ODHE Basic Title IX Investigator Training
May 18 and 19, 2021

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Disclaimers

- **We can't help ourselves – we're lawyers**
- We are not giving you legal advice – consult with your legal counsel regarding how best to address a specific situation
- This training does not cover institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance

Presentation Rules

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- Questions are encouraged!
- “For the sake of argument…”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution electronically to post

Training Requirements for All TIX Team Members

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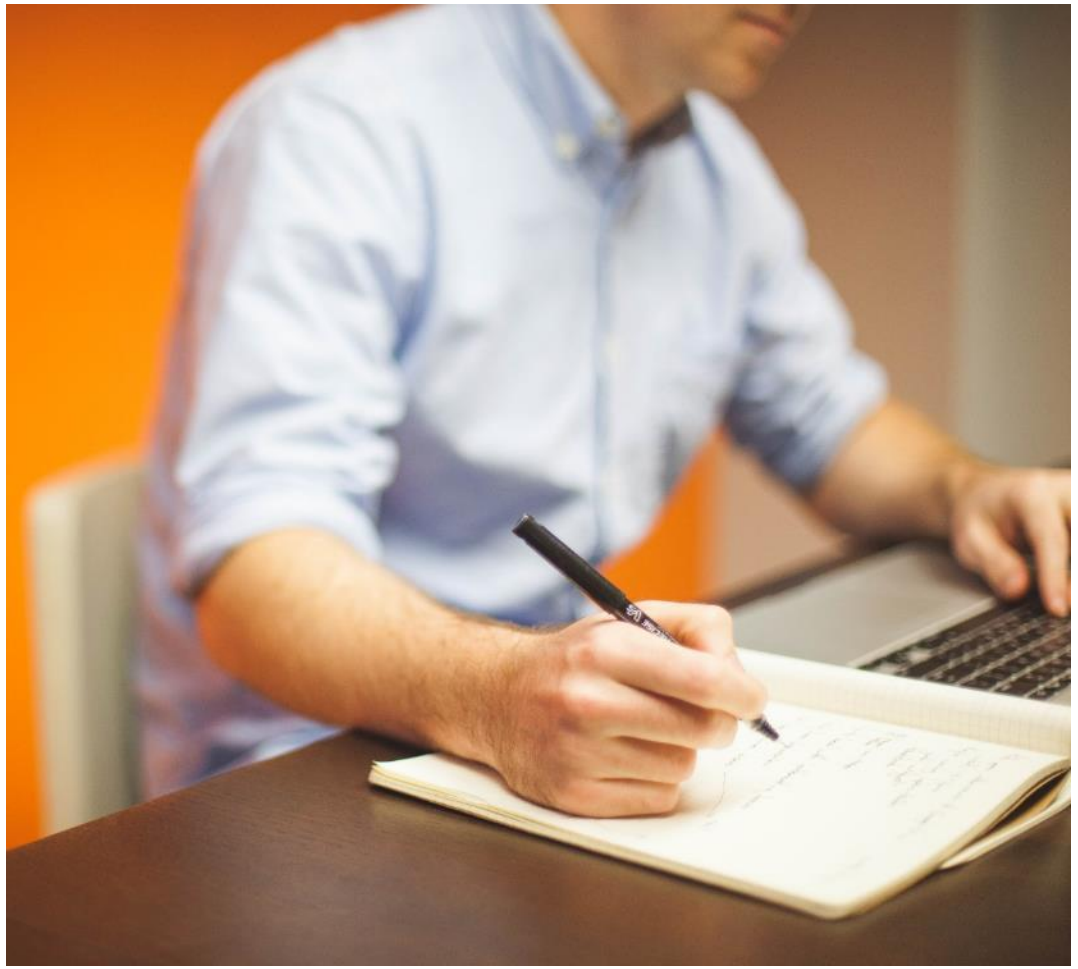
- Definition of sexual harassment
- Scope of the institution's program or activity
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy
- How to serve impartially
  - Avoiding prejudgment of the facts
  - Conflicts of interest
  - Bias (use reasonable person/ "common sense" approach)
  - Not relying on sex stereotypes

Additional Training Requirements for Investigators

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence



Aspirational Agenda – Day 1

1:00-2:30	Introduction, Title IX Overview (Definitions, Processes, and Jurisdiction), Changes to the Investigator's Role
2:30-3:30	Avoiding bias, conflicts of interest, and prejudgment of the facts
3:30-3:40	Break
3:40-5:00	Relevance and Relevance Hypotheticals

Aspirational Agenda – Day 2

1:00-2:00	Continue Relevance Hypotheticals, Investigative Techniques
2:00-3:00	Live Presentation and Discussion with Bricker Attorneys
3:00-3:15	Break
3:15-5:00	Investigative Techniques, Writing the Report, Q&A

