

Title IX Investigator Training

Investigation Toolkit

Kaleva Law Office

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Disclaimers

- Consult with legal counsel regarding how best to address a specific situation
- We will send a copy of the slides after this presentation to all who registered their email address when signing in
- We will take questions at the end as time permits

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your district electronically to post

Agenda

- Key Tasks of the Investigator
- Investigation Process
- Timelines and Steps
- Bias and conflicts of interest
- Relevancy
- Investigative Techniques
- Takeaways

Key Tasks of the Investigator

- The Investigator carries out an investigation by conducting interviews of the involved individuals and witnesses, collecting documentary and other evidence, and drafting an investigative report.
- The Title IX Coordinator may serve as Investigator, but the person cannot have a conflict of interest or bias.
- As a practical matter, Investigator may be an administrator such as the assistant principal.
- For bigger schools you do have the option of having a district-based investigator AND a school-based investigator. Districts can outsource the investigation.

Timelines and Steps

The accused party must be given notice of the complaint and “sufficient details” along with “sufficient time” to prepare for the initial investigative interview.

After an investigation is complete, both parties and their representatives must be given electronic or paper copies of all evidence, and they have 10 days to review and respond to it.

The investigator then compiles an investigative report, which is given to both parties.

Once the investigative report is complete but prior to any final determination, the parties have another 10 days to respond to the investigative report, including the ability for the parties to ask written cross-examination questions to the other party.

After all this, the decision-maker then compiles the final decision, which is shared with both parties, and the appeal process begins.

Investigation Process

- Burden of proof and burden of gathering evidence is on district
- Equal opportunity to present witnesses
- May not prohibit parties from discussing allegations or gathering/presenting evidence
- Provide same opportunity to have others present including advisor of choice
- Written notice of any hearings/interviews/meetings

Investigation Process

Provide All Evidence to Parties

- Allow 10 days to review
- Allow parties to submit a written response before completion of Investigative Report

Prepare Investigative Report

- Provide to parties 10 days prior to determination of responsibility
- Allow parties to submit written response

Impartiality, Conflicts of Interest, and Bias



Being Impartial, Unbiased, without Conflict of Interest, and Avoiding Pre-Judgment of Facts

- 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.

Bias: Concerns Raised in Comments in Preamble

- Preamble concerns about all paid staff members being biased in favor of institution
- Institutional bias: cover-ups
- Past tweets that appear to support complainants or respondents
- Being a feminist
- “Appearance of bias” v. actual bias

Conflict of Interest: Concerns Raised in Comments in Preamble

- Decision-maker and financial and reputational interest aligned with institution (or to protect institution)
- Co-mingling of administrative and adjudicative roles
- Title IX Coordinator supervisor of decision-maker
- Past advocacy for victim's or respondents' rights (example also for bias)
- “Perceived conflict of interest” v. actual conflict of interest

Preamble Discussion: Bias and Conflict of Interest

- 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.”
- No *per se* prohibited conflicts of interest in using employees or administrative staff.
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process.

Discussion Recommendation for Assessing Bias

- “Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists...bearing in mind that the very training required by 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve **impartially** and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.”

Examples in Discussion for Unreasonable Conclusion that Bias Exists

“For 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”

Examples in Discussion for Unreasonable Conclusion that Bias Exists

- Department also cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations”
- Explained that this means, the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias”

Avoiding Pre-Judgment of Facts at Issue

- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Keep an open mind as a decision-maker and actively listen to all the facts presented as subjected to cross-examination*
- Each case is unique and different

Avoiding Sex Stereotypes

- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Comments in the preamble include examples of sex stereotypes in comments (e.g., Women have regret about sex and lie about sexual assaults, men are sexually aggressive or likely to perpetrate sexual assault)
- Discussion – prohibition against sex stereotypes, but not feasible to list them
Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
 - Cautions against an approach of “believing” one party over the other and precludes credibility determinations based on a party’s status as a complainant or respondent

Avoiding Sex Stereotypes

- Consideration of marginalized groups: people with disabilities, people of color, people who identify in the “LGBTQ” community
 - Preamble discusses concerns by commentators about stereotypes and accommodations for individuals with disabilities under the ADA, and individuals with developmental and cognitive disabilities
 - Preamble discusses concerns from people of color for cultural and racial stereotypes
 - Preamble discusses concerns regarding stereotypes of the “LGBTQ” community

Disclaimer

- This section uses the terms “rape,” “victim,” and “perpetrator” – **CRIMINAL**, not **POLICY**
- This section is about rape myths and trauma as **context for what may or may not be someone’s internal dialogue**, to help you ask sensitive questions
- Both parties may be traumatized – and the trauma may be **completely unrelated** to the incident you’re investigating

