Title IX Investigator Training

Final Title IX Regulations

34 CFR Part 106

Effective August 14, 2020

Title IX Investigator Training

July 2020

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Title IX Investigator Training

- ✓ *On Title IX's definition of "sexual harassment"*
- ✓ *On the scope of the school's education program or activity*
- ✓ *On how to serve impartially, including by avoiding prejudgment of the facts at issue*
- ✓ *On how to avoid conflicts of interest and bias*
- ✓ *On how to conduct an investigation*
- ✓ *Evidence: Relevancy, Privilege, Exclusions*

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History & Evolution

1972	1975	1997	2011–2017	2017	2018–2019	2020
Title IX Adopted by legislative action	Implementing Regulations addressed sex discrimination, but not sexual harassment	Department began issuing guidance addressing sexual harassment	Significant ED guidance released on issue of sexual harassment and sexual violence	Withdrawn Guidance: 2011 DCL 2014 Q&A 2017 Q&A	Negotiated Rulemaking & Proposed Rule	Newly Revised Title IX Rules Effective 8/14/20

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Principles Underlying the New Rules

Protect	Protect Due Process & Fundamental Fairness
Improve	Improve Integrity of the Grievance Process
Effectuate	Effectuate Purpose of the Law in Preventing Sex Discrimination



CITATION	SUMMARY
106.45(a)	School's treatment of parties may constitute discrimination
106.45(b)(1)(i)-(x)	**Grievance Process Requirements**
106.45(b)(2)	**Written Notice of Allegations to Both Parties**
106.45(b)(3)-(b)(4)	**Formal Complaints Must be Investigated, Dismissals, Consolidation**
106.45(b)(5)(i)-(vii)	**Investigation Requirements**
106.45(b)(6)	Cross Examination Conducted by Advisor
106.45(b)(7)	Independent/Neutral Decision-maker, Standard of Evidence Same, Written Determination
106.45(b)(8)	Appeals: Procedural Irregularities, New Evidence, Bias or Conflict of Interest
106.45(b)(9)	Informal Resolution: Voluntary, Written Consent. Not Allowed for Employee Respondent
106.45(b)(10)	Record Keeping, Publication of Training Material

Procedural Protections 106.45

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Title IX Personnel

TITLE	RESPONSIBILITIES	TRAINING	STATUS
Title IX Coordinator (multiple &/or deputies)	Coordinate, Intake Reports & Complaints, T9 analysis, Initiate Formal Complaint, Implement Supportive Measures	Sexual Harassment, Investigation & Grievance Procedure, Hearings, Appeals & Informal Resolution (as applicable); Impartiality, Relevance, Privilege	Must be Employee May Not Serve as Decision-Maker
Investigator	Conduct Fair, Objective and Impartial Investigation, Differentiate b/w Related & Relevant Evidence & Privilege	Sexual Harassment; How to Conduct an Investigation, Impartiality, Relevance, Privilege, Report-Writing	Staff or External May Not Serve as Decision-Maker
Decision Makers	Evaluate Evidence, Make & Write Decision, "Rule" on Relevancy during Cross-Examination	Sexual Harassment, Hearing Process, Technology, Evidence/Relevancy	Staff or External Cannot Serve in Any Other Capacity
Advisor(s)	Question Opposing Party & Witnesses	None required	Party provided Staff or External
Informal Resolution Facilitator	Informal Resolution Processes	Informal Resolution Processes	Staff or External

Definition of Sexual Harassment

Jurisdiction & Scope of Title IX Rule



Definition of Sexual Harassment 3-Prongs

Quid Pro Quo	***Employee*** **Conditions Something of Value for Sexual Favor**
Davis Standard	**So Severe, Pervasive and Objectively Offensive**
VAWA Crimes	**Sexual Assault, Stalking, Dating & Domestic Violence**



Definition of Sexual Harassment 3-Prongs

1. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
2. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
3. "sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291)a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30)



Sexual Harassment: Quid Pro Quo

- Applies solely to an employee respondent
- Involves an abuse of authority by an employee
- Doesn't require a showing of severity, pervasiveness or offensiveness
- Need not be explicit, could be implied



Sexual Harassment: Severe, Pervasive, Offensive (*Davis)*

- "Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity"
- directed at verbal or expressive conduct
- evaluated under the "reasonable person standard" taking into consideration the characteristics of the alleged victim



Sexual Harassment: Clery/VAWA Crimes

- “sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v),
- “dating violence” as defined in 34 U.S.C. 12291(a)(10),
- “domestic violence” as defined in 34 U.S.C. 12291)a)(8),or
- “stalking” as defined in 34 U.S.C. 12291(a)(30).