Title IX Overview

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New Title IX Regulations

- "Non-negotiable principles"
- Formal Rulemaking
    - Preamble and guidance versus the regulations
- New Definitions
- New Required Processes
- New Training Requirements
- Changes to Jurisdiction
    - "Education Program or Activity"
    - Complainant must be in the United States
    - Mandatory Dismissal from the Title IX process
- Live hearings req'd before Title IX discipline

Non-Negotiable Principles
Preamble, p. 30059

- The right of every survivor to be taken seriously, and
- The right of every person accused to know that guilt is not predetermined

Formal Rulemaking

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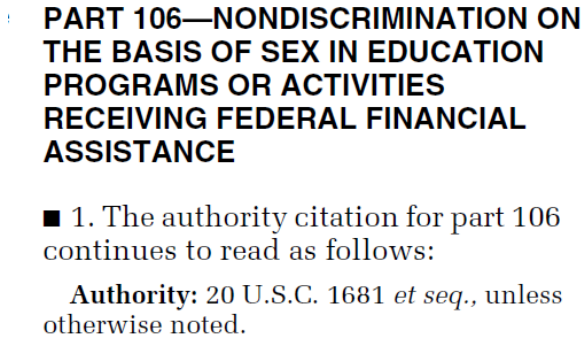
Preamble/Guidance and the Regulations

Preamble/Guidance:

- Dept. of Ed. Interpretation
- May rely on legal precedent
- Entitled to deference
- Potential for change based on Dept. of Ed. leadership
  - Ex: 2011 Dear Colleague Letter

The Regulations:

- 34 C.F.R. § 106
- Force and effect of law
- Will require notice and comment rulemaking in order to amend



PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

■ 1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.

New Definitions
34 C.F.R. §106.30(a)

- Actual knowledge
- Complainant
- Consent**
- Formal complaint
- Respondent
- Sexual harassment
- Supportive measures

"Actual Knowledge"
34 C.F.R. §106.30(a)

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(a) As used in this part:

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment
- To one of the following:
  - Title IX Coordinator, or
  - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient

"Formal Complaint"
34. C.F.R § 106.30(a)

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Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint

Formal Complaint

- Triggers the need for a recipient to respond by following a grievance process
- Title IX Coordinator must offer the Complainant supportive measures **regardless** of whether a formal complaint is filed
- Required for both a formal grievance process (investigation and hearing) as well as an informal resolution process

New Definition of Sexual Harassment

34 C.F.R. §106.30(a)

(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

Sexual Harassment

- **Sexual harassment** means **conduct on the basis of sex** that satisfies one or more of the following:
  - **Quid pro quo** – 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;
  - **Hostile environment** – 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
  - **Clery crimes** – sexual assault, dating violence, domestic violence, or stalking

Clery Crimes

- Refers to certain statutory definitions for sexual assault, dating violence, domestic violence and stalking
  - **Sexual assault** is defined as forcible and non-forcible sex offenses as defined in the FBI's Uniform Crime Reporting (UCR) database, which you can find in the National Incident-Based Reporting System (NIBRS) manual
  - **Dating violence, domestic violence,** and **stalking** definitions are from Clery statute (not regulations) as amended by VAWA
- Remember – must be on the basis of sex to be Title IX Sexual Harssment

Sexual Assault

- Remember, this is definition used by the FBI for crime reporting
- Strict construction of the references in the regulations define Sexual Assault to include the following:
    - Rape
    - Sodomy
    - Sexual Assault with an Object
    - Fondling
    - Incest
    - Statutory Rape

Sexual Assault: Rape

- The **carnal knowledge** of a person,
  - without the consent of the victim,
  - including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- **Carnal knowledge** is defined as the slightest penetration of the sexual organ of the female (vagina) by the sexual organ of the male (penis).

Sexual Assault: Sodomy

- **Oral or anal sexual intercourse** with another person,
  - without the consent of the victim,
  - including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sexual Assault: With an Object

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- To use an object or instrument to unlawfully **penetrate**, however slightly, **the genital or anal opening** of the body of another person,
  - without the consent of the victim,
  - including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.
- An object or instrument is anything used by the offender **other than the offender's genitalia**, e.g., a finger, bottle, handgun, stick.

Sexual Assault: Fondling

- The **touching of the private body parts** of another person for the **purpose of sexual gratification**,
  - without the consent of the victim,
  - including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

Sexual Assault: Incest

- Sexual intercourse **between persons who are related** to each other within the degrees wherein marriage is prohibited by law

Sexual Assault: Statutory Rape

- Sexual intercourse with a person who is **under the statutory age of consent.**

<u>In Ohio:</u>

- Under 13 → can't consent
- Under 16 → can't consent to those older than 18

Dating Violence

- Act of **violence** committed by a person who is or has been in a romantic or intimate relationship with the complainant.
  - The existence of such a romantic or intimate relationship is determined by:
    - the length of the relationship,
    - the type of relationship,
    - and the frequency of interactions between the individuals involved in the relationship.