Disclaimer

- Do **not** assume that because there are signs of trauma, the trauma was caused by the respondent and therefore the respondent violated the policy
- Do **not** assume that because there are not signs of trauma, therefore nothing bad happened

Know the Facts

- Most rapes are committed by perpetrators that know their victims
- Rapes can happen in a committed relationship
- Rapes can happen between individuals of any gender
- Victims of intimate partner violence may return to their perpetrator for a variety of reasons that may not seem rational to outsiders looking in

Know the Facts

- Drug-facilitated sexual assault is common, and the most common drug used is alcohol
- Being drunk doesn't excuse a perpetrator's own behavior
- A wide variety of responses are normal for a victim of trauma (e.g., calm, hysterical, angry, in denial, detached, withdrawn, or in shock) – don't make assumptions about how they "should act"

Trauma and the Brain

- Trauma affects the way the brain **encodes and decodes memories** of what occurred
- Fight, flight, or freeze

Why Don't People Tell Right Away?

- We had some guidance for this in 2001..
 - Fear of retaliation
 - Fear of not being believed

Why Is Being Trauma Informed Important?

How you handle a person in your first meeting can make the difference between:

- Cooperation in the investigation **vs.** refusal to cooperate
- Re-traumatization **vs.** supportive environment
- Putting off other potential complainants or witnesses from coming forward **vs.** encouraging future reports
- Lawsuit or OCR complaint (or both) **vs.** supportive and cooperative relationship

Words Have Power

- Victim vs. survivor vs. complainant
- **Stick with policy language** to the extent possible

Culture Affects Response

- Age of consent
- Dating vs. arranged marriages
- Attitudes towards homosexuality
- Attitudes towards intimate partner violence
- Cooperating with investigations
- Sharing personal information
- Reactions toward authority figures
- Reactions toward male vs. female

Culture Affects Response

- I won't report it if it doesn't feel wrong
- I'll admit it because I don't understand it's prohibited
- I won't report it if I would be a snitch
- It's impolite to look you in the eye, so I'll look down the whole time
- I deserved it, it's normal
- Reporting this would result in serious consequences at home

The Bottom Line

Be Human & Be a Blank Slate

Issues of Relevancy (NOT Rules of Evidence)



The Rules of Evidence do **NOT** apply and **CANNOT** apply but relevancy decisions still need to be made



The final regulations do not allow a district 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.”

So what is relevant?

Evidence is generally considered relevant if it has value in proving or disproving a fact at issue

- The regulations strenuously avoided having schools apply federal rules of evidence (the rules used by lawyers in litigation about admissibility of testimony and evidence) in favor of following the maxim above . . .
- Basically, you apply the definition without getting into the complexities of the rules and exceptions lawyers use in litigation.

General Issues of Relevancy

Here is what we know is **NOT** relevant under the regulations:

- Information protected by a legally recognized privilege
- Evidence about complainant's prior sexual history – unless such questions/ evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct or if the questions/evidence concern specific incidents of the complaint's prior sexual behavior with respect to the respondent and are offered to prove consent.
- 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*

General Issues of Relevancy

The process allows both parties to submit all relevant evidence:

- After receiving the investigation report, the decision-maker allows parties to ask witnesses all relevant questions and follow-up questions.
- A district may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice

Relevancy: Legally Privileged Information

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 34 CFR 106.45(b)(1)(x):

- A district'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

- Preamble of regulations identifies medical and treatment records.
- Other typical privileges recognized across jurisdictions but with variations (will want to involve your legal counsel for definitions in your jurisdiction):
 - 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

Relevancy: Legally Privileged Information

- So what do you do about what may be legally privileged information?
 - Check with school attorney
 - Document
 - Document
 - Document

Consent: Left to Schools to Define

- No required definition in law, regs, or guidance
- We will use standard language for our purposes

Who Can Never Give Consent?

- Regardless of age, if the other person is a coach, teacher, administrator, or other person of authority
- Severely cognitively disabled persons
- Those who are incapacitated
- Those who are by law unable to give consent

Consent

- **Clear** – verbal (or non-verbal) communication
- **Knowing** – Mutually understood as willingness to participate in a sexual activity and the conditions of that sexual activity
- **Voluntary** – Freely and actively given

Consent

- May be withdrawn with clear communication
- Consent for one activity is not consent for everything
- Silence or failure to resist does not constitute consent
- Previous consent does not constitute consent for future activities

When Does Consent Not Exist?

- Use of physical force, threats of physical force, physically intimidating behavior, or coercion
- Individual from whom consent is required is incapacitated

Evidence of Consent?

- What words or actions did complainant use to convey consent/non-consent?
 - Must examine sexual contacts, acts between parties in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

Evidence of Consent?

- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- “They gave consent” = What did you say to them, and what did they say to you?

Evidence of Consent?

