



TITLE IX TRAINING: REQUIREMENTS OF THE NEW TITLE IX REGULATIONS

Part III: For Title IX Investigators and Decision – Makers

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**Part III: *Required Training for Title IX Investigators and
Decision-Makers***



Title IX Training Requirements for Title IX Investigators

□ Let's Review What You Learned in Parts One and Two of the Training

- ✓ Definition of sexual harassment;
- ✓ Reporting requirements;
- ✓ What schools must do to support alleged victims;
- ✓ Title IX grievance procedures; and
- ✓ Requirements and roles of the Title IX Coordinator, Informal Resolution Facilitator, Investigator and Decision-Maker.



TODAY'S TRAINING

The new regulations
mandate Title IX
Investigators and Decision-
Makers receive training



We Are Here

Title IX
Coordinator



Investigator



Decision-maker



Appeal
Officer



Informal
Resolution
Facilitator



Training for Title IX Investigators

□ What Will You Learn?

1. Review the parties to a Formal Complaint.
2. Review the formal investigative process, including required impartiality.
3. How to investigate.
4. How to create an investigative report “that fairly summarizes relevant evidence” (as described later in this section).



Training for Title IX Decision-Makers

□ What Will You Learn?

5. How to impartially evaluate evidence and determine credibility.
6. What is relevant and what is not.
7. How to create a final written determination.



First, Let's Review



Parties to a Formal Complaint

- **Complainant**: A person alleged to be the victim of sexual harassment.
- **Respondent**: A person alleged to be the perpetrator of sexual harassment.
- **Reminder**: A parent may act on behalf of a minor student who is a Complainant or Respondent.



Required elements of the investigative process

The final regulations require schools to:

- **Investigate** and adjudicate formal complaints of sexual harassment, and
- **Give** Complainants and Respondents meaningful opportunity to participate in the investigation.



The Basic Elements of a Formal Complaint Process Include

- Objective evaluation of **inculpatory (favorable to Complainant)** and **exculpatory (favorable to Respondent)** evidence.
- Credibility may not be based on the person's status.
- The Title IX Coordinator, Investigator and Decision-Maker(s) must not have a conflict of interest or bias.
- Presumption Respondent is not responsible until the conclusion of the grievance process.
- Reasonably **prompt** time frame for the grievance process.
- A standard of evidence – either **“preponderance of the evidence” (more likely than not)** or **“clear and convincing” (reasonably certain)**.
- Ensure burden is on District, not the parties, to gather evidence, but District may not breach any privilege (e.g., doctor-patient) without a voluntary waiver.

Basic Elements of a Formal Complaint Process (Cont'd)

- ❑ **Witnesses:** parties have equal opportunity to present witnesses.
- ❑ **Free Speech:** district cannot restrict either party from discussing the allegations or gathering evidence.
- ❑ **Advisors:** parties have the right to an advisor.
- ❑ **Written Notice:** must be given to a party whose participation is invited or expected, with sufficient details and enough time to prepare.

- ❑ **Inspection and Review of Evidence:** prior to the completion of an investigative report, *the parties must have at least 10 days to review the evidence and submit a written response.*
- ❑ **Summary of Investigative Report:** the investigator *must create an investigative report, provide copies to the parties and give the parties at least 10 days to respond in writing.*



How To Investigate Formal Complaints



Who May Serve a Title IX Investigator?

- Administrators?
- HR?
- Central Office Staff?
- Internal Security?
- In House Counsel?
- Outside Investigator?
- Non-Attorney?
- Attorney?



Remember: the Title IX Decision-Maker **may not** be the Investigator.



Who May Serve an Investigator?

The appropriate Investigator should possess

- ✓ Ability to be objective
- ✓ No personal relationship with involved parties
- ✓ **Attention to detail**
- ✓ The right temperament
- ✓ **Does not report to Respondent!**

Remember

The objective is to provide an objective process to Complainant and Respondent. Therefore, to the extent possible, you want to have separate people serve as Coordinator, Investigator and Decision-Maker



Requirements for Investigator

- ❑ Must complete all training required by new regulations.
- ❑ **The Coordinator may serve as Investigator or Facilitator**, but there are reasons to separate these roles, if possible.
- ❑ Like the Coordinator, Investigator may not have a conflict or bias either for or against:
 - Complainants or Respondents generally, or
 - A Complainant or Respondent.



