



Title IX Coordinator Training Online Course

Class Two: Conducting a Title IX Investigation

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Class Overview:



- Investigations
 - Impartiality/Conflicts of Interest
 - Investigations Involving Employees
 - Investigating a Formal Complaint
- Understanding Relevance
- Investigative Report
- Violations of Other Policies

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Investigations

Impartiality, Bias, Prejudgment & Conflict of Interest



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Evidence: Investigation vs. Hearings

- **Investigations:** Directly Related to the Allegations
- **Investigation Report:** Relevant Evidence
- **Hearings:** Relevant Evidence
- “The Department acknowledges that the evidence gathered during an investigation may be broader than what is ultimately deemed relevant and relied upon in making a determination regarding responsibility, but the procedures in § 106.45 are deliberately selected to ensure that all evidence directly related to the allegations is reviewed and inspected by the parties, that the investigative report summarizes only relevant evidence, and that the determination regarding responsibility relies on relevant evidence.”

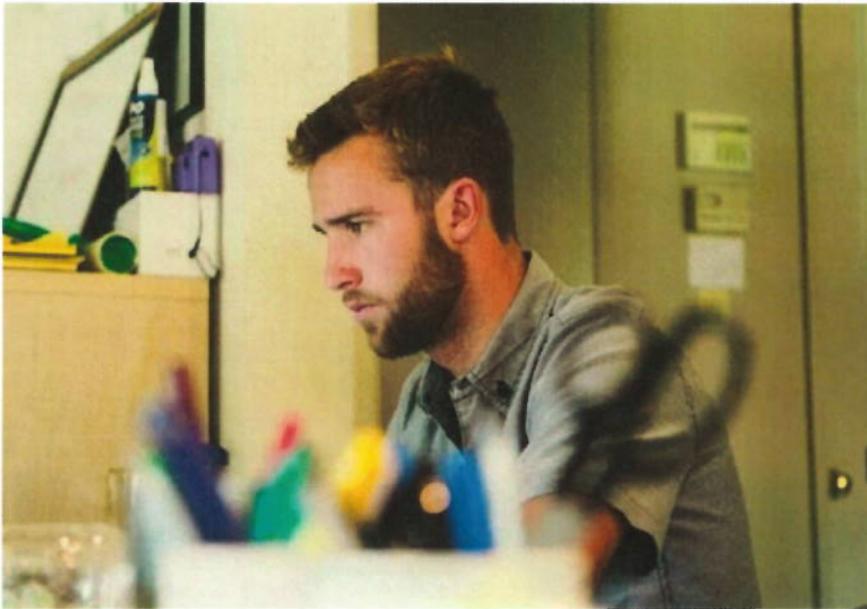


Investigations Involving Employees

The Basics:

- The regulations also apply to employee complainants and respondents in matters involving allegations of Title IX sexual harassment and investigations must comply with the Title IX regulations, including using the same procedures and standards of proof used in handling student allegations.
- Title VII also applies to employee complainants who allege sex discrimination.
- Title VII and Title IX requirements aren't the same.
- OCR expects institutions to comply with Title IX regardless of Title VII's requirements.
- Collective bargaining or state employment laws may apply as well.

Title VII & Title IX



- **Title VII - Standards**
 - Submission becomes a term or condition
 - Unreasonably interferes with work performance or creates a hostile environment
 - Employer knew or should have known
- **Title VII - Timeframe**
 - Immediate and appropriate corrective action to end the harassment and prevent recurrence
- **Title IX - Distinctions**
 - Reasonably prompt timelines
 - Interim supportive measures that are non-punitive and non-disciplinary
 - Administrative leave available

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Evidence: Understanding Relevance

How is Relevance Defined?



- The Department declines to define certain terms in this provision such as “upon request,” “relevant,” or “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- The Regs do not adopt the Federal Rules of Evidence.

