

Overview of the Title IX Regulations for Investigators

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Introduction

- Effective date for compliance: August 14, 2020
- Treat both parties equitably and equally
- “Prompt & equitable” grievance procedures
- Sexual harassment actionable when it “denies a person equal access to education”
- Schools may decide how to best implement the prohibition on conflicts of interest and bias
- Flexibility to outsource Title IX investigation & adjudication functions



Practice Point

At the beginning of a Title IX investigation, investigators should:

- Review the allegations
- Review relevant policies, including:
 - Title IX harassment policies
 - Sexual misconduct policies (may be called “non-Title IX sexual harassment”)
 - Title VII policy, if applicable
- Determine which policy or policies may apply
- Review procedures for investigation and grievance process under appropriate policy
- Confirm with Title IX Coordinator

Definitions of “Sexual Harassment”

Sexual harassment is defined as conduct on the basis of sex that satisfies one or more of the three types of behavior:

Definitions of “Sexual Harassment”

1. A school’s employee conditioning provision of an aid, benefit or service of the school on an individual’s participation in unwelcome sexual conduct (“quid pro quo” harassment;
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 school’s education program or activity; or
3. Sexual assault, dating violence, domestic violence, or stalking, as defined in the referenced statutes

Definitions of “Sexual Harassment”

- “Quid pro quo” harassment
 - May be express or implied
 - Need not be “severe” or “pervasive” as a single incident is inherently “offensive” and jeopardizes equal educational access

Definitions of “Sexual Harassment”

- Sexual Assault includes forcible and non-forcible sex offenses
 - Rape, sodomy, sexual assault with an object, forcible fondling
 - Incest, statutory rape
- Dating Violence
- Domestic Violence
- Stalking

* Important to consider the definition of consent

Definitions of “Sexual Harassment”

- 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 school’s education program or activity

Recipient's General Response - Threshold Criteria

- Four threshold criteria
 - Incident constitutes “sexual harassment” under Title IX
 - School has “actual knowledge”
 - Conduct occurred within school’s own “education program or activity”
 - Alleged harassment occurred within the United States

Recipient's General Response - Threshold Criteria

Actual Knowledge

- Notice of sexual harassment or allegations of sexual harassment to the school's Title IX Coordinator or any official of the school who has the authority to institute corrective measures (or to any employee of an elementary or secondary school)



Practice Point

If report of the alleged incident was initially received by someone other than the Title IX Coordinator, investigators may consider:

1. Reviewing that individual's report or notes about initial contact with the Complainant; and
2. Interviewing that individual during the investigation.

Recipient's General Response - Threshold Criteria

Actual Knowledge continued:

- Notice may be written or oral, by observation, via newspaper article, or other means
- Reporting of sexual harassment to Title IX Coordinator always constitutes “actual knowledge”
- Mandated reporters are optional

Recipient's General Response - Threshold Criteria

Education Program or Activity

- Locations, events, or circumstances over which the school exercises substantial control over both the respondent and the context in which the sexual harassment occurs
 - Includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution
- Incidents that occur outside of the school's education program or activity may still be subject to the school's code of conduct, and the school may still offer supportive measures

Recipient's General Response - Threshold Criteria

Incidents outside of the United States

- Includes study abroad programs
- Although not subject to the Title IX regulations, incidents may be addressed via the school's code of conduct or other relevant policies
- Supportive measures may still be offered



Practice Point

In some cases, the investigator may need to consider the “jurisdictional issues” as part of the investigation.

Questions regarding jurisdiction may be discussed with the Title IX Coordinator.

Recipient's Response – Deliberately Indifferent

School will be held liable for violating its obligations under Title IX if it is found that a school is “deliberately indifferent,” which is defined as “clearly unreasonable in light of the known circumstances.”

Only alleged incidents meeting the threshold criteria require a response by the institution.

Recipient's Response to Qualifying Incidents of Sexual Harassment

- A school has a duty to respond if an incident meets the four threshold criteria
- Schools must treat complainants and respondents equitably
- Schools must follow their grievance process
- If no formal complaint is filed, the school must offer the complainant supportive measures

Recipient's Response to Qualifying Incidents of Sexual Harassment

Supportive measures

- Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Designed to restore or preserve equal access to the school's education program or activity without unreasonably burdening the other party
 - Includes measures designed to protect the safety of all parties or the school's educational environment, or deter sexual harassment

Recipient's Response to Qualifying Incidents of Sexual Harassment

Supportive measures

- May include counseling, extensions of deadlines or other course-related adjustments, modifications to work or class schedules, campus escort services, mutual restrictions on contact between parties, changes in work or housing locations, leaves of absence, increased security of certain areas on campus, etc.