Conflict of Interest or Bias?

Q: How can you determine whether an investigator has a conflict of interest or bias?



Conflict of Interest or Bias?

- A. I've known Respondent for years; he goes to my church and I know his family. He wouldn't do that.
- B. That's just Joe. He's harmless.
- C. Complainant tends to be dramatic and exaggerate.
- D. I know this student and she has a history of lying.
- E. All the above.



Conflict of Interest or Bias?

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- C. Complainant tends to be dramatic and exaggerate.
- D. I know this student and she has a history of lying.
- E. All the above.**



Investigation of Formal Complaints

- ❑ **Remember**: It is not the Investigator, but the Decision-Maker who decides as to responsibility for Title IX purposes.
- ✓ In other words, **the Investigator is the fact gatherer.**
- ✓ The Decision-Maker makes conclusions based on facts gathered by the investigator.



The Investigator Only Investigates

Title IX
Coordinator



Investigator



Decision-maker



Appeal
Officer



Informal
Resolution
Facilitator



The Decision-Maker Decides

Title IX
Coordinator



Investigator



Decision-Maker



Appeal
Officer



Informal
Resolution
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The Investigator's Role

- Be neutral.
- Interview witnesses.
- Gather information (e.g., written statements, documents, video and/or audio).
- Give Parties an opportunity to review and respond to the evidence.**
- Prepare required investigative report.
- Provide Parties with investigative report and an opportunity to review and respond.**
- Provide investigative report to the Decision-Maker.



If You Are The Investigator

- Be respectful of all parties (Complainant, Respondent, and the witnesses).
- Be neutral.
- Use common sense (**pay attention to signals and document them; be practical**)
- Don't tolerate retaliation and remind witnesses about anti-retaliation policies.
- Document, document, document!



Typical Steps of an Investigation

1. Send Interview Notices to Complainant and Respondent.
2. Interview Complainant.
3. Interview Respondent.
4. Interview Witnesses.
5. Review documents, video footage, and any audiotapes.
- 6. Provide the evidence to the parties and allow at least 10 days to review and respond in writing.**
7. Prepare investigative report.



Typical Steps of an Investigation (cont'd)

8. **Provide Parties a copy of the investigative report and give them at least 10 days to review and respond.**
9. Provide investigative report to the Decision-Maker.
10. **A decision is made by the Decision-Maker**

Note: DM must give parties opportunity to submit written questions before reaching a decision).



1. Send Interview Notices to Complainant and Respondent

Written Notice of Meetings and Interviews



District must provide:

- to a Party (and advisors, if any) whose participation is invited or expected,
- written notice of date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, AND
- with sufficient time to prepare to participate.



2. Interview Complainant

- ❑ Investigator should behave compassionately, yet professionally, and maintain objectivity.
- ❑ Review Formal Complaint with Complainant and pin down dates, times and locations where alleged harassment took place.
 - Who, what, where, when, why, how?
 - **Any witnesses?**
 - **Did you confide in anyone?**
 - Any threats or promises carried out by Respondent?
 - Any other complaints about Respondent?
 - **Anything else I should know? Any documents?**



Closing With Complainant

- Inform Complainant you will be speaking to Respondent.
- Instruct Complainant to report anything new and to whom to report.
- Thank Complainant for the report.
- Tell Complainant the District will get back to them soon (likely next to review the evidence).
- Tell Complainant the District prohibits retaliation, and**



Closing With The Complainant (Cont'd)

Prepare notes

- ✓ Best to prepare simultaneous notes
- ✓ Review with witness/check in
- ✓ Do not change their words
- ✓ Only record facts
- ✓ Make no reference to yourself in the first person

NO “I noticed the Complainant did not make eye contact.”

YES “The Complainant did not make eye contact.”