Sexual Assault

- Sexual assault means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation
- Includes any sexual act directed against another person without their consent, including rape, sodomy, sexual assault with an object, fondling, incest and statutory rape



Dating Violence

- (10)DATING VIOLENCE The term dating violence means violence committed by a person—
- (A)who is or has been in a social relationship of a romantic or intimate nature with the victim; and
- (B)where the existence of such a relationship shall be determined based on a consideration of the following factors:
- (i)The length of the relationship.
- (ii)The type of relationship.
- (iii)The frequency of interaction between the persons involved in the relationship.



Domestic Violence

8)DOMESTIC VIOLENCE THE term domestic violence includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.



Stalking

- (30)STALKING THE term stalking means engaging in a course of conduct directed at a specific person that would cause a reasonable person to—(A)fear for his or her safety or the safety of others; or
- (B)suffer substantial emotional distress.

Educational Program or Activity 106.44

- Locations, events, or circumstances where the school exercises substantial control over both:
  - the Respondent
  - the context in which the alleged sexual harassment or discrimination occurs
    - includes any building owned or controlled by the school or by a student organization that is officially recognized by the school



Dismissals 106.45(b)(3)

Doesn't meet definition or jurisdictional requirements:apply to individual allegations or to an entire complaint the parties must receive written notification and reasons for any dismissal; mandatory dismissals are appealable

Complainant wants to withdraw complaint Complainant notifies the Coordinator in writing that they would like to withdraw the complaint, or any allegation therein

Respondent is no longer enrolled or employed

Specific circumstances prevent school from gathering evidence sufficient to reach a determination

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Formal Grievance Process

Grievance Process Basic Requirements

- Treat parties equitably
- Require objective evaluation of all relevant evidence
- Train Title IX personnel & post all training on web-site
- Include a presumption that respondent is not responsible
- Include reasonably prompt time frames
- Describe the range of, or list, possible disciplinary sanctions and remedies
- State standard of evidence: preponderance or clear and convincing
- Include process and bases for appeals
- Exclude privileged evidence



Require objective evaluation of all relevant evidence 106. 45(b)(1)(ii) Title IX personnel must be conflict & bias free

(ii)Require an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness;

(iii)Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity….



How to Serve Impartially & Objectively

106.45(b)(1)(ii) Require on objective evaluation of all relevant evidence-including both inculpatory and exculpatory evidence-and that provides credibility determinations may not be based on a person's status as a complainant, respondent or witness;