Practice Point

Investigators should be familiar with supportive measures available to the parties and in effect during the grievance process.

Investigators should respect and follow those supportive measures during investigation.

Recipient's Response – Emergency Removal

Title IX does not prohibit a school from removing a respondent from the school's education program or activity on an emergency basis, provided that the school:

- Undertakes an individualized safety & risk analysis;
- Determines that an immediate threat to the physical health or safety of any student or individual arising from the allegations of sexual harassment justifies removal; and
- Provides respondent with notice & an opportunity to challenge the decision immediately following removal.

Recipient's Response – Administrative Leave

Title IX does not prohibit a school from placing a non-student employee respondent on administrative leave during the pendency of a Title IX grievance process.

Grievance Process - Formal Complaint

Formal Complaint

- Filed by a complainant or signed by the Title IX Coordinator
- Alleges sexual harassment against a respondent
- Requests the school investigate the alleged incident of sexual harassment
- Must be filed with the Title IX Coordinator in person, by mail, or by email
- No time limit on a complainant's filing of a formal complaint
- School must respond to a formal complaint (i.e., follow the Title IX grievance process and investigate the allegations)

Grievance Process - Formal Complaint

Dismissal of a Formal Complaint

- MUST dismiss a formal complaint if the alleged incident:
 - Would not constitute sexual harassment under Title IX, even if proved;
 - Did not occur in the school's education program or activity; or
 - Did not occur against a person in the United States.

Grievance Process - Formal Complaint

Dismissal of a Formal Complaint

- MAY dismiss a formal complaint (or any allegations within) if at any time during the investigation or hearing:
 - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or allegations within;
 - The respondent is no longer enrolled or employed by the school; or
 - Specific circumstances prevent the school from gathering sufficient evidence to reach a determination as to the formal complaint or allegations within.



Practice Point

If a situation involving dismissal arises during an investigation, an investigator should immediately discuss with the Title IX Coordinator.

Grievance Process - Formal Complaint

Dismissal of a Formal Complaint

- Dismissal does not preclude action under another relevant school policy (i.e., Code of Conduct)
- Upon dismissal, the school must promptly notify the parties

Grievance Process - Formal Complaint

Consolidation of Formal Complaints

- A school may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances

Grievance Process - Process for Formal Complaints

A school's grievance process must:

- Treat complainants and respondents equally
- Require objective evaluation of relevant evidence, including inculpatory and exculpatory evidence, and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness
- Require that any individual designated by the school as a Title IX Coordinator, investigator, investigator, decision-maker, or informal resolution facilitator not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

Grievance Process - Process for Formal Complaints

A school's grievance process must:

- Ensure Title IX Coordinators, investigators, decision-makers, and informal resolution facilitators receive training
- Include a presumption that the respondent is not responsible for the alleged conduct until a determination is made at the conclusion of the grievance process
- Include reasonably prompt time frames for conclusion of the grievance process
- Include a process that allows for temporary delay of the grievance process or the limited extension of time frames with good cause and written notice

Grievance Process - Process for Formal Complaints

A school's grievance process must:

- Describe the range or list of possible disciplinary sanctions and remedies
- State the standard of evidence
- Include procedures and permissible bases for appeals
- Describe range of supportive measures
- Not require, allow, rely upon or otherwise use privileged information without permission



Practice Point

While it is presumed that a respondent is not responsible for the alleged misconduct until a determination is reached at the conclusion of the grievance process, this does not lead to an assumption that the complainant is lying or that the alleged harassment did not occur.

Investigators and decision-makers must remain impartial and not prejudge that the respondent is responsible.

Investigators should carefully and conscientiously understand and follow this “presumption” guideline.

Grievance Process - Notice

In response to a formal complaint, a school must give written notice of the allegations to the parties.