Reminder About Documentation

- ❑ Notes may be evidence. Write as if Jury is reading over your shoulder.
- ❑ **Do not add editorial comments.**
 - ✓ “Witness seemed credible.”
 - ✓ “Complainant was nervous.”
- ❑ **Only include factual observations.**
 - ✓ “Respondent would not look me in the eye.”
 - ✓ “Respondent refused to tell me about previous misconduct allegations.”
- ❑ Prepare notes while information is fresh.
- ❑ Edit for accuracy and completeness.



Reluctant Complainants

- ❑ Explain the district must investigate (show policy).
- ❑ Reassure that the district will take appropriate action.
- ❑ Reassure retaliation will not be tolerated.
- ❑ Confidentiality – do not guarantee but will limit information to need-to-know basis. Keep as confidential as possible.



If Complainant has an Advisor

- ❑ You may want to have district's legal counsel available.
- ❑ Questions should be kept in the context of the harassment investigation.
- ❑ If advisor prohibits Complainant from answering questions, document that.
- ❑ **Note: District may restrict role of advisors at interviews, but restriction(s) must be uniform.**



3. Interview Respondent

- ❑ Investigator should be professional and objective in describing concerns raised by Complainant.
- ❑ Do not make accusations.
 - ✓ State the concerns/allegations.
- ❑ Do not suggest Respondent apologize to Complainant.
- ❑ Do not delay interviewing the Respondent.
 - ✓ Must interview most critical witnesses promptly!



Interview Questions for Respondent

- Obtain details about what happened.
 - ✓ Who, what, where, when, why, how?
 - ✓ Any witnesses?
- Was the conduct welcomed? How did Complainant respond?
- Any recent or anticipated personnel actions against the Complainant?
 - ✓ If so, What ? Why?
- If Respondent denies, ask,
 - ✓ Any situation which Complainant may have misunderstood?
 - ✓ Why would Complainant make a false accusation?
- Take notes.
- Ask Respondent to write down what happened.**



Instructions To The Respondent

- ❑ Explain that retaliatory actions violate the law and policy.
- ❑ Explain the importance of remaining professional and avoiding statements like:
 - “I feel targeted.”
 - “I don’t want the Complainant in my class anymore.”
 - “I’m not going to meet alone with anyone anymore.”



Reminder: First Amendment Rights

- ❑ For Title IX investigations, a party can exercise free speech by talking about the investigation, **which is contrary to common practice.**
- ❑ However, Title IX prohibits retaliation.
- ❑ Therefore, abuse of First Amendment rights to intimidate, threaten, or coerce is prohibited retaliation.
- ❑ All parties, including the witnesses are protected.



4. Interview Other Witnesses

- ❑ You will learn from Complainant and Respondent if there are witnesses.

- ❑ Interview only if necessary.
 - *e.g.*, you may not need to interview if Respondent admits to allegations.
 - The investigator does not need to feel compelled to interview everyone, let common sense rule.



4. Interview Other Witnesses (cont'd)

- ❑ Try to start with the witnesses who knows the most.
 - Explain a concern has been expressed– start broad.
 - Assure the district will not retaliate.
 - Phrase questions to give as little information as possible.
 (“Are you aware of anyone using offensive language in the lunchroom?”)

- ❑ **When you have sufficient information, evaluate whether further witness interviews serve a purpose.**

Remember: The standard is not perfection. The issue is whether the district reasonably believes the allegation and acted in good faith.



5. Other Documents?

- If witnesses have documents, ask them to provide a copy (or location if the witnesses do not have them readily available)
- Ask them to report any new information.
- Remind them of the anti-retaliation policies.



Note: documents, video footage and audio may reveal more witnesses that may need to be interviewed!



Review Complaint History of Complainant



- Be careful of duty to be objective and neutral. Only report any complaint history similar to or related to the complaint you are investigating.
- Remember, your role is to be neutral, it is not to be hostile to Complainant.
- Nonetheless, it is prudent to review personnel, student, and complaint files.

Are There Other Accusations Against Respondent?



- It is prudent to review whether similar complaints have ever been made against Respondent.
- Remember, your role is to be neutral, it is not to be hostile to the Respondent.
- Nonetheless, it is your duty to investigate and gather facts.



Medical Documents?