Domestic Violence

- Act of violence committed by:
  - A current or former spouse or intimate partner of the complainant;
  - A person with whom the complainant shares a child in common;
  - A person who is cohabitating with, or has cohabitated with, the complainant as a spouse or intimate partner;
  - A person similarly situated to a spouse of the victim under the domestic/family violence laws of the jurisdiction;
  - Any other person against an adult or youth victim who is protected from that person's acts under the domestic/family violence laws of the jurisdiction

Stalking

- Engaging in a **course of conduct**
  - directed at a specific person
  - that would cause a reasonable person with similar characteristics under similar circumstances to:
    - Fear for the person's safety or the safety of others; or
    - Suffer substantial emotional distress.
- It must be sex-based stalking to fall under the Title IX definition (Preamble, p. 30172 fn. 772) – Think "celebrity stalking"

Stalking: Course of Conduct

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"Course of Conduct"

- Under VAWA regulations: means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Stalking: Reasonable Person

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"Reasonable person"

- Under VAWA regulations: means a reasonable person under similar circumstances and with similar identities to the victim.

Stalking: Substantial Emotional Distress

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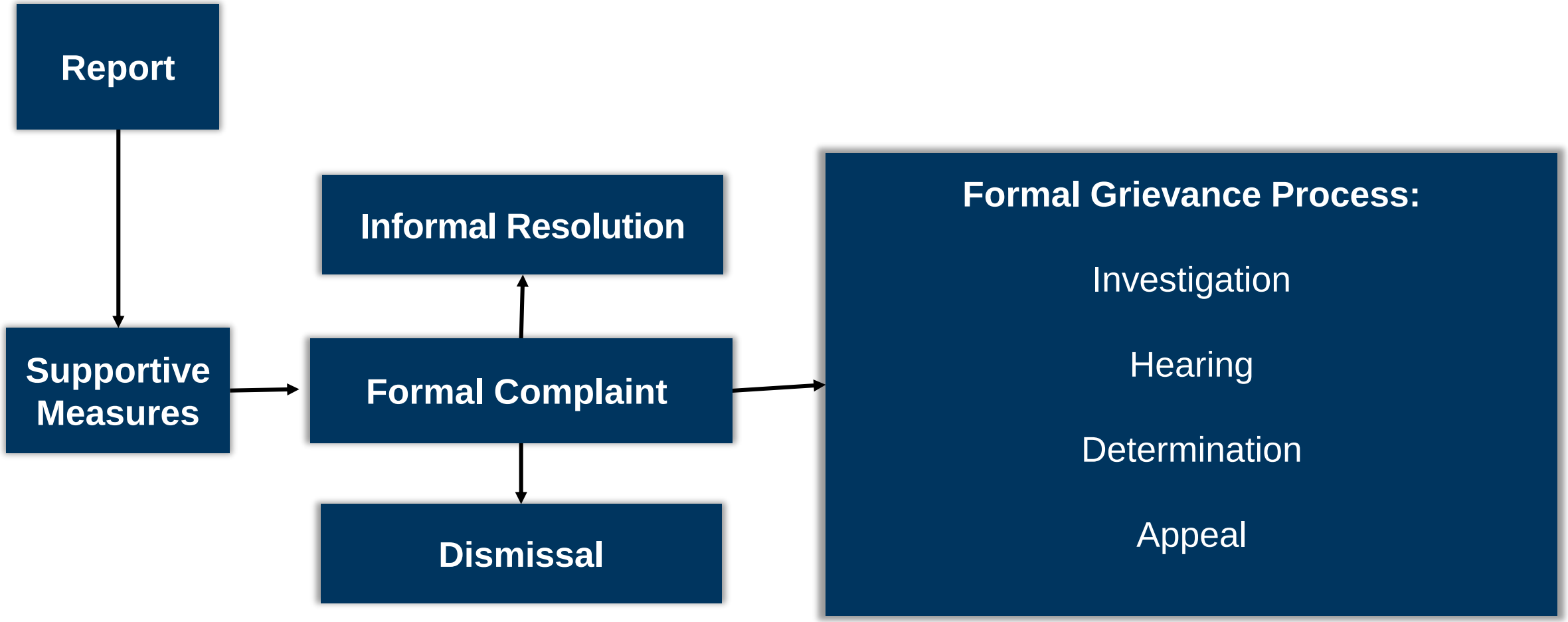
"Substantial emotional distress"

- Under VAWA regulations: means significant mental suffering or anguish that may, but does not necessarily, require medical or other professional treatment or counseling.

