



## Title IX Training Webinar

June 24, 2020

### New Title IX Regulations: Investigator Training

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#### I. Essential Elements of an Investigation

- An investigation is simply the process the school uses to resolve complaints of sex discrimination or sexual harassment.
- The investigator is the initial fact-finder.
  - Under the final Title IX rules, effective 8/14/2020, the investigator cannot be the individual who makes a determination regarding responsibility, including sanctions.
- ALL investigations must be:
  - Adequate
  - Reliable
  - Unbiased
  - Impartial
  - Prompt
  - Provide an equal opportunity for both parties to present witnesses and other evidence.
- The Investigator
  - Cannot be the decision-maker or appeal decision-maker;
  - Can be internal or external;
  - Must be impartial and unbiased in general and in the specific case;
  - Should be recused if there is a conflict of interest.

- The specific steps in a Title IX investigation will vary depending on:
  - The nature of the allegation,
  - The age of the student(s) involved,
  - The size and structure of the school,
  - Any applicable state or local requirements, and
  - What the school has learned from past experience.
- Key procedural elements from final Title IX Rules:
  - Written notice of investigation sent to parties:
    - Identities of the parties involved in the incident;
    - The conduct alleged;
    - The date and location of the incident;
    - Respondent's entitlement to a presumption of innocence;
    - Parties' right to an advisor of their choice, at the party's expense, who may be an attorney; and
    - Parties' right to review and comment on evidence.
- If new allegations added, must issue written notice.
- Key procedural elements from final Title IX Rules:
  - Prior written notice of interviews to parties with sufficient advance time to prepare:
    - Date
    - Time
    - Location
    - Participants
    - Purpose
- Key procedural elements from final Title IX Rules:
  - Burden of proof and evidence gathering on school, not parties;
    - May be preponderance of evidence or clear and convincing;

- Must use same standard for all complaints of sexual harassment against students and employees
    - Respondent entitled to presumption of innocence (must be stated in written notice).
- No “gag orders” restricting parties from discussing allegations or gathering/producing relevant evidence:
  - Must also protect against retaliation/intimidation of parties/witnesses;
  - Schools can require parties and advisors to sign confidentiality/non-disclosure agreement to ensure evidence not used for any purpose other than participation in Title IX proceedings.
- Additional considerations:
  - Are there any other ongoing school or criminal investigations of the incident? If so, determine the scope of each investigator’s role.
  - Consider whether information can be shared among the investigators.
  - If forensic evidence is involved, consider whether to consult with campus law enforcement or forensic expert to ensure evidence is correctly interpreted.

## **II. Confidentiality**

- The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination or sexual harassment, or has been identified as the perpetrator or respondent to any such report or complaint, or is a witness to any complaint or investigation...
  - ... except as required to carry out the purposes of Title IX (including the conduct of any complaint resolution process), applicable law, or as permitted by FERPA.
- All information must be maintained in a secure manner.
- Do not over-promise confidentiality; due process and other considerations may require disclosure of information obtained through investigation.
- Notify complainant of the information that will be disclosed, to whom it will be disclosed, and why.

## **III. Conducting Interviews**

- The investigator should develop a general investigation plan:
  - Gather and review any relevant documents, policies, or other evidence.

- Determine where interviews will take place (neutral, private, convenient).
- Prepare pre-interview points; consider providing in writing.
- Determine order of interviews.
- Develop list of questions for each that will help you determine whether more likely than not that complaint is founded under Title IX and school policy.
- Points to review with complainant, respondent, and witnesses:
  - Explain process;
  - Expectation of honest cooperation, and result (if any) of refusal to honestly cooperate;
  - Request or state expectation of confidentiality/discretion as appropriate;
  - Explain policy on non-retaliation and how to report retaliation;
  - Explain school's position on confidentiality.
- Consider reducing to writing and having complainant and respondent sign.
- Basic interview questions:
  - Who committed the alleged acts?
  - Who else was around?
  - What exactly occurred or was said? Include details.
  - When did it occur, and was it a one-time event, repeated event, ongoing?
  - Where did it occur?
  - How did you react? How did it affect you?
  - Are there other individuals who might have relevant information?
  - Did you tell anyone about it?
  - Ask for any available evidence (including social media content).
  - Probe for hidden agendas.
- Other interview tips:
  - Consider personality, tone, and psychological dynamics.
  - Focus on facts, avoid spending too much time discussing "why?" questions.
  - Avoid prejudging evidence.
  - Consider all possibilities.
  - Be an active listener.
  - Take notes or record.
  - Control emotions, be investigative rather than an advocate.
- Obtaining witness statements

- Written in first person.
- Focus on facts, not conclusions (may include how the incident affected the individual).
- If the investigator writes the statement for the witness, get confirmation of accuracy.
- Consider having it notarized or including statement “based upon my personal knowledge, the above facts are true and correct.”
- Handling Evidence
  - Beware “chain of custody” issues.
  - Maintain investigation file containing:
    - Investigator’s notes (running record of actions taken, interviews conducted).
    - Written statements.
    - Paper and electronic records.
    - Photographs, video, and audio recording.
    - Any other evidence received, both inculpatory and exculpatory.