- ❑ When investigating a formal complaint and throughout the grievance process the District must:
 - ✓ **not 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, UNLESS**
 - ✓ **the District obtains that party's voluntary, written consent.**



6. Opportunity to Inspect and Review Evidence

- ❑ Prior to completion of investigative report, Investigator:
 - ✓ **must send each party and advisor, if any, the evidence *that is directly related to the allegations* to inspect and review in an electronic format or hard copy .**
 - ✓ **the parties have at least 10 days to submit a written response, which Investigator **MUST** consider prior to completion of investigative report.**

Purpose: to give parties equal access to the evidence obtained “directly related” to the allegations, **even if the district does not intend to rely on the information.**



“Directly Related” to the Allegations?

- This is not defined.
- Use “plain and ordinary meaning”.
- It is up to the Investigator to decide.
- Would include “inculpatory” and “exculpatory” evidence.

Example: if there is nothing in Respondent’s personnel file related to the allegation(s), would not likely need to provide the entire personnel file to the Complainant ***BUT*** if you have reviewed file as part of the investigation, include a note that you reviewed it to give parties opportunity to respond.



“Directly Related” to the Allegations (cont’d)

- ❑ The regulations allow parties to respond with their view of the case, or present additional relevant facts and witnesses that the Decision-Maker should evaluate.
- ❑ The right to inspect evidence is an important procedural right for both parties.
- ❑ *e.g.*, although investigator does not intend to rely on the Respondent’s personnel file, the Complainant may provide that there is a separate complaint file, which includes similar complaints against Respondent



Confidential Information

- ❑ District may permit or require Investigator to redact information that is not “directly related” to the allegations or that is privileged (*e.g.*, medical information).
- ❑ However, information that is confidential, sensitive or private may still be “directly related to the allegation” and thus subject to review by both parties.
- ❑ Consider non-disclosure agreements before disseminating certain information.



Confidential Information (ont'd)

❑ Other Best Practices:

- ✓ Use initials when possible for student witnesses, but Respondent is entitled to know all witnesses.
- ✓ Provide adult witness names.
- ✓ Notify parents when their child is involved in a Title IX investigation (if under 18).



7. Prepare Investigative Report

- ❑ The investigator **MUST** fairly summarize **relevant evidence** in an investigative report.



What is relevant evidence?

- ✓ Formal Complaint.
- ✓ Board Policy, FFH, possibly others.
- ✓ What Complainant said in their interview(s).
- ✓ What the Accused said in their interview(s).
- ✓ What witnesses said in their interview(s).
- ✓ Ages of Parties and Witnesses.
- ✓ Documents, Audiotapes, Recordings.
- ✓ Personnel/School file of Complainant.
- ✓ Personnel/School file of Respondent.



What is Not Relevant?

- ✗ Sexual/Disciplinary History of Complainant
- ✗ Popularity/Reputation of Complainant
- ✗ Popularity/Reputation of Accused

Remember: Questions and evidence about a complainant's prior sexual history are not relevant evidence, unless specific statutory exceptions are met



Elements of an Investigative Report

- ❑ The investigative report should summarize :
 - ✓ District policies/guidelines and their applicability to the investigation.
 - ✓ The incident or issues investigated, including dates.
 - ✓ Parties involved.
 - ✓ Steps taken to investigate.
 - ✓ Summary of Investigation.
- ❑ Investigator is only required to report the facts, not make findings.
- ❑ Avoid making legal conclusions.



Sample Investigative Report

Sample Investigative Report

To: Dr. Decision Maker

From: Anna Investigator

Date:

Re: Formal Complaint of Complainant Jane Doe

Refer to Policy

Sample School District prohibits discrimination, sexual harassment, against any employee or student on the basis of sex or gender.

Acknowledge Anti-Retaliation Policy

Retaliation against anyone Involved in the complaint process is a violation of College District policy.

Short Summary of Complaint, including parties and dates

On December 20, 2020, student Jane Doe submitted a formal complaint because of a meeting on December 10, 2020, with the Athletic Joe Smith.

In the complaint, Ms. Doe alleges that Mr. Smith intentionally exposed himself to her at the meeting.