Notice includes:

- Notice of school's grievance process
- Sufficient details of allegations known at the time, including:
 - Identities of the parties involved, conduct constituting sexual harassment, and date and location of the alleged incident
- Sufficient time period for parties to prepare a response before an initial interview

Grievance Process - Notice

Notice requirements continued:

- Statement that respondent is presumed not responsible until final determination is made
- Statement that the determination of responsibility will be made at the conclusion of the grievance process
- Right to an advisor of their choice
- Right to inspect and review all evidence gathered during the investigation
- Reference school policy that prohibits knowingly making false statements or submitting false information



Practice Point

Before beginning an investigation, investigators should be familiar with the school's entire Title IX policy and understand the expectations of an investigator.

Grievance Process - Investigation of Formal Complaints

- Schools must investigate formal complaints
- Title IX Coordinator may serve as the investigator
- Burden of proof and gathering of evidence is on the school

Practice Point

Note that the burden is on the school to develop facts
and meet the burden of proof.

Grievance Process - Investigation of Formal Complaints

- Medical and similar privileged records are not available unless the party or parent gives written consent
- Both parties must be given the equal opportunity to present fact and expert witnesses and evidence during the grievance process

Grievance Process - Investigation of Formal Complaints

- Neither party may be restricted in their ability to discuss the allegations or gather and present relevant evidence
- Both parties have the right to an advisor
 - School may establish restrictions on the advisor's participation in the grievance process, provided the restrictions are equally applied



Practice Point

Investigators should be familiar with the school's guidelines for advisors participating in Title IX cases.

Grievance Process - Investigation of Formal Complaints

- School must provide written notice of any interview, meeting or hearing at which a party is expected to participate
 - Include date, time, location & purpose of meeting with sufficient time to prepare
- All parties and advisors must have equal access to inspect and review all evidence gathered during the investigation that is directly related to the allegations



Practice Point

Note that the full investigation file, which includes evidence that is directly related to the allegations, must be provided to both parties.

Grievance Process - Investigation of Formal Complaints

- The parties have at least 10 days to respond in writing to the investigation evidence and (preliminary) investigative report
- The investigator must consider those responses prior to finalizing the investigative report
- School may require parties to submit any additional evidence prior to finalization of the investigative report or after the report and prior to the hearing

Grievance Process - Investigation of Formal Complaints

- Evidence provided to the parties must be available at the hearing for reference or use in cross-examination
- Investigative report fairly summarizes relevant evidence
- Investigative report must be completed at least 10 days prior to the hearing
- Copies of the investigative report must be provided to the parties and their advisors for review and written response
- Investigators MAY include recommended findings or conclusions in the report, but the decision-maker must objectively evaluate the relevant evidence to make a determination



Practice Point

Investigators should carefully review the section of the Title IX policy referencing investigative reports.

The policy may expressly state that the investigator will or will not include recommendations or conclusions in the investigative report.

Adhere to the school's policy.

Grievance Process - Hearings

- The decision-maker cannot be the Title IX Coordinator
- A postsecondary school must provide a live hearing.
- Hearings may be conducted with all parties physically present or virtually
- If a party does not have an advisor at the live hearing, the recipient must provide an advisor of the party's choice, without charge to the party
- A parent or guardian may act on behalf of party

Grievance Process - Hearings

- Each party must be given opportunity for relevant questions and cross-examination
 - Cross-examination is conducted directly, orally, and in real time only by the party's advisor
- Only relevant questions may be asked during cross-examination
 - Before a question is answered, the decision-maker will rule on relevance and explain any decision to exclude a question as not relevant

Grievance Process - Hearings

Not relevant under Title IX:

- Questions and evidence about a complainant's sexual predisposition
- Questions and evidence about a complainant's prior sexual behavior, except when:
 - Questions & evidence are offered to prove someone other than the Respondent committed the alleged conduct; or
 - Questions & evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent & are offered to prove consent.
- Medical and similar privileged records unless the party has provided written consent

Grievance Process - Hearings

Cross-examination

- May 2020 Regulations: If a party or witness does not submit to or participate in cross-examination, the decision-maker(s) **must not rely** on any statement of that party or witness in reaching a determination
- August 2021 Letter from the DOE: Rescinded the statement regarding the prohibition against statements not subject to cross-examination, and schools are no longer required to include the above provision in the policy.
- However, the 2021 change has not been reflected in all policies. Consult with your Title IX Coordinator about the school's approach to cross-examination.