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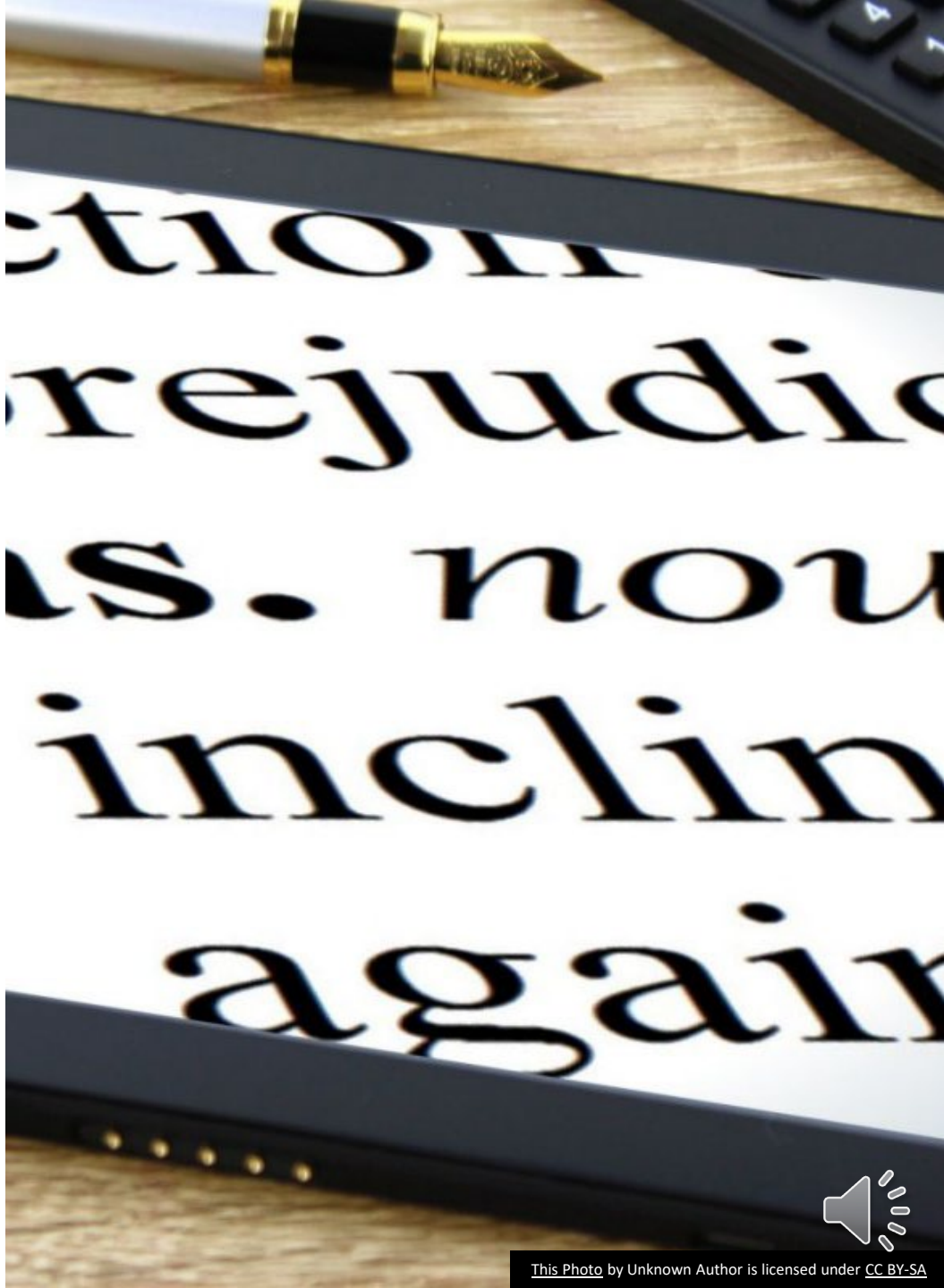
Investigators Must be Conflict & Bias Free & May Not Serve as Decision-Makers

- Rule prohibits "single-investigator model"
- Coordinator *may* serve as investigator as long as can do so conflict and bias-free * *note the Department cautions on this*
- May have more than one investigator on a case



Conflicts of Interest and Bias

- Schools must have process to ensure no conflict/bias
- May provide a process for parties to assert claims of conflict/bias during the investigation
- Consider including a provision in your policy that allows students to raise concerns about an investigator, or any Title IX personnel during the grievance process
- Conflict & bias of Title IX personnel is a basis for appeal



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Presumption of Non-Responsibility 106.45(b)(1)(iv)

- Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility at the conclusion of the grievance process.



Reasonably Prompt Timeframes

Reasonably Prompt Timeframes 106.45(b)(1)(v)

Concurrent Law Enforcement Activity
- distinct, separate and independent processes
- obligated to respond to T9 allegations irrespective of criminal matter
- law enforcement investigation could justify a delay or extension
- delay cannot be protracted or open-ended

Availability of Parties & Witnesses
- must try to accommodate individuals' schedules to allow their meaningful participation
- parties may participate remotely
- a party or witness cannot indefinitely delay the grievance process by refusing to cooperate
- the process can proceed even in the absence of a party or witness
- must keep nonparticipating party informed



The Investigation

Investigation of a Formal Complaint

- School bears burden of proof and gathering evidence
- School cannot access, disclose, or otherwise use a party's medical records without voluntary, written consent
- Parties have the right to present witnesses and other inculpatory and exculpatory evidence
- Not restrict the ability of either party to discuss the allegations or to gather and present relevant evidence
- Provide the parties the right to an advisor, who may accompany them to any meeting
- Provide written notice of the date, time, location, participants, and purpose of all interviews, or other meetings, with sufficient time for the party to prepare
- Provide both parties and their advisors an equal opportunity to inspect and review any evidence prior to conclusion of the investigation
- Create an investigative report that fairly summarizes relevant evidence and, send to each party and the party's advisor, the investigative report for their review and written response