#### **IV. Making Credibility Determinations**

- Avoid making credibility determinations based on an individual’s gender, sexual orientation, gender identity, or other protected characteristic.
- Avoid making credibility determinations based on an individual’s status as a complainant, respondent, or witness.

#### **V. Standard of Proof**

- Judicial standards of proof:
  - Beyond a reasonable doubt (used in criminal cases)
  - Clear and convincing evidence (highly likely)
  - Preponderance of the evidence (more likely than not) – used in:
    - civil cases.
    - discrimination and civil rights cases.

- A preponderance of the evidence exists when 50.1% of the evidence supports the allegation(s) in the complaint.
- A preponderance is not based on the amount of evidence, but based on the credibility determinations and weight given to the evidence by the investigator.
- Either preponderance or clear and convincing is acceptable under Title IX as long as:
  - Same standard is applied to all complaints of sex discrimination or sexual harassment;
  - Same standard applies to complaints against students as against employees.

## VI. Relevance

- What is “relevant evidence”?
- Evidence that is of consequence to the outcome of the investigation;
- Evidence that makes any fact more or less probable than it would be without the evidence.
- Relevance does not exist in a vacuum – the relevance of any particular piece of evidence is determined in relation to what is required to make a determination regarding responsibility.
- Determining relevance is different than determining how much weight to give the evidence
  - Irrelevant evidence: Exclude from consideration
  - Relevant: Include for consideration
    - Determine how much weight to be given compared to other evidence – reliability
- Note: Questions of a complainant’s prior sexual behavior or sexual predisposition are not relevant
  - *except to the limited extent they are offered to prove that someone other than respondent committed the conduct, or as related to specific incidents between complainant and respondent to prove consent.*

## VII. The Written Report

- The Investigator must ask questions and sort through evidence, both inculpatory and exculpatory, to produce a summary of relevant evidence.

- After conducting all interviews and receiving all evidence, but prior to completion of the investigative report, each party must be provided with copies of any evidence directly related to the allegations in the complaint
  - Each party must have 10 days to submit a written response to the investigator
  - The investigator must “consider” written responses prior to completing investigative report.
- Investigative report must “fairly summarize relevant evidence”.
- Final investigative report must be provided to each party and the party’s advisor, if any, at least 10 days prior to the decision-maker making a determination regarding responsibility.
  - Parties must be given an opportunity to review and provide written response to investigative report.
- Be aware of new record-keeping requirements!
  - Investigation materials must be maintained for seven years.

## **IX. Bias and Impartiality**

- The Investigator must be unbiased and impartial
- Bias = prejudice in favor of or against one person or group compared with another
  - Opposites of bias = fair, objective
- An Investigator is not on anyone’s “side”
  - Your goal is to help the decision-maker reach a determination of responsibility based on reliable, relevant evidence;
  - Your goal is not to achieve any particular outcome;
  - Avoid becoming emotionally invested or slipping into advocacy – this is not your role.
- Conflicts of interest
  - A conflict of interest exists when the Investigator has a personal or professional interest in a case that prevents them from discharging their duties in a fair, neutral, and impartial manner;
  - Conflicts of interest may arise due to Investigator’s relationship to a party or witness;

- Where the Investigator has a stake in the outcome of the process (e.g., personnel evaluations based on increasing or reducing number of founded complaints);
- Other circumstances that negatively affect the Investigator's neutrality.
- Must avoid the intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings.
- Examples of bias:
  - Assuming that complainants or respondents generally are more likely to tell the truth
  - Assuming that respondents are presumptively responsible for alleged sexual misconduct
  - Assuming that a victim was "asking for it" based on what they wore, how much they had to drink, how they were dancing, etc...
- An unbiased process:
  - Gives parties equal opportunities for participation at every stage;
  - Presumes innocence until a determination regarding responsibility is made;
    - Results in a determination made based on an objective review of all relevant, available evidence
- An unbiased investigation provides both parties with equivalent rights to:
  - Written notices;
  - Introduce witnesses and evidence for your consideration;
  - Review and respond to the other party's evidence; and
  - Credibility determinations based on specific factors, not a party's status as complainant or respondent.
- **Next Step: Determination Of Responsibility**
- **Determination cannot be made by the Investigator or Title IX Coordinator.**