- [Ask the respondent] What did complainant say to you and/or what actions did they take to show consent?
 - “How did you know they wanted to have sex?”
- If applicable, what role, if any, did respondent play in complainant’s intoxication/incapacitation?



Introduction to Investigative Techniques

Skills development and knowing how to approach your cases

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, cooperate with law enforcement to the extent permitted by law (i.e., FERPA)
- Types of evidence
 - Electronic communications
 - Security information
 - Pictures, videos, audio
 - Police reports
 - Personnel files
 - Prior complaints against respondent

Begin Witness List

- Who should be included?
- Who should NOT be included?
 - Document any exclusion!
- In what order should the witnesses be interviewed?
- Be flexible

Craft Questions for Each Witness



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

- What should you have with you?
 - Allegations
 - Investigation log – index of parties/materials/dates
 - Investigation notes cover sheet – label your notes!
 - Pre-prepared questions
 - Evidence you may need to reference or show witness
 - Policy or Handbook
- **THINK ABOUT WHAT MAKES YOU FEEL ORGANIZED-THESE ARE JUST SUGGESTIONS**



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

Setting up the Interview

1

Identify yourself, your role, and a general outline of what you're investigating

2

Consider requesting the Title IX Coordinator check in with those who fail to respond or refuse to participate

3

Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods

Set the Stage



Make introductions



Be hospitable



Give overview of why they are being interviewed



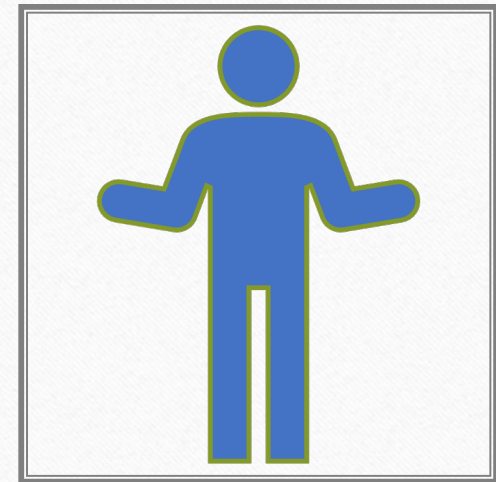
Explain retaliation policy



Invite questions from person being interviewed

Begin Broadly

- 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

- 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

Re-review your notes

Re-review the elements of each charge

- Have you elicited all the information this witness might have about each element?
- Do you have an understanding of how the witness obtained the information they shared?
- Use the magic question: “Do you have anything else you want to tell me that you think is relevant?”

Credibility

Gather

Gather facts to assist decision-maker

Ask

Ask questions to test memory

Identify

Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence

Be

Be sensitive to potential trauma experienced by witnesses

When Consent is at Issue

- 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 and reminders against retaliation - but do not prohibit a party from discussing allegations

Inform the witness of next steps and how to reach you

After the Witness Leaves



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

Physical Evidence

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

Inspection and Review of Evidence

- **Provide ALL Evidence to both parties and advisors**
 - Include everything directly 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



Written Investigation Report

- Summarize **facts**
- Assess **credibility** for decision-maker
- No determination
- Provide to parties and advisors
- Allow 10 days to review (SET A CALENDAR REMINDER)

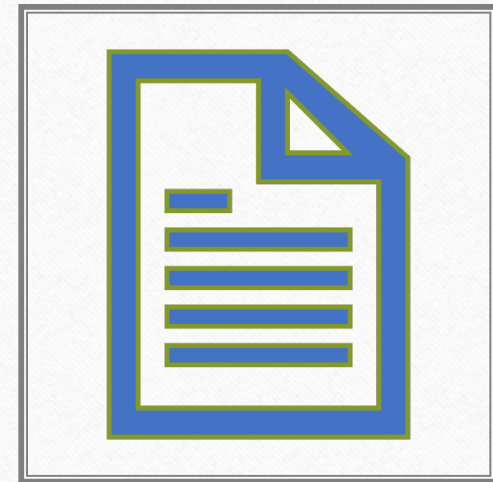
Report Writing: The Investigator's Responsibility

- **Step One:**

- Draft written investigation report.
 - Must fairly summarize the relevant evidence.
 - Include information about witness credibility if possible for decision-maker
 - Must be given prior to completing the final investigation report, QA period, and determination of responsibility.
- Give at least 10 days for the parties to prepare a written response to the draft, which the investigator must consider in completing the final report.

- **Step Two:**

- Draft final investigation report and provide to the Decisionmaker.



Key Takeaways

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

Document Your Process

- All these steps aimed at you having a helpful and complete record of your process
- What is unseen (especially in the new regulations) either
 - Leads to a jumbled process for decision maker; or
 - Could result in some serious legal issues
- Aim at providing the most helpful report you can to the decision-maker while documenting carefully as you go along.

Questions?

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