Grievance Process - Determinations

- Decision-maker applies the standard of evidence adopted by the school to make and issue a written determination, which includes:
 - Identification of allegations
 - Description of procedural steps during the Title IX process
 - Findings of facts supporting the determination
 - Conclusions regarding application of code of conduct to the facts
 - Statement of, and rationale for, the result as to each allegation, including a determination of responsibility, any disciplinary sanctions, and whether remedies will be provided
 - Procedures and permissible bases for appeal



Practice Point

The investigator's organization of the investigation file and investigative report will be useful as the decision-maker drafts a description of the procedural steps.

Grievance Process - Standard of Evidence

- Preponderance of the evidence (“more likely than not”)
- Clear and convincing evidence (“highly probable”)
- Same standard must be used for formal complaints against students as is used for formal complaints against employees
- Same standard must be applied to all formal complaints of sexual harassment

Grievance Process - Appeals

- An appeal process must be offered to both parties
- Parties may appeal on several bases:
 - Procedural irregularity that affected the outcome
 - New evidence that was not reasonably available at the time of the determination or dismissal that could affect the outcome of the matter
 - Title IX Coordinator, investigator or decision-maker had a conflict of interest or bias that affected the outcome
- Appeal decision-maker issues a written determination

Grievance Process – Informal Resolution

- Mediation, restorative justice, other forms of alternative dispute resolution may be available to the parties after a formal complaint is filed
- Must be voluntary and parties must consent in writing to the process
- Cannot be offered or facilitated by a school in a case involving an employee's sexual harassment of a student

Training for Title IX Coordinators, Investigators & Decision-Makers

- Title IX Coordinators, investigators, decision-makers and informal resolution facilitators must receive training on:
 - Definition of sexual harassment under Title IX
 - Scope of the school's education program or activity
 - How to conduct an investigation and grievance process
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
 - Investigators must receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence
- Training materials must be maintained for 7 years and made publicly available on the school's website
- Training is to be 8 hours with additional training annually – may be in-person or online/virtual

Miscellaneous

- Recordkeeping
- Remedial Action
- Dissemination of Policy & Grievance Procedures
- Retaliation and Amnesty
 - Retaliation is prohibited under Title IX
 - Investigators should understand the school's amnesty provisions
- Confidentiality
- Exemption for educational institutions controlled by religious organizations

Thank you!

Send questions or comments to

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Role of the Investigator and Planning the Investigation

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Title IX Process Begins

School's Response

- I. School must “respond promptly in a manner that is not deliberately indifferent”
- II. Supportive measures
 - a. Formal vs. informal

Who comprises your team of investigators?

Investigators must be:

- Impartial, unbiased & free of conflict
- Removed from the Parties
- Trauma-informed interviewing is helpful

I. Understand the Presumptions

Non-responsibility

- 2020 Amendments require a school to include in its Title IX grievance process “a **presumption that the Respondent is NOT responsible for the alleged conduct** until a determination regarding responsibility is made at the conclusion of the grievance process.”
- Presumption does NOT imply that the alleged harassment did not occur, or that Respondent is truthful and Complainant is not truthful.
- Presumption is designed to ensure that investigators and decision makers serve impartially and do not prejudice that the Respondent is responsible for the alleged harassment.

II. Understand the Burden of Proof

Burden is on the school (aka the investigator)

- The burden of proof is not on the Complainant to prove the policy violation
- The burden of proof is not on the Respondent to disprove the policy violation
- The burden lies with the **investigator** to uncover the relevant facts and on the **fact finder** to determine if the respondent violated policy

III. Ultimate Goal of the Process

- Determine
 - What is the alleged conduct?
 - Does the evidence support that it occurred - by a preponderance of the evidence?
 - Was the Respondent the Party who committed the acts?
 - Did the conduct constitute a policy violation?
- Understand the Parties' Rights
 - Parties are not required to participate in the investigation
 - Right to an advisor & advisor restrictions during interviews
 - Right to provide their account and have it on the record

IV. Goal of the Investigator

- Gather the facts
- Present the facts to:
 - Parties
 - Advisors
 - Decision-maker
- Be thorough and neutral

CC Sexual Misconduct Policy states: “The investigation will include a review of **documents and physical evidence** as well as interviews with the parties and other(s)...the parties will have an **equal opportunity** to **provide evidence** and to **identify witnesses**, including facts and expert witnesses.” (page 10)

V. Early steps

Title IX office will:

- Receive the formal complaint
- Assess for potential conflict
- Notify the Parties of the allegations
- Assess for supportive measures (you will follow up)

VI. Form Investigative Team

When assigning investigators, the following factors may be considered:

- Experience with Title IX investigations, specific forms of sexual harassment, student or employee cases, etc.
- Availability (time commitment)
- Conflicts of interest and/or actual and perceived biases
- Native language(s) of the parties

VI. Form Investigative Team (cont'd)

Ideally two investigators

- **Lead Investigator:**
 - Coordinates with the Title IX Coordinator & the Parties
 - Drafts the investigative report & prepares the Investigation File/Binder
- **Co-investigator**
 - Takes notes during the interview, note questions, & ask questions during the interview if prompted by the Lead Investigator
- **Importance of Gender Balance**
 - Consider having people of different genders or ethnicities, etc. present while interviewing complainants, respondents, and witnesses
 - Allows the individual to converse with the investigator with whom they feel most comfortable
- **Importance of speaking the native language of the parties**
 - Ideally, investigator is also a native speaker of the language or very fluent
 - If not possible, interviews may require a translator. The translator should be briefed on the Title IX process and relevant terms.

V. Early Steps (cont'd)

Investigator will:

- Review the complaint
- Meet with Laretta, review notes
- Assess for conflict- knowledge, issue
- Pull the policy
- Preserve potential evidence
- Create a Plan (more detail to come)
 - Create a witness list
 - Create a timeline
 - Create an evidence list
 - Create a running to do/follow up list
 - Brainstorm questions

VII. How to gather the evidence the decision-maker needs

- Identify sources of evidence
- Collect evidence and preserve chain of custody
- Asking the right, probing questions ...sensitively
- Determining what information is relevant to include in the investigative report:
 - Who, what, where, when, why, how; and
 - What policies are implicated

**The next step
is to Create an
Investigation
Plan**

Maintaining Objectivity

- Empathetic
- Administrative not judicial process
- Remain objective - fair and helps the process
- Challenging process
 - Emotionally
 - Time lapses
 - COMMUNICATION can alleviate
- Article in Chronicle of Higher Education

Chronicle of Higher Education 3/11/22

STUDENT MENTAL HEALTH



Katie Meyer's Suicide Put the Spotlight on Student Discipline. Experts Say Mental Health Is the Larger Issue.

By *Kate Hidalgo Bellows* | MARCH 11, 2022



Investigation Planning & Design

Susanna Murphy, Esq.
Title IX Solutions LLC



Investigation Planning

Planning Phases

- I. Form Investigative Team
- II. Document Review
- III. Drafting a Plan
- IV. Next Steps

I. Working as a Team (if pairs)

Communicate with your co-investigator

- Delegate tasks & play off one another's skills
 - Lead investigator vs. note-taker
 - Lead Writer of Summary of Interviews
 - Lead Writer of Investigative Report
 - Communication with Parties & Title IX Coordinator

II. Review Documents

Cambridge College Title IX Sexual Misconduct and Sexual Harassment Policies: Complaint Procedures

- Your Investigation Guide
 - Review policy at every stage of the investigation process
 - Ask Title IX Coordinator for clarification, if necessary
- Understand the Parties' Rights
 - Parties are not required to participate in the investigation
 - Right to an advisor & advisor restrictions during interviews
 - Right to provide their account and have it on the record

Straight from the CC Sexual Harassment Policy

- The Title IX Coordinator will appoint a Title IX Investigator
- The College will appoint a Title IX Decision-maker
- Prior to any meetings between any Party and the Title IX Investigator, the Title IX Coordinator or the Deputy Title IX Coordinator for Students will promptly **provide written notice** to the parties (the “Initial Notice”), allowing sufficient time to prepare responses before any initial interview...

II. Review Documents

Formal Complaint

- Report versus Formal Complaint
- Formal Complaint
 - Signed & submitted by the Complainant or Title IX Coordinator
 - Required for an investigation to begin

II. Review Documents

Sample Report of Possible Policy Violation:

January 12, 2022: Melissa Gomes emailed Title IX Coordinator Bethany James about an incident that may have occurred at a recent dinner hosted by the School of Management following a presentation that was part of the Chancellor's Speaker Series.

Ms. Gomes reported that while she was leaving the restroom during the dinner, she saw Professor Eric Anderson leaning over Freshman Tyeisha Barnes and put his hand on Tyeisha's buttocks, over her clothing. Ms. Gomes reported that Tyeisha Barnes appeared very intoxicated at the time and did not appear to be happy about the interaction.