Summary of Investigation

As part of my investigation:

- I conducted interviews with student Jane Doe, and Athletic Director Joe Smith and Jane Doe's friend Abby who Jane says she told immediately after the incident. I also interviewed Jane Doe's mother who submitted the formal complaint.
- I reviewed the video recording of the time when Jane Doe entered Mr. Smith's office.
- I reviewed all documentation from HR regarding Ms. Smith and the student records of Jane Doe.



Sample Investigative Report

Investigative Report (You may want to do this chronologically and attach notes)

Interview of Complainant Jane Doe

In interviewing Ms. Jane Doe, She said she was asked by the Athletic Director not to "tell anyone," and that his exposure was an accident. She claimed that there should be video tape of her entering and exiting the Athletic Director's office on December 10, 2020. She also said she immediately reported the incident to her friend Abby and that she and Abby immediately told Jane's mother.

Interview of Respondent Athletic Director Joe Smith

In interviewing Mr. Smith. He admitted the incident occurred but said it was an accident and due to the fitting of his basketball shorts that caused the incident. He said he had never had anything like this happen in his career.

Review of Mr. Smith's Personnel File.

I checked Mr. Doe's personnel records and there were two similar complaints against him in 2017-2018 but it was determined that Mr. Doe had not violated District policy, and that the incidents were likely accidents. Both previous complaints involved Mr. Doe asking female students to come to his office after hours. I have included the prior complaints and determinations. Mr. Smith did not mention these incidents. When I re-interviewed me. He said he did not mention the previous complaints because I did not ask him about them. He then smiled and said I was vindicated from those complaints.

Interview and Written Statement from Abby

I spoke with Abby and she confirmed Jane Doe told her Joe Smith had just exposed himself to her. I asked Abby to write a statement and she submitted a detailed 3 page statement of what happened that day.

Interview of Jane Doe's Mother.

Jane Doe's mother also submitted a detailed statement.

Review of Surveillance Video from December 10, 2020

I reviewed the video and it shows Jane Doe entering Coach Smith' office at 6 p.m. and running out at 6:05. She is crying. In the video you can see Mr. Smith walking away with his gym bag. He stops and talks to a student.

I interviewed the student seen talking with AD Smith shortly after the alleged incident. The student said was not aware of any alleged incident that happened on December 10, 2020 and said Coach Smith appeared normal.

Sincerely,



8. Provide Report to Parties

- ❑ The investigator **MUST** fairly summarize relevant evidence, and
 - ✓ **at least 10 days prior to a hearing (if a hearing is provided) or “other time of determination of responsibility”, send to each party and the party’s advisor, if any, the investigative report in an electronic format or hard copy, for their review and written response.**
 - ✓ No required process for amending or supplementing the investigative report in light of the parties’ responses after reviewing the report.
 - ✓ Any rules or practices a District adopts must apply equally to both parties and must be mindful of the recipient’s obligation to conclude the entire grievance process within the designated time frame.



9. Provide the Investigative Report to the Decision-Maker

- ❑ The investigative report should contain relevant evidence including exculpatory and inculpatory evidence, whether obtained from the parties or other sources.
- ❑ Investigator is not prohibited from making ***recommended findings but discuss with counsel whether this should be in writing.***
- ❑ **Decision-Maker is under the independent obligation to objectively weigh the evidence and decide and cannot simply defer to the recommendations made by the Investigator.**



10. The Decision-maker Decides

Title IX
Coordinator



Investigator



Decision-Maker



Appeal
Officer



Informal
Resolution
Facilitator



Role of the Decision-Maker



Role of Decision-Maker

Decision-Maker is responsible for:

- Managing parties' opportunity to ask questions as part of grievance process.
- Reviewing the investigative report and making findings.
- Conducting live hearing. Hearings for K-12 are not required (only colleges).



Role of Decision-Maker (Cont'd)

Decision-Maker is also responsible for:

- Making findings of fact and conclusions based on investigative report and parties' questions.
- Determining whether Respondent is responsible.
- Producing a Written Determination and providing to both parties at the same time.