Investigation: Rights of the Parties

- Opportunity to Present Evidence & Witnesses
- Cannot Restrict Parties Right to Discuss Case
- Right to an Advisor
- Notice & Opportunity to Prepare
- Right to Review All Related-to Evidence
- Right to Review Investigation Report
- Burden on School Not on Parties

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Right to Discuss the Allegations & Gather Evidence 106.45(b)(5)(iii)

- ✓Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (no gag orders)

- ✓Parties have the right to discuss the allegations with anyone they choose with limited exceptions:
  - ✓no-contact directive
  - ✓retaliatory manner



Right to an Advisor 106.45(b)(5)(iv)

Parties must have the same ability to select an advisor of choice, who may be, but need not be an attorney

- ✓Parties can choose anyone to be their advisor
  - ✓friend, parent, classmate, attorney
- ✓Role of advisors
  - ✓provide support, accompany party to meetings/interviews
  - ✓adversarial with respect to their role in the hearing and in conducting cross examination
- ✓School may limit to advisor's role with respect to their participation
- ✓Any rules around the role of advisors must apply equally to both parties
- ✓If a party does not have an advisor, the school must provide one at no cost to the party for the limited purpose of conducting cross exam during the hearing
- ✓Advisor does not have to match the qualifications of the other party's, so if the other party has an attorney, the school is not obligated to provide an attorney



Written Notice 106.45(b)(5)(v)

Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate;

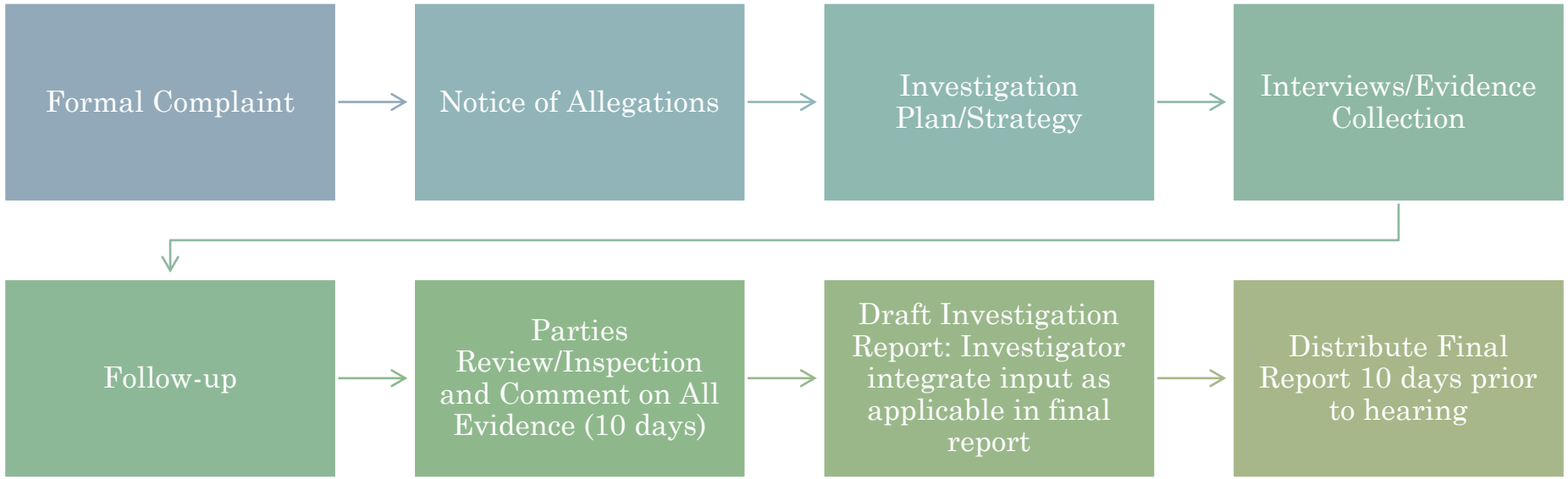
Burden of Proof 106.45(b)(5)(i)