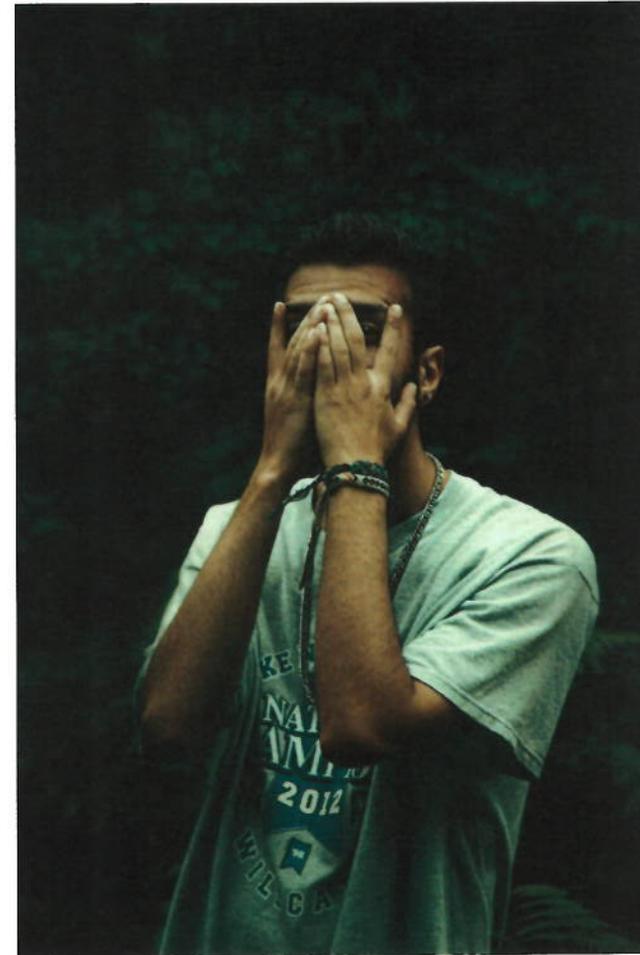
September 4, 2020 Guidance from OCR

So What Is the Ordinary Meaning of the term?

- Evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence; *and*
 - The fact is of consequence in proving or disproving the allegations.
- In other words: Does the evidence tend to prove or disprove the allegations?
- A determination regarding relevancy can rely on logic, experience or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/rules/fre/rule_401

BUT YOU JUST SAID ...



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Should All Relevant Evidence Be Considered?

- Everything comes in except what the regs say a school may exclude.
 - Schools are not permitted to adopt rules that would exclude relevant evidence, e.g., that may be deemed to be unduly prejudicial, concern prior bad acts, or constitute character evidence.
 - A school may not exclude relevant evidence (e.g., lie detector test results, or rape kits) unless the evidence is identified as “NOT RELEVANT” under the Regulations.



What Evidence is “NOT RELEVANT” Under the Regulations?

- A party’s treatment records, without the party’s prior written consent [§106.45(b)(5)(i)];
- Information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
- Questions or evidence about a complainant’s sexual predisposition, and questions or evidence about a complainant’s prior sexual behavior unless 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. [§ 106.45(b)(6)(i)-(ii)];

AND (as we will address with hearings)...

- Although the regulations provide that a decision-maker may not rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)], this provision is **not enforced by OCR but may apply under state law or law in some federal circuits.**
- A school's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the school should be detailed in its Title IX training materials.



Investigating a Formal Complaint

Conducting an Investigation



- Don't restrict the ability of either party to discuss allegations or gather evidence.
- Provide parties written notice sufficient to prepare.
- Allow parties an equal opportunity to identify witnesses, as well as inculpatory and exculpatory evidence.
- Allow parties to have advisors.
- Don't access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without the party's voluntary, *written* consent.

Interviews



Consider whether interviews will be:

- Recorded or not recorded.
- Followed with written statements or summaries.

What does your policy say?

When interviewing, the investigator must:

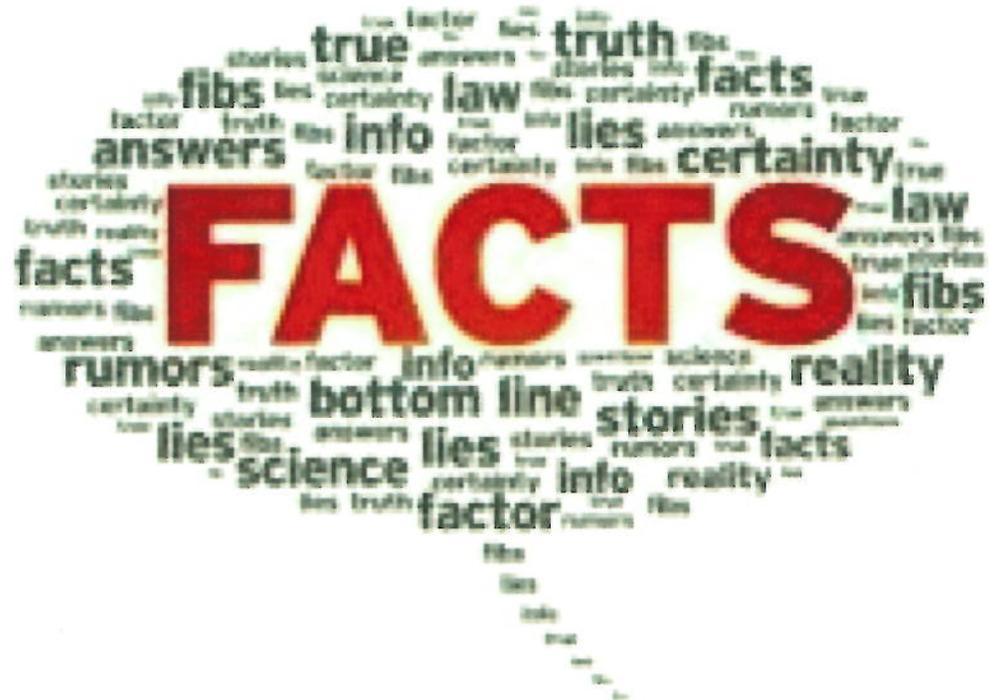
- Be free of conflicts of interest.
- Be prepared.
- Be objective, unbiased, and free from stereotypes.
- Avoid prejudging parties or responsibility.
- Demonstrate respect for all parties and witnesses.
- Take the lead in seeking evidence (inculpatory and exculpatory) – it is not the parties' responsibility to investigate.
- Be alert to/consider carefully non-verbal communications.

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Investigative Report

The Investigative Report

- Defines the investigator's role
- Reports the material facts
 - Context matters
 - Facts not opinion
- Identifies any gaps
- Keep a neutral voice
- Must fairly summarize relevant evidence



Review of Evidence

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- Parties must have equal opportunity to inspect and review *all* evidence directly related to the allegations.
- Schools must:
 - Allow the parties at least 10 days prior to inspect, review and respond to the evidence prior to completion of the investigative report.
 - Consider parties' written response before completing report.
 - Must provide evidence to parties and their advisors for review and response at least 10 days before hearing.

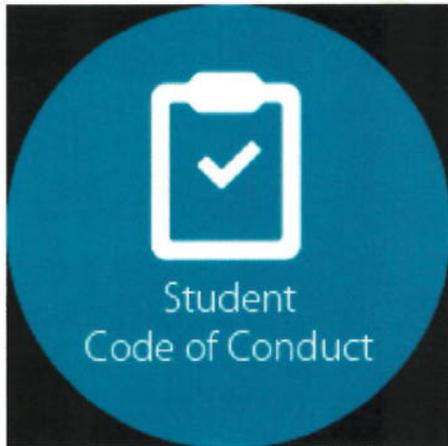
Recommendations Regarding Responsibility?

- Investigative Reports MAY include a recommendation regarding responsibility and related analysis.
- **However:** “The decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.” [Preamble, Fed. Reg. Vol. 85, No. 97, May 19, 2020, p. 30308]
- Decision-makers must make independent decisions based on:
 - Investigative report and related evidence, and
 - Information presented at hearing, including information resulting from cross-examination.



Violations of Other Policies

Violations of Other Policies



- Knowingly making false statements or submitting false information
 - Being alert to potential claims of retaliation
- Sexual Harassment not covered in the regulations but violating campus policies
 - Violations occurring in programs or at locations outside the current definition
 - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards

Remember to update notice with later-discovered allegations.



Due Process (Fundamental Fairness)



The Process That Is Due

A Fair Process:

- that follows the law,
- is implemented without bias, stereotypes or pre-judgment, and
- provides an equal opportunity for parties to be heard and present evidence,
- allows the decision-maker(s) to reach a determination consistent with the standard of evidence.