Overview of New Required Processes



New Grievance Policy Requirements
34 C.F.R. §106.45(b)(5)(vi) and (vii)

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- Time for parties/advisors to **review evidence** (**10 days** to submit a written response, "which the investigator will consider prior to completion of the investigative report")
- Time for parties/advisors to **review the investigative report** and respond in writing (at least **10 days** prior to hearing)

- A hearing process with:
  - Advisors
  - Trained decision-maker(s)
  - Cross-examination

Know Your Exit Ramps

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- **Where and When do cases "exit" your process?**
- Where do your exit ramps take you and when are the available with regard to:
  - Cases that *were* covered by your policy but are not covered by the new TIX regs? (e.g., off campus sexual assault)
  - Conduct that *was* covered by your policy but isn't included in the new definition of Sexual Harassment? (e.g., sexual exploitation, stalking that is *not* based on sex)

Changes to Jurisdiction
34 C.F.R. §106.44(a)

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Actual knowledge of SH → Educational program or activity → Against a person in the United States

- A recipient with **actual knowledge** of sexual harassment in an **educational program or activity** of the recipient **against a person in the United States** must respond promptly in a manner that is not deliberately indifferent
- "includes **locations, events, or circumstances** over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

Mandatory Dismissal of a Formal Complaint

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34 CFR §106.45(b)(3)(i)

The recipient **must** investigate the allegations in a formal complaint

- **(BUT)** If the conduct alleged in the formal complaint
  - **would not constitute** sexual harassment as defined in §106.30 even if proved,
  - did not occur in the recipient's **education program or activity**, …
  - or **did not occur against a person in the United States**, ….
- then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

Discretionary Dismissal of a Formal Complaint

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34 CFR §106.45(b)(3)(i)

MAY dismiss if:

- Complainant notifies TIXC in writing they would like to withdraw the formal complaint
- Respondent is no longer enrolled or employed by the recipient
- Specific circumstances prevent the recipient from gathering sufficient evidence

Dismissal/Referral ≠ Merit

Preamble, p. 30214

- Don’t base this decision on your opinion of the merits
- Permitting recipient to dismiss because they deem allegation meritless or frivolous without following grievance procedure would defeat the purpose of the regulations

Changes to the Investigator's Role

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No single-investigator model

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- The role of investigator and decision-maker MUST be separate.
- The investigator does not make decisions to help prevent bias of information the investigator may have “gleaned” from the investigation process that is otherwise not relevant to the decision.

The investigation and report will consider more information

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- The investigator has the burden of asking the parties for and collecting all **relevant** evidence
- Relevance may be institution-determined, but we will discuss it further later today
- Parties have the right to present fact and expert witnesses
- Issues of relevance will often not be made until the decision-maker is involved (after your involvement)

The Investigator's Roles

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1. The gatherer of all relevant evidence

2. The organizer of all relevant evidence

Being Impartial and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (1 of 2)

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Section 106.45 **requires** that investigators (and Title IX Coordinators, decision-makers, informal resolution officers and appeals officers)

- be free from **conflict of interest, bias,** and
- be trained **to serve impartially** and **without prejudging facts**.

(Preamble, p. 30053)

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (2 of 2)

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- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(Preamble, p. 30249-30257; 30496)

Impartiality

- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and it's contrary to your neutral role] (Preamble, p. 30323)

Bias: Concerns raised in comments in preamble

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Examples:

- Neutrality of paid staff in Title IX positions
- Institutional history and "cover ups"
- Tweets and public comments
- Identifying as a feminist

- **No *per se* bias** based on these issues alone
- Will always be a fact-specific analysis

How the Department tried to prevent bias

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No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

Bias: Objective Rules and Discretion (1 of 2)

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"[R]ecipients ***should*** have **objective rules** for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the **Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias**…" (Preamble, p. 30250)

Bias: Objective Rules and Discretion (2 of 2)

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- **Discretionary**: Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory**: Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

Conflict of Interest: Concerns raised in comments in preamble

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Examples:

- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

- **No *per se* bias** based on these issues alone
- Will always be a fact-specific analysis

Preamble Discussion on Bias and Conflict of Interest (1 of 3)

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- Final regulations "leave recipients **flexibility to use their own employees, or to outsource** Title IX investigation and adjudication functions, and
- the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient's own employees are expected to perform functions free from conflicts of interest and bias." (Preamble, p. 30251)

Preamble Discussion on Bias and Conflict of Interest (2 of 3)

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- Example: it is **not** a ***per se* bias** or **conflict of interest** to hire professionals with **histories of working in the field of sexual violence** (Preamble, p. 30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead **recommends** using a **reasonable-person test** to determine whether bias exists.

Preamble Discussion on Bias and Conflict of Interest (3 of 3)

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"[F]or example, assuming that all self-professed feminists, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents" is **unreasonable** (Preamble, p. 30252)

Training, Bias, and Past Professional Experience

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- This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience (Preamble, p. 30252)

Examples of Bias

- An investigator who used to supervise one of the parties;
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

Avoiding Prejudgment of Facts at Issue

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A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

Issues of Relevance

What is Relevant?