**The burden of gathering evidence and the burden of proof must remain on schools not the parties*

- Both parties have the right to provide evidence and witnesses, but it is not their responsibility
- It is the school's job to conduct the investigation, track down and gather all of the evidence possibly and interview witnesses
- The school is neutral during this process, they are not focusing on gathering evidence to prove respondent "guilty" or to prove respondent is not responsible; they are not "building a case"
- The goal is a truth-seeking mission; gather everything so that a neutral decision maker can reach an accurate determination based on the facts



Steps in the Investigation Process



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Notice of Allegations (NOA) 106.45(b)(2)

Notice of allegations—(i) Upon receipt of a formal complaint, a recipient must provide the following written notice to the parties who are known:

(A)Notice of the recipient's grievance process that complies with this section, including any informal resolution process.

(B)Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.

Sufficient Details of NOA 106.45(b)(2)

1. The identities of the parties involved in the incident, if known.
2. The conduct allegedly constituting sexual harassment under § 106.30.
3. The date and location of the alleged incident, if known.
4. 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.
5. 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.
6. Right to inspect and review evidence
7. 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.

Investigation

Develop	Develop Investigation Plan
Gather	Gather all Relevant Evidence
Conduct	Conduct Interviews
Provide	Provide Evidence to Parties; Draft Final Investigative Report

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Investigation Plan

- Determine the scope of the investigation
- Establish a preliminary timeline of events Identify important testimony and evidence
- Develop an initial witness list
- Determine order in which to interview the accused and witnesses

Interviewing Parties & Witnesses

Interviews

- Interviews should be conducted in a private location with no interruptions; try to make the interviewee feel comfortable
- Provide a brief explanation of the institution's investigatory process
- Advise interviewees of the anticipated time frame for completing the investigation
- Explain what, if any, information might be shared with others
- Explain the institution's prohibition on retaliation

Don’t: Use overly “legalistic” or formal language

Do: Balance empathy with objectivity; establish rapport while maintaining professionalism

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Don’t: Avoid difficult or embarrassing questions because they are uncomfortable

Do: Use tact and sensitivity, but can’t skip important details

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Don’t: Ask leading questions based on what you think probably happened

Do: Allow the details and facts to come out first, then follow-up with additional clarifying questions as you learn more

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Don’t: Make promises you can’t keep, or set unrealistic expectations

Do: Be clear about the process including the limits on “confidentiality”

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Don’t: Interrupt, ask “blaming” or biased questions, or fill in the gaps with your own assumptions

Do: Ask open ended questions and Allow Interviewee to provide their story in their own words…allow space to let them speak

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Don’t: Treat the interview like an interrogation or inquisition

Do: Ensure you remain objective and keep your role in context, this is an administrative process, not a law enforcement investigation

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Don’t: Allow subconscious or unconscious bias or preconceived beliefs to taint your objectivity

Do: Take a moment before each interview to consciously affirm that you will keep an open mind throughout the process, gather all of the evidence first, and then analyze it in context

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Evidence

Evidence

- School Carries the Burden of Evidence
- Only Relevant Evidence May be Considered by Decision-Maker
- Investigator Must Collect All Evidence Related-to Allegations
- Privileged Evidence is Not Admissible Without Consent
- Medical Records, Mental Health Records are Not Admissible Without Consent
- No Other Restrictions on Evidence (legal rules don't apply)
- Parties Have the Right to Inspect the Evidence
- Statements of Party of Witness that Does Not Submit to X-Exam May Not be Relied Upon by Decision-Maker
- Decision-Maker Evaluates Credibility During Hearing
- School May Develop Guidelines re: Evaluating Evidence (weight,etc.), as Long as Don't Contravene Rules



Relevancy

Relevance: evidence pertinent to proving whether facts material the allegation are more or less likely to be true and that do not relate to complainant's sexual predisposition of prior sexual acts (with two exceptions).

Related-to vs. Relevant

Related-to

Investigator must collect all evidence that is related to the allegations whether or not relevant (excluding evidence subject to privilege, medical records)

Relevant

Relevant evidence is all evidence related to, except that which is protected under the rape shield provisions (and not otherwise privileged, medical records)

Relevancy, Rape Shield Protections & Exceptions

- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are NOT RELEVANT, *unless*:
  - offered to prove
    1. <u>"Mistaken Identity"</u>
       - that someone other than the respondent committed the conduct alleged by the complainant, or
    2. <u>Consent</u>
       - concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.



Privileged Evidence Inadmissible 106.45(b)(1)(x)

Not 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 in writing.

- ✓patient-doctor
- ✓attorney-client
- ✓spousal privilege

Other Inadmissible Evidence

Statements of non-cooperating party or witness: the statements of a party or witness that does not submit to cross examination may not be considered by the decision-maker in rendering a decision

Evidence

- Investigators and decision-makers must receive training on issues of relevance, procedural rules (both required and any discretionary-i.e. rules of order and decorum for hearing) for conducting investigation and hearing, including evidentiary rule.
- A school MAY train or adopt guidelines, regarding how to evaluate, credit or assign weight to types of relevant, admissible evidence, that must be reflected in published training materials as long as they don't conflict with 106.45 and apply equally to both parties.
- School's may not adopt rules that contravene these requirements, so they can't exclude other evidence on different grounds (such as exclusions that might apply in court-hearsay, lie detector tests, etc).
- An appeal based on procedural irregularity could include appeal of a decision to include or not include evidence based on categorization as relevant or not, or on school's failure to objectively evaluate all relevant evidence.



Opportunity to Review Evidence & Investigative Report

Prior to completion of investigative report, school must send to parties and their advisors, all evidence gathered that is directly related to the allegations, inculpatory & exculpatory, and provide at least 10 days to review and respond in writing

Final investigation report must fairly summarize relevant evidence and be provided to party and the party's advisor at least 10 days prior to a hearing with an opportunity to review and respond in writing

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Right to Inspect Evidence 106.45(b)(5)(vi)

Schools must send the parties *and their advisors:*

- ✓ **ALL** evidence directly related to the allegations
  will include relevant **and irrelevant evidence <u>including that which would otherwise be excluded under the rape shield protections</u>*
- ✓ includes evidence the school will <u>not</u> use/rely in making a decision
- ✓ includes inculpatory or exculpatory evidence whether obtained from a party or other source
- ✓ electronic format or a hard copy, otherwise, method and format of delivery up to school
- ✓ parties must have *at least 10 days* to submit a written response
  **consider when determining reasonable timeframes*
- ✓ the investigator <u>will</u> consider parties input prior to completion of the investigative report
- ✓ evidence *must be made available at hearing*

- ✓ *Note that both evidence and report MUST be sent to advisor, this is the default. If parties wish to opt out, they can, request that the request be provided in writing*



The Investigative Report

Investigative Report

Must fairly summarize the relevant evidence

- Have discretion to determine what format or what other elements to include if any
- Additional information useful from a practical perspective, i.e. providing sufficient background info/context to understand the evidence, to satisfy record-keeping requirements and document process was thorough, fair, etc.

Investigation Requirements 106.45(b)(5)(vii) Right to the Investigative Report & Evidence

AFTER the initial review period which includes all evidence:

- ✓the investigator will finalize the investigative report incorporating feedback received from the parties as appropriate.
- ✓The final report will summarize RELEVANT evidence
  - * will exclude evidence about complainant's prior sexual history with two limited exceptions
- ✓The final report must be provided to the parties and their advisors in electronic or hard copy, at least ten (10) days prior to the hearing, with an opportunity to respond in writing.



Re-Cap & Key Takeaways

1. Definition of sexual harassment and the scope and application of Title IX is significantly narrowed under the revised rules. The formal grievance process, including investigations, is triggered only upon the filing of a formal complaint and only if within the strict definition, scope and jurisdiction of the rule.
2. Investigators must be trained under these rules, free of any conflicts of interest or bias and must conduct a thorough and impartial investigation within the school's designated "reasonably prompt timeframe"; Investigators may not serve as Decision-makers.
3. The school carries the burden of proof and a respondent is presumed not responsible until application of the grievance process and a determination of responsibility after a live hearing by a neutral decision maker.
4. The Investigation includes many procedural protections including right to receive sufficient advance notice with opportunity to prepare, right to provide evidence and witness, and right to inspect all evidence related to the allegations. All rules must apply equally to both parties.

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