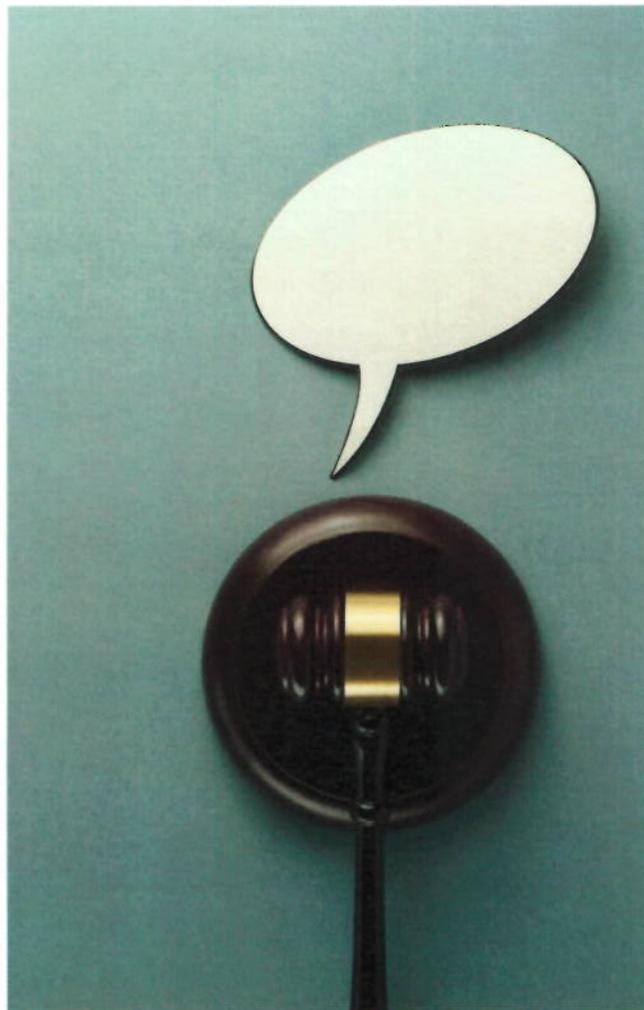
Title IX Sexual Harassment Grievance Process: Elements of “Due Process”



- Notice to the Respondent of the allegations
 - Opportunity to respond
 - Adequate opportunity to prepare before responding
- Notice to the Parties of the process that will be used, including appeals
- Opportunity to present evidence and witnesses
- Cross-examination, including questioning of witnesses
- Live hearing (in separate spaces upon request and as appropriate)
- Opportunity to have advisors of choice



Relevance & Credibility Determinations



In Hearings:

- Decision-maker must evaluate only “relevant” evidence during the hearing and when reaching the determination regarding responsibility – and must do so “objectively”
- The decision-maker must determine the relevance of each cross-examination question before a party or witness must answer.
- Make It Easy: “Not probative of any material fact.”

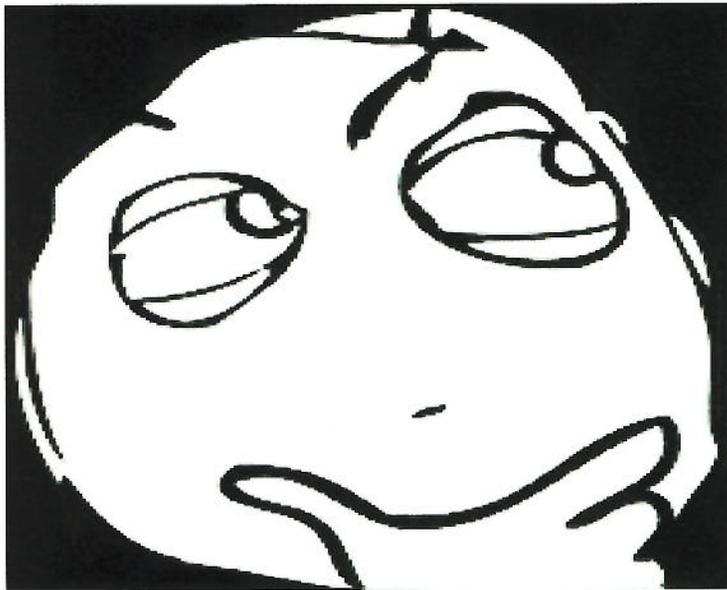
Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of evidence.
- A school may adopt rules around weighing of evidence so long as they do not conflict with the regulations and they apply equally to both parties.
 - For example: A school may adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.