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From the Regulations…

- No definition of relevance

But What *is* Relevant?

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From the Preamble…

- The preamble discussion indicates relevance may include: evidence that is "**probative of any material fact concerning the allegations**." (Preamble, p. 30343)
- "[E]vidence pertinent to proving whether **facts material to the allegations** under investigation are **more or less likely to be true** (*i.e.*, on what is relevant)" (Preamble, p. 30294)

Relevancy Visuals

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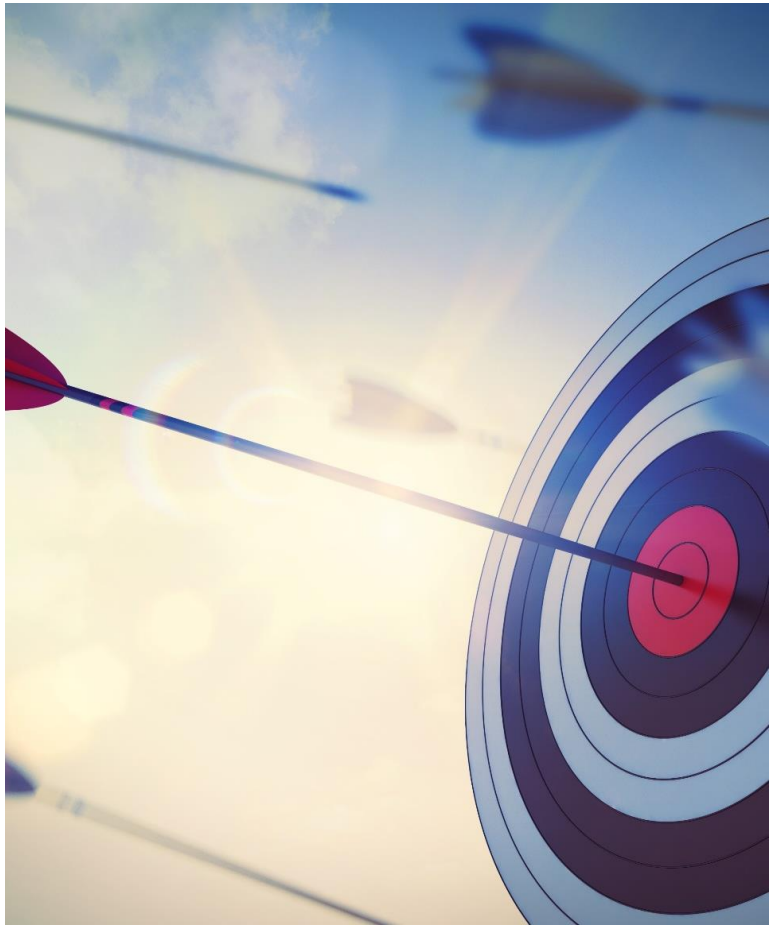

Issues of Relevance (NOT Rules of Evidence) (1 of 2)

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- The Rules of Evidence do **NOT** apply and **CANNOT** apply
- "The Department appreciates the opportunity to clarify here that the final regulations **do not allow a recipient to impose rules of evidence that result in the exclusion of relevant evidence**; the decision-maker must consider relevant evidence and must not consider irrelevant evidence." (Preamble, p. 30336-37)

Issues of Relevance (NOT Rules of Evidence) (2 of 2)

- Cannot *per se* exclude certain types of evidence:
  - A recipient may not adopt rules excluding certain types of relevant evidence (**lie detector** or rape kits) where that type of evidence is not labeled irrelevant in the regulations (e.g., sexual history) or otherwise barred for use under 106.56 (privileged) and must allow fact and **expert witnesses**. (Preamble, p. 30294)

NOT Rules of Evidence
What does that mean?

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- Cannot exclude redundant evidence
- Cannot exclude character evidence
- Cannot exclude hearsay
- Cannot exclude evidence where the probative value is substantially outweighed by the danger of unfair prejudice (Preamble, p. 30294)

- Cannot rely on a statement against a party interest (Preamble, p. 30345)
- Cannot rely on a statement of deceased party (Preamble, p. 30348)

What isn’t relevant?

- Information protected by a legally recognized privilege
- Party’s medical, psychological, and similar records unless voluntary written consent
- Party or witness statements that have not been subjected to cross-examination at a live hearing

Relevancy: Medical treatment and Investigations

Section 106.45(b)(5)(i): when investigating a formal complaint, recipient:

- "**[C]annot access, consider, disclose, or otherwise use a party's records that are made or maintained by** a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, **unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section**."

Relevancy: Legally Privileged Information

Section 106.45(b)(1)(x):

- A **recipient's** grievance process **must…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.

Relevancy: Legally Privileged Information – What does this include?

- Preamble identifies medical and treatment records
- Jurisdiction-dependent
  - Attorney-client communications
  - Implicating oneself in a crime
  - Confessions to a clergy member or other religious figures
  - Spousal testimony in criminal matters
  - Some confidentiality/trade secrets

Issues of Relevancy: What isn't relevant? – Rape Shield Provision

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- Evidence about **complainant's** prior sexual history (must exclude) unless such questions/ evidence:
  - are offered to prove that someone other than the respondent committed the conduct, or
  - if the questions/evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Rape Shield Provisions (Cont.)

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- Rape shield protections do not apply to Respondents
  - Plain language of the regulations concerns "complainant's sexual predisposition or prior sexual behavior" only (34 CFR 106.45(b)(6)
  - "The Department reiterates that the rape shield language…does not pertain to the sexual predisposition or sexual behavior of respondents, so **evidence of a pattern** of inappropriate behavior by an alleged harasser **must be judged for relevance as any other evidence must be**." (Preamble, p. 30353)

Additional information for Investigators regarding relevancy

- There are more considerations for decision-makers regarding relevancy than investigators
- Of note, if a party or witness's statement is not subject to cross-examination at the hearing, the decision-maker cannot consider that statement

Relevance and the Investigator

The gatherer of all relevant evidence

- **Recipient** must ensure that "all *relevant* questions and evidence are admitted and considered (though varying weight or credibility may of course be given to particular evidence by the decision-maker)." (Preamble, p. 30331)

Relevance and the Investigation and Report

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Focus of Investigations (according to the Preamble):

- "The requirement for **recipients** to **summarize** and evaluate **relevant evidence**, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to section 106.45, appropriately direct **recipients** to **focus investigations** and adjudications **on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true** (i.e., on that is relevant.)" (Preamble, p. 30294)

Retaliation

Participation in an investigation is **voluntary**

- When parties elect not to participate, a recipient cannot retaliate against them (Preamble, p. 30322)
- It is the right of any party or witness not to participate in the investigation

Relevancy Hypotheticals for the Investigator

Relevancy Hypotheticals

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Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Relevancy Hypotheticals: Scenario Review

- The following hypotheticals are all based upon the scenario we provided in advance of today's training. We will go through it together now before we go through the hypotheticals.
- You are the investigator who has been handed this information from the Title IX Coordinator.

Hypothetical Report from Cody

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Corona College Email

To: Title IX Coordinator
From: Cody Craft
Date: February 16, 2021

Hi, my name is Cody Craft and I'm not sure how to make a report to this office, but I need to report that two students, Rachel Rex and Rebecca Rex, have been harassing me and stalking me in recent weeks. They are twin sisters and are friends with my ex-girlfriend, Wendy Watson. I think they may be acting this way because they were told to do so by Wendy. I recently received a No Contact Order from the University and have tried to keep my distance from Wendy, but she's allowed to send her friends to follow me and harass me?

Wendy Watson is my ex-girlfriend and I believe she may have recently filed a complaint against me for private disagreements in our relationship. I don't think she should be able to that because I didn't do anything wrong and I never "abused" her. I haven't received notice of her complaint but I've been told that I might get kicked out of school over it. First, can you tell me whether this is true and whether I need to get a lawyer?

Hypothetical One

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You sit down to interview Cody. Cody tells you that he heard that Wendy falsely accused a high school boyfriend of abuse and he was almost kicked out of school. He believes this high school boyfriend still lives in the area and would like you to interview him.

Is this relevant?

Hypothetical Two

In your interview with Rebecca, Rebecca tells you that she has hired a constitutional law expert who will provide a report stating that there is no way that Rebecca's statements to Riley are protected by the First Amendment.

Is this relevant?

Hypothetical Three

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In your interview with Cody, Cody disclosed to you that he has proof that he has post-traumatic stress disorder from Rachel and Rebecca's actions. Cody states that he has medical treatment records to prove this, but does not want to provide them to you.

Is this relevant?

Hypothetical Four

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In your interview with Wendy (who is a witness in the case against Rachel and Rebecca), Wendy mentions that before she started dating Cody, she heard that Cody was nearly expelled from high school for threatening a teacher with physical violence.

Is this relevant?

Hypothetical Five

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In your interview with Rachel, she discloses that she had a class with Cody last spring from he abruptly disappeared after midterms. Rachel heard a rumor that Cody was removed from the course because he cheated on the midterm exam.

Is this relevant?

Hypothetical Six

In your interview with Rebecca, Rebecca tells you that she has consulted with a domestic violence expert who is willing to state that Cody's actions towards Wendy are common precursors to physical violence in dating relationships.

Is this relevant?

Hypothetical Seven

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During the investigation, you learn that Cody is distantly related to Rachel and Rebecca. In your interview with Cody, he asks that you contact his great aunt Judy because she can tell you how dishonest Rachel and Rebecca's side of the family has been in the past. Great Aunt Judy also has theories about how Rachel and Rebecca's father committed fraud in the early 90's, which she believes is relevant to the way Rachel and Rebecca view men.