II. Review Documents

Sample Formal Complaint:

On January 10, 2022, I went to the Chancellors Speaker Series at the Boston World Trade Center. Cocktails were served after the speech, and I became intoxicated. Professor Anderson is my Economics professor, and we were talking and flirting during the cocktail hour. I was not planning on staying for the dinner because I had to go to my job. On my way out of the reception, Professor Anderson followed me out and asked if he could leave with me. I told him “no” because I had to go to work. During this conversation he touched my waist/butt area and my hair, which made me uncomfortable.

In the month or so before this, Professor Anderson had sent me text messages that seemed sexual and made me uncomfortable.

I don't really want Professor Anderson to get in any trouble, but he has been making me uncomfortable and I want him to stop.

Signed: Tyeisha Barnes, January 19, 2022

II. Review Documents

Written Notice of Allegations

- Prepared by the Title IX Coordinator and sent to the Complainant and Respondent at the start of the Investigation
- Page 21 of CC Sexual Harassment Complaint Procedures:
 - Provides **notice** of the allegations potentially constituting sexual harassment as defined in this policy;
 - Provides **sufficient details** known at the time (i.e., the identities of the parties involved, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known);
 - Includes a statement that the **Respondent is presumed not responsible** for the alleged conduct and a determination regarding responsibility is made at the conclusion of the grievance process;
 - Informs the Complainant and the Respondent that a **Title IX Investigator has been appointed** who will be investigating the allegations;
 - Identifies the Title **IX Investigator by name** to each Party;

II. Review Documents

Sample NOA/NOI:

Complainant Freshman Tyeisha Barnes alleges that Professor Eric Anderson touched her waist/buttocks area and her hair. This incident allegedly occurred on January 10, 2022 while both parties were attending a Chancellor speak Series Event at the Boston World Trade Center. Tyeisha Barnes alleges she was intoxicated and that the touching was unwanted. Tyeisha Barnes also alleges that she had previously (approximately November 29, 2021 to January 11, 2022) received numerous text messages that were sexual in nature from Professor Anderson, despite her asking him not to send those. Administrative Assistant of the Business School, Melissa Gomes, initially reported this series of events to TIX Coordinator Bethany James after having witnessed at least part of the encounter between the Parties.

The Respondent is alleged to have violated CC's policy against sexual harassment and sexual violence (?)- discuss with Laretta what alleged at outset.

(Additional notifications about presumption of no responsibility etc... to follow and should be templated.)

II. Review Documents

Notice of Allegations/Investigation (NOA/NOI) = Backbone of your Investigation

- Outlines details from the alleged incident (to be verified)
- May contain potential witnesses and/or sources of evidence (to be collected)
- Presents the timeline of the incident & reporting process
- Helps us focus on the key questions that are to be addressed during the Title IX Grievance Process (investigation + hearing)

III. Draft Investigation Plan

At a minimum, the Investigation Plan contains:

1. Names of Investigators & Parties
2. List of Allegations
3. Witness List + Order of Interviews for all Witnesses & Parties
4. Evidence List
5. Intended Investigation Timeline

III. Draft Investigation Plan

Start with what you know! Pull information from the Notice of Allegations, formal complaint, and report:

- Names of Investigators
- Names of Parties
- Definitions of Policy Violation(s)
- Witness List + Follow Up Tasks
- Evidence List + Follow Up Tasks
- Next Steps

III. Draft Investigation Plan

Names of Parties

- Include any known information, including:
 - Full Name
 - Contact Information
 - Title or Role at the school; e.g. Freshman, Professor, Administrative Assistant
 - Contact Information
 - Accommodations needed
 - Name of Advisor (if known) & Relationship to Advisor (friend, mother, attorney, etc.)

III. Draft Investigation Plan

Witness List + Follow Up Tasks

- Include name and relationship to Complainant/Respondent
- Create a logical order of interviews
 - Generally, interview Complainant before Respondent...witnesses after?
 - Though this is not always the case for strategic or logistical reasons
 - Note the logic of the order of interviews (scheduling conflicts, delays, witness refusal to participate, etc.)
- List may expand as investigation unfolds!
- Follow up tasks: obtaining full names & contact information, scheduling interviews, etