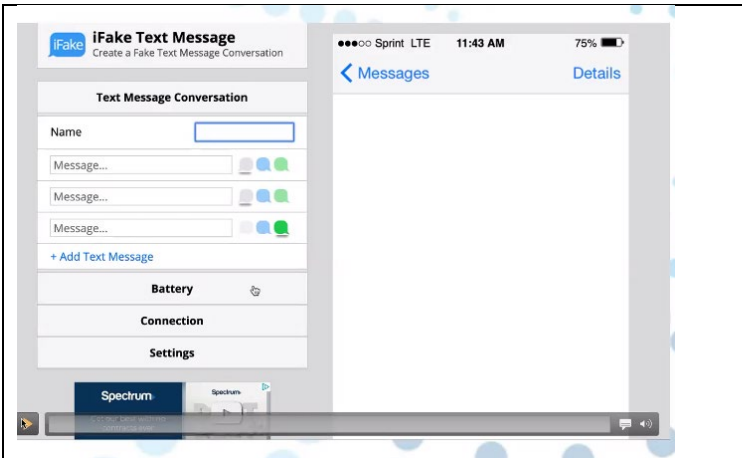
Never assume that an item of evidence is authentic.




Ask questions, request proof.




Investigate the authenticity if necessary.




Is it authentic?




QUESTION THE PERSON WHO OFFERED THE EVIDENCE




REQUEST ORIGINALS



OBTAIN ORIGINALS FROM THE SOURCE



HAVE OTHERS REVIEW AND COMMENT ON AUTHENTICITY



ARE THERE OTHER RECORDS THAT WOULD CORROBORATE?

Assessing Credibility and Reliability

No formula exists, but consider the following:

- Opportunity to view
- Ability to recall
- Motive to fabricate
- Plausibility
- Consistency
- Character, background, experience, and training
- Coaching
- Bias

Barriers to Evidence Collection

- Non-Participating Parties
- Uncooperative Witnesses
- Uncooperative Advisors
- Identity of party or witness unknown
- Refusal to share materials
- Materials lost or no longer accessible
- Difficult topics

Barriers to Evidence Assessment

- Authenticity/Technology
- Colluding witnesses
- Colluding parties
- Totally different versions

Questions?



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