Factors to Weigh

- Consider each material fact separately.
- Credibility as to the facts:
 - Credibility on one fact doesn't make all of that person's testimony credible, and
 - Lack of credibility on one point doesn't make all of that person's testimony non-credible.
- Does the testimony feel rehearsed or memorized?
- Is the testimony exactly the same as another witness?
- Does the testimony make sense?
- Is the testimony detailed, specific & convincing? If not, is there a reason?
- Is it a statement against interest?
- Less credible witness isn't necessarily being dishonest.

Credibility Considerations



- What evidence is most believable?
- Corroborating evidence
 - Other testimony
 - Physical evidence
- Consider faulty memories
- Explore reasons for inconsistencies
- There are no “perfect” witnesses, complainants or respondents
- **Beware**
 - Eyewitness accounts
 - Unintended bias about witnesses or memory



The Decision- Maker (Hearing Officer)

Getting Ready

- Self-identify any conflict of interest or bias.
- Prepare, prepare, prepare.
- Read the report carefully and repeatedly, but don't prejudge.
- Understand the conduct at issue and the elements of the alleged violations.
- Identify areas of agreement and disagreement.
- Determine if there are areas that require further inquiry, e.g., did the investigator explore & consider all the relevant evidence?
- Prepare to explain credibility determinations

Hearing Decorum

Points to Consider: May have rules that:

- Require advisors be respectful and prohibit abusive/intimidating questioning.
 - Deem repetition of the same question irrelevant.
 - Allow for removal of advisors.
- Specify any objection process.
- Govern the timing and length of breaks to confer, and prohibit disruption.
- Require that *parties* make any openings and closings.
- Who will enforce the rules of decorum?
 - How will you train decision-makers?

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Advisors

Advisors



- Parties must have the opportunity to have an advisor present during any grievance proceeding (hearing or related meeting) to support and advise them.
- A party may choose not to have an advisor.
 - However, the institution must provide an advisor to question and cross-examine witnesses if the party isn't accompanied by one.
 - Institutions may require parties to provide advance notice of their advisor's attendance.
 - What if they are a no-show?
- Advisor provided by institution need not be an attorney.
 - Need not be of "equal competency."
 - Needs to understand advisor's role & responsibilities
- May establish guidelines for advisors.
 - Role of advisors in hearings and meetings and decorum requirements.
 - Use of non-disclosure Agreements.

Advisor or Legal Representative

- Clarify procedures and role in advance.
- Distinguish between advisor and legal representative.
- Emphasize the “ground rules” - provide any rules of decorum.
- Establish lines of communication and points of contact.





Written Determination

Written Determination

- Identification of allegations potentially constituting sexual harassment
- Description of the procedural steps
- Findings of fact supporting the determination
- Conclusions regarding the application of the code of conduct/policy to the facts
- Statement of and rationale for the result as to each allegation, including sanctions and whether remedies will be provided
- Appeal procedures and grounds



Appeals

Appeals

Must provide an appeal from a determination of responsibility and dismissal of a formal complaint, based on:

- Procedural irregularities that affected the outcome.
- New evidence not reasonably available at the time of determination that could affect the outcome.
- Bias or conflict of interest of the Title IX Coordinator, investigator or decision-maker that affected the outcome.
- Inappropriate or impermissible dismissal of any formal complaint or allegation.
- May include other grounds, equally available to both parties.

Appeal Process



- Notify other party upon receipt of appeal.
- Appeal decision-maker can't be Title IX Coordinator, investigator or hearing decision-maker.
- Opportunity for both parties to submit written statement.
- Written decision with the result and rationale simultaneously to both parties.

Note

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Title IX Coordinator Training

Online Course Module 5

Assessment

1. Allegations that a faculty member sexually harassed another faculty member during a departmental meeting would not trigger the institution's Title IX policy and grievance procedures, because no student is involved.

True False

2. An investigator cannot access, consider or otherwise use a party's confidential treatment records without the party's voluntary, written consent, unless the records were created by the institution's student health center and the center is covered by FERPA, not HIPAA.

True False

3. Parties must have equal opportunity to inspect and review all evidence directly related to the allegations gathered by the investigator, not only the relevant evidence.

True False

4. The investigator or other designated individual must provide a copy of the investigative report to the parties and their advisors, if an advisor has been identified, at least 10 days before the hearing.

True False

5. An institution may exclude relevant evidence from consideration at a hearing if that evidence is unduly prejudicial, concerns prior bad acts or constitutes character evidence, provided that the institution's policy specifically spells out those limitations.

True False