



New Title IX Regulations: Investigators

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Discussion Topics:

- Overview of Title IX and the New Regulations
- Investigation Process
- Hypothetical Scenario
 - Initial Investigation
 - Credibility & Relevance Determinations
 - Investigative Reports
- Key Takeaways
- **Next Up:** Decision Maker & Advisor Training



Presented by Janylyn Brouwer Daub

TITLE IX OVERVIEW

What is Title IX?

Title IX of the Educational Amendments of 1972 to the Civil Rights Act of 1964

“No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or **be subjected to discrimination** under any education program or activity receiving federal financial assistance.”

Proposed Regulations

- Published November 16, 2018. (first Title IX guidance published by OCR to go through a formal notice-and-comment process since 1997)
- Comments were taken until January 30, 2019 (appx. 124,000 comments)
- Final regulations **effective August 14, 2020**
 - Effect of Coronavirus?
- Remember—the regulations are the law!

What's New?

- Mandatory Training
- Roles (the same but different)
- Sexual Harassment Definition
- Scope of Coverage
- Actual Knowledge Standard
- Grievance & Hearing Procedures
- Retention of Records

Key Roles

- Title IX Coordinator (must be an employee)
- Investigator
- Advisor (party permitted to have an advisor of his/her choice)
- Decision-maker(s)

Key Change: The Decision-maker **cannot be** the same person as the Title IX Coordinator or the Investigator.

Training Requirements

A [University] 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 conduct an investigation** and grievance process including hearings, appeals, and informal resolution processes, as applicable, and **how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias**...A [University] also must ensure that investigators receive training on **issues of relevance** to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.

Sexual Harassment Definition

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- (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).

Scope of Coverage

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- What is the school’s “education program or activity?”
 - Locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs.
 - Specifically includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Who can report?

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How?

In person, by mail, by telephone, or by electronic mail, using the contract information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person's verbal or written report.

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When?

At any time (including during non-business hours)

When does a university have an obligation to respond?

“Actual knowledge” means notice of sexual harassment or allegations of sexual harassment

Actual Knowledge – Who?

- Title IX Coordinator, AND
- A designated school official
 - Must have authority to institute corrective measures on the school's behalf

Grievance & Hearing Procedures

- “Single Investigator” Model is banned
- Live Hearings
- Advisors
- Cross-Examination

Guaranteeing a Fair & Impartial Process

- Presumption of Innocence
- Conflicts of Interest
- Bias

Does this situation cause bias?

A member of the Title IX department shares the following image on their personal social media page:





Presented by Mark Scudder & Tracy Maginn

GRIEVANCE PROCEDURE: INVESTIGATIONS

Investigation Topics

- Big Picture Items
- Roles Within School's Title IX Department
- Evidence Gathering

Big Picture Items

- Both the investigation and hearing processes have gone through significant changes as a consequence of the regulations
- Cannot be discriminatory on the basis of sex and must apply to complainants and respondents

Roles Within School's Title IX Department

- Single investigator model is no longer allowed
 - Investigators and Decision Maker(s) cannot be the same in any given case
- All individuals in the case must be unbiased

This is one area that could result in requiring additional staff!

Timeline

- Conduct the investigation
 - Interview witnesses, gather evidence, etc.
- Produce the evidence to both sides
- Finalize the report
- Conduct a hearing

Investigation Overview

- Coordinate with law enforcement as needed
 - Never force *or* discourage a complainant go to the police
- Gather as much evidence as possible
 - Texts, e-mails, pictures, etc.
- Strategically schedule interviews
 - But surprise interviews are now barred
- Conduct an exhaustive and complete investigation

Evidence Gathering

- Equal opportunities for both parties to have witnesses
- Can't restrict parties from discussing allegations or presenting evidence
- Access to have other people present, including advisors or attorneys
- Must provide written notice to all parties of date, time, location, participants, and purpose of all hearings, interviews, and other meetings with sufficient time for the party to prepare
- Equal opportunities for parties to inspect and review evidence obtained and a opportunity to respond to evidence

Interview Basics

- Typical strategy for witness interviews:
 - Put the witness at ease
 - Explain the procedure and situation
 - Let the witness give a narrative
 - Ask questions based on the narrative as well as questions that may be outside the narrative
- Consider whether a specific interview requires a different approach

Putting the Witness at Ease (or Not)

- Private location
- Comfortable
- Avoid displays of power
 - “Scary” office
 - Sitting across desk
 - High chair, etc.
- Have a note-taker so the interviewer can just have a conversation

Explain the Procedure

- Set the tone for the interview
- Review the policy as necessary
 - Be clear about confidentiality
 - Explain what steps have been taken
 - Remind them of anti-retaliation provisions
- After the interview, explain the next steps

Questioning

- The goal is an open-ended conversation
- The narrative – Just let the witness talk
 - Fill in the gaps and get specifics
- Questions outside the narrative are particularly helpful for third party witnesses
- Be non-judgmental
- Get more information than you give
- Listen carefully for witnesses and tangible evidence that would be helpful for the investigation

Making Credibility Determinations

- Watch for witnesses changing their story – particularly after witnesses may have talked with one another
- Is the witness' story consistent with tangible evidence
- Does it make sense?
- A Respondent's statements are not inherently less valid than a Complainant's *and vice versa*

Let's watch a few interview interactions...

These first three videos feature the complainant in an investigation, Sophia.

Keep an eye out for the good, the bad, and the ugly.

INVESTIGATOR INTERVIEW WITH COMPLAINANT

What are your thoughts?

Type your observations in the chat or unmute yourself and share!



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Let's watch a few interview interactions...

Last up is one final interview featuring a friend of the complainant, Olivia.

Any problems that you notice?

INVESTIGATOR INTERVIEW WITH WITNESS

What are your thoughts?

Type your observations in the chat or unmute yourself and share!



Production of All Evidence to Both Parties

- Universities are required to produce all evidence directly related to the allegations to both sides
- The parties get ten days to respond to this evidence before the investigative report can be finalized

What does this mean for the identity of any witnesses?

Investigative Report - Requirements

- Universities must prepare investigative report on the allegations of the formal complaint
- Must provide ten days after finalizing to circulate before hearing and determination of responsibility



Presented by Janilyn Daub

HYPOTHETICAL SCENARIO

Ready to give this a try?

Let's take a look at a hypothetical situation...

Some additional evidence for your case file...

- Summary of Interviews
- Additional Evidence:
 - Text messages
 - Snapchats



Take a few minutes to look over these documents and be prepared to discuss.

Discussion

- Who should you interview?
- What's a reasonable timeline for the investigation?
- What types of things are you going to be looking for?
- Can you identify any areas of potential bias?





Presented by Chris Bayh

EVIDENTIARY ISSUES

Two opportunities for parties to weigh in

Opportunity 1: The Evidence

§ 106.45(b)(5)(vi):

- Equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
 - including the evidence upon which the recipient does not intend to rely in reaching a determination
 - inculpatory or exculpatory evidence whether obtained from a party or other source
- Send to advisors
- Provide both sides at least 10 days to submit a written response
- Consider those in completing the investigative report

Two opportunities for parties to weigh in

Opportunity 2: The Report

§ 106.45(b)(5)(vii):

- Create an investigative report that fairly summarizes relevant evidence
- At least 10 days prior to the hearing, send to each party and the party's advisor the investigative report
- Provide 10 days for their review and written response

Common Pitfalls



Bias & Evidentiary Issues – Key Points

- Dispassionate, plain statement of the relevant facts
- Key: the “relevant facts”
- Framework: chronological, reporting side, responding side
- If evidence is missing, explain why
- No credibility judgments
- Avoid opinions or conclusions
- Avoid words that subtly signal opinions or conclusions
 - Adjectives and adverbs – just the facts!
 - “However”

Relevance & Cross-Examination

- All evidence must be **“relevant”**
- Looking ahead, any admitted **“statement”** must be subject to **cross-examination**

Relevance – how defined?

- “The final regulations do not define relevance, and the **ordinary meaning** of the word should be understood and applied.” Cmts. p. 811, fn 1018.
- A school “may **not** adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.” Cmt. p. 812.

Relevance – any specifics?

- A few – § 106.45(b)(6)(i):
 - Irrelevant: “the complainant’s sexual predisposition or prior sexual behavior”
 - Think: rape shield laws
 - Exceptions—where prior sexual behavior may be relevant:
 - Assailant identity: “to prove that **someone other than the respondent** committed the conduct alleged”
 - Prior complainant-respondent relations: evidence “concern[ing] specific incidents of the complainant’s prior sexual behavior **with respect to the respondent** and are offered to prove consent”

Relevance – making the call

- What if we get a relevance call wrong?
 - Chance to reexamine it: “if a party disagrees with an investigator’s determination about relevance, the party can make that argument in the party’s written response to the investigative report under § 106.45(b)(5)(vii).”
- This may suggest erring on the side of inclusion... or not.
 - Impact of changing the call
 - How to responsibly include close-call evidence, if you choose to do it

Cross-Examination: how it bears on investigation

- Conduct your investigation with an eye toward the requirement of cross-examination.
- To be admitted, any “statement” must be subject to cross-examination.
- “Statement” is broad.
 - It “has its ordinary meaning.”
 - It “would not include evidence (such as videos) that do not constitute a person’s intent to make factual assertions, or to the extent that such evidence does not contain a person’s statements.”
 - Includes “police reports, SANE reports, medical reports, and other documents and records... to the extent that they contain the statements of a party or witness.”
- Who makes the statement is important.

Hearsay – what about that?

- “the proposed rules do not speak to admissibility of hearsay”
- However, § 106.45(b)(6)(i) “states that the decision-maker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested by cross-examination” Cmt. p. 811 & fn. 1017.

Let's take a look at our investigative file...

Relevant or not?



In our investigation, two interviewees—both of whom are Complainant's sorority sisters—stated that Complainant has had many sexual partners, including one-night stands with men she has met on the same night of their encounters.



Let's take a look at our investigative file...

Relevant or not?



Pictures from the night in question show Complainant at a bar with her friends. It was Halloween, and complainant is pictured wearing a very revealing costume. In our investigation, one of her friends who was out with her that night stated that Complainant referred to her costume as “sexy superhero.”



Let's take a look at our investigative file...

Relevant or not?



We spoke to both Complainant and Respondent. They both agree that they have had consensual sex on two prior occasions. Complainant says that this latest encounter was not consensual; Respondent says that it was.



Let's take a look at our investigative file...

Relevant or not?



Investigation shows that Respondent used campus computers to access and view pornographic videos on two occasions.



Let's take a look at our investigative file...

Relevant or not?



Two interviewees stated:

- They have heard rumors that Respondent has behaved in a sexually inappropriate way with women before, with no specifics;
- Respondent is generally thought of as a “creep.”



Let's take a look at our investigative file...

Relevant or not?



In the investigation, we interviewed Jennifer, a friend of the Complainant. Jennifer stated that her old roommate, Elizabeth, once confided in Jennifer that the Respondent had sex with her while she was unconscious during freshman orientation two years ago. Elizabeth never filed a Title IX complaint, never contacted law enforcement, and never told anyone else about the incident.



Let's take a look at our investigative file...

Relevant or not?



One of Complainant's friends stated that Complainant has a reputation for lying and exaggerating. The friend offered two examples.



Let's take a look at our investigative file...

Relevant or not?



Respondent has some criminal history. Last year, he was arrested and charged with public intoxication and underage consumption when police found him staggering home alone late one night. He paid a fine and the charge was expunged. The year before, he was charged with credit card fraud. He pleaded to a Class A misdemeanor and received probation and a fine.



Importance of the Investigative Report

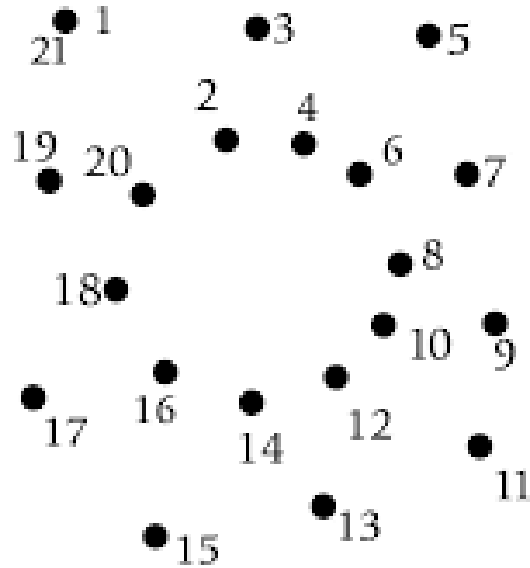
- Foundation for the hearing
- Pre-hearing opportunity for Complainant and Respondent to “litigate” what, exactly, are the facts and what facts should come into evidence at the hearing
- Laying ground for eventual appeal



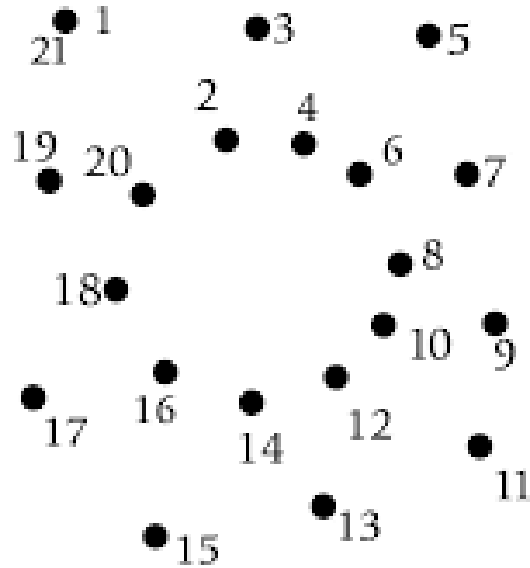
Presented by Mark Scudder & Tracy Maginn

THE INVESTIGATIVE REPORT

Writing a Strong Investigative Report



Writing a Strong Investigative Report



It's important to connect ALL of the dots in order to paint a complete picture that fully supports any future conclusions.

Keep an eye out for gaps or missing connections in order to produce the strongest investigative report possible.

Writing a Strong Investigative Report

Remember:

- Don't forget to outline the procedural steps that have been followed
- Paint the complete picture with relevant, unbiased evidence
- Write from a point of neutrality
 - Avoid any implications of bias or conflicts
- Look to the template as a starting point



Presented by Janylyn Daub

KEY TAKEAWAYS & DISCUSSION

Key Takeaways

- There have been significant changes in both the investigation and hearing processes as a result of the new regulations.
- We must do our best to provide an impartial, unbiased process for all parties involved.
- Always keep relevance in mind!
- Develop an investigative report that connects the dots and sets you up for success should there be a future appeal.

NEXT UP: DECISION MAKER/ADVISOR TRAINING



QUESTIONS?

Submit through the chat window!



THANK YOU FOR ATTENDING!