Is this relevant?

Hypothetical Eight

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Rebecca tells you that she has been unable to sleep since Cody filed the report and would like to provide treatment records to support the effects of Cody's report on Rebecca. Rebecca is willing to sign a waiver.

Is this relevant?

Introduction to Investigative Techniques

Initial Review

- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
    - What elements do you think will be disputed?
    - Agreed upon?

Begin Evidence List

- If there is a criminal investigation, work with law enforcement to collect and preserve evidence

Types of evidence

- Electronic communications
- Security information
- Pictures, videos, audio
- Police reports
- Personnel files
- Prior complaints against respondent

Begin Witness List

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- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

Craft Questions for Each Witness

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- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible

Organizing for the Interview

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- What should you have with you?
  - Intake Report
  - Written notice with allegations
  - Investigation log
  - Investigation notes cover sheet
  - Pre-prepared questions
  - Evidence you may need to reference or show witness
  - Policy or Handbook

Note-taking Tips

- Use predictable symbols in the margin to easily skim during the interview:
  - **?** ← Follow-up questions
  - ***** ← Potential evidence
  - **W** ← Potential witness

- Try to record exact quotes when possible
- Interview notes are now required to be produced as part of the record

Remember: The gatherer of relevant evidence

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- To ensure burden of proof and burden of gathering evidence is not on the parties (106.45(b)(5)(i))
- To provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory or exculpatory evidence (106.45(b)(5)(ii))
- Not restrict the ability of either party to discuss the allegations under investigation or to gather or present relevant evidence (106.45(b)(5)(iii))

Setting Up the Interview (1 of 2)

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- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods

Setting Up the Interview (2 of 2)

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You must now provide any party whose participation you seek, with written notice (email) with “sufficient” time to prepare:

- Date
- Time
- Location
- Participants
- Purpose of interview or meeting

(106.45(b)(5)(v))

Set the Stage

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- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

Begin Broadly

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- Elicit a monologue about the incident
  - What happened earlier that day before the incident?
  - What happened with regard to the incident?
  - What happened next?

Freeze Frames

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- Ask the witness to “freeze” on the moment and describe details
  - What could they see? Feel? Smell? Taste? Hear?
  - Where was the other person? How were they positioned?
  - Where were you? How positioned?
  - What did you say to the other person? Them to you?
  - Describe other person’s tone, demeanor, body language

Ask Follow-Up Questions

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- Re-review your notes
- Re-review the elements of each charge
  - Have you elicited all of the information this witness might have about each element?
  - Do you have an understanding of how the witness obtained the information they shared?

Credibility

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- Gather facts to assist **decision-maker**
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

When Consent is at Issue

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- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent

Closing the Interview

- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

After the Witness Leaves (1 of 2)

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- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

After the Witness Leaves (2 of 2)

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- Consider whether there are additional allegations that you need to bring to the Title IX Coordinator
- Ensure you are not leaving the burden of proof on any party or witness alone (106.45(b)(5)(i))

Physical Evidence

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- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log

What about advisors or support persons in interviews?

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Must provide parties the same opportunity to be accompanied by the advisor of their choice

- Nothing in the preamble prohibits support persons in the interview process (this is different at the hearing)
- Allowed to limit participation of advisor in process
- Whatever rules your institution selects, apply them equally to both parties

(106.45(b)(5)(iv))

Inspection and Review of Evidence

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Provide ALL Evidence to both parties and advisors

- Include everything related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

(106.45(b)(5)(vi))

Create Investigative Report

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- Summarize **facts**
- No determination
- Provide to parties and advisors
- Allow 10 days to review prior to hearing
- We will discuss report writing later today

Live Presentation

Key Takeaways (1 of 2)

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- Study your updated grievance procedures
- Know the definition of sexual harassment and keep the policy language in mind as you interview parties and witnesses
- Identify when/if another policy such as anti-bullying is in play

Key Takeaways (2 of 2)

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- Make sure you understand potential biases (actual or perceived)
- Trauma may affect how someone responds to an incident
- Prepare for your interview with questions and statements
- Start with open-ended questions
- Obtain any documentary evidence that you can

Writing the Report

Remember: The organizer of all relevant evidence (1 of 2)

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- Your second role, after gathering all relevant evidence, is to organize all relevant evidence for the parties and the decision-maker.
- Here are some tools for how to best organize all the relevant evidence.

Remember: The organizer of all relevant evidence (2 of 2)

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The new Regulations provide that the investigator must create a report that:

- Fairly summarizes relevant evidence

(106.45(b)(5)(vii))

What does this mean?