Manage Parties' Opportunity to Ask Written Questions

For districts not conducting a hearing:

❑ **AFTER** Investigator has sent the parties a copy of investigative report *and* **BEFORE** reaching a determination regarding responsibility, Decision-Maker(s) must:

- Give each party the opportunity to submit written, **relevant questions** of any party or witness (**Decision-Maker determines what is relevant**).
- Provide each party with the answers, and
- Allow for additional, limited follow-up questions.
- **If Decision-Maker excludes a question as not relevant, he or she must provide an explanation to the party.**



Rape Shield

Parties are not allowed to ask questions or seek evidence about prior sexual acts because they are deemed irrelevant, **UNLESS:**

- offered to prove that someone other than the Respondent committed the alleged conduct, or
- concern specific incidents of Complainant's prior sexual behavior with respect to Respondent and are offered to prove consent.



Evaluate Investigative Report

❑ When evaluating the investigative report, the Decision-Maker should:

- ✓ Approach investigative report objectively.
- ✓ Consider all inculpatory and exculpatory evidence.
- ✓ Consider if there is any reason Complainant would be lying?
- ✓ Are their previous complaints about the Respondent?



Determine Credibility

When evaluating the Parties' credibility, the Decision-Maker:

- ❑ May not make credibility determinations based on a person's status as Complainant, Respondent, or witness.
- ❑ Must evaluate Complainant, Respondent, and witness statements for internal and external consistency.
- ❑ Should:
 - identify corroboration of relevant details, where possible.
 - Identify the witnesses and whether they have a motive.
 - consider information indicating a party provided inconsistent story and reasons for inconsistency.
 - consider motives, if any, of Complainant and Respondent.
 - note patterns of conduct, if any.



Weigh Evidence, Decide, then Prepare Written Determination

- ❑ **Avoid making legal conclusions.**
 - May address whether policy has been violated (based on school's evidentiary standard) but not that the law has been violated.
 - Enough to determine whether policy was violated; do not need to determine whether law was violated.



Prepare Written Determination

A Written Determination should:

- Identify the allegations – can be done by Investigator.
- Describe procedural steps taken in grievance process – can be done by Investigator.
- Include Statement of Facts.
- State finding for each allegation, according to adopted standard of proof, ***including rationale and*** Issues that could not be resolved and reasons for lack of resolution.
- Apply District policies/code of conduct and their applicability to the investigation.
- Action taken, if any.
- Describe bases for appeal.



Example Findings with Rationale

- ❑ Respondent admitted to making remarks to Complainant about how she looked in her dresses, and that he liked her wearing dresses, but said he did not realize the remarks were inappropriate when he made them. Instead, he said he realized there was a problem when Complainant suddenly transferred classes. I find that, **based on his admission, Respondent violated the District's policy against sexual harassment.**
- ❑ Complainant claims harassment occurred. Respondent denies it, and there are no witnesses or proof. **I am unable to determine whether the policy was violated.**
- ❑ Respondent's allegations are very detailed, and she told her mother immediately after the incident. The video footage corroborates Complainant's report. Respondent was evasive when discussing prior complaints against him that were similar to Complainant's allegations. There is no proof Complainant had any prior knowledge of prior complaints against Respondent, which happened at another district. **I find Complainant is more credible than Respondent.**



Provide Written Determination to the Parties

The District must provide the written determination to the parties simultaneously.

The determination regarding responsibility becomes final:

- If an appeal is filed: “on the date that the recipient (the District) provides the parties with the written determination of the result of the appeal”.
- If an appeal is NOT filed: “on the date on which an appeal would no longer be considered timely”.



Part III of Title IX Training for Title IX Investigators

What did you learn?

- ✓ How to investigate.
- ✓ Duty to gather information objectively and to be impartial.
- ✓ How to document an investigation.
- ✓ How to create an investigative report “that fairly summarizes relevant evidence”.



Part III of Title IX Training for Decision-Makers

What did you learn?

- ✓ Process for allowing parties an opportunity ask written questions.
- ✓ What is relevant and what is not.
- ✓ Duty to evaluate information objectively and be impartial.
- ✓ How to prepare a written determination.



Appendix

Attachment A	Template for Interview Notes of Complainant
Attachment B	Template for Interview Notes of Respondent

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