Start with the basic information

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Identify with just factual information:

- Complainant
- Respondent
- Investigator
- Witnesses
  - Perhaps organize by fact v. expert witnesses or by party whom requested the witness

Consider general organization

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Natural and neutral organization suggestions:

- Chronological order
- By topic or allegation
  - Perhaps by chronology within each topic or allegation
- By chronology of how the information came in to the investigation
- By witness summary

Explain how organized

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Explain your structure. Example:

“The information in this report is a summary of the facts as agreed upon by the parties and the witnesses. Where there is a difference in the accounts, it is noted in the report. For the sake of clarity, the report is organized chronologically and by subject matter when appropriate.”

Other basic information to include

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- Basic description of charges
- How did the complaint make its way to an investigation?
- Witnesses Interviewed
- Witnesses Not Interviewed (and why)
- The procedure followed, step-by-step
- Any procedural anomalies that need explained?

Identification of witness sign-off

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If this is your practice:

“Each person interviewed was provided with a written copy of a summary of their interview, and was given an opportunity to provide feedback and approve the accuracy of the summary.”

- Did everyone do so?

A statement regarding relevant evidence

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"All relevant information gathered during the course of the investigation has been included in this report."

- Identify if you thought something was not relevant and why – consider still including in attachment for decision-maker
- Provide a table or list of all relevant evidence gathered and attach that evidence

Identify and include all alleged policy violations

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- Definition of prohibited conduct alleged from applicable policy
- Related definitions as appropriate (e.g. consent, incapacitation) or any code of conduct included if done together
- Include verbatim, in entirety

Give an Overview of the Evidence Collected

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and

Attach as appendices any statements and important evidence

Be helpful to reviewers – keep it transparent (1 of 2)

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Citations to the record – always

- Be helpful for your fact-finders!

Hearing packet or exhibits – helpful to number the pages sequentially for easy citation

Be helpful to reviewers – keep it transparent (2 of 2)

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- Insert into the report screenshots of text messages and pictures where relevant
- If information is attached but not referred to in a summary, may want to drop a footnote explaining why not

What not to include in report (but note requested and why not included) (1 of 3)

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The specific type of evidence deemed not relevant in the Regulations:

- Information protected by a legally recognized privilege
- Party's medical, psychological, and similar records unless voluntary written consent
- Rape Shield protection for Complainant

What not to include in report (but note requested and why not included) (2 of 3)

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If evidence is requested by a party and/or you determine it is not relevant,

- **always** explain that it was requested, and
- **why** you determined it was not relevant.

What not to include in report (but note requested and why not included)

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If you determined evidence was not relevant because of matters outside of the specific reasons identified in the regulations—i.e. because you did not think it was probative of material fact—explain and consider attaching in an Appendix

- “Show Your Work”

Helpful synthesis

If you can, synthesize the information from multiple parties and witnesses

Where the stories diverge:

- “Information from [Complainant]”
- “Information from [Respondent]”

Summary of Information (1 of 2)

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Don’t forget to summarize impact on **complainant** if the charges require consideration as an element

- “The investigator notes that this incident and the process may have had an impact on [Respondent]. However, to determine whether sexual harassment occurred, the hearing panel will be required to review the impact of the reported behavior on [Complainant]. This is the reason that the information here focuses solely on [Complainant].”

Summary of Information (2 of 2)

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Undisputed Facts

- Series of numbered sentences

Disputed Facts

- Series of numbered sentences

Make sure you have facts for each element of each charge

Bad vs. neutral and clear writing examples

Writing examples

Disclaimer: The following hypotheticals are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.

Example 1

Bad example: Complainant was very believable when they said they had been attacked by Respondent.

Neutral and clear correction: Complainant stated they were attacked by Respondent on Saturday. Complainant provided the names of witnesses and contact information for those witnesses.

Example 2

Bad example: Complainant stated that she didn't think she had witnessed anything, but that I should check with her.

Neutral and clear correction: Complainant stated that Complainant did not believe that her roommate, Rebecca, had witnessed anything. Complainant asked the investigator to follow up with Rebecca to verify what, if anything, Rebecca witnessed.

Example 3

Bad example: Respondent seemed nervous at the interview and wasn't consistent with the information.

Neutral and clear correction: Respondent provided the following information at the interview: that Respondent was at the party from 7-8, that Respondent was not at the party at 7:30, and that Respondent may not have been at the party.

Example 4

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Bad example: Respondent requested that I follow up with her roommate, but I did not because the evidence seemed redundant.

Neutral and clear correction: Respondent requested the investigator follow up with her roommate. The investigator scheduled an interview with the roommate to follow up on any additional information the roommate may have. The roommate's account of events at the interview, provided in Exhibit C, is consistent with Respondent's statement regarding the time period between 12 and 2 on the date of the allegation. The roommate was not present outside of that time frame and had no additional information.

Additional information available at:

Title IX Resource Center at www.bricker.com/titleix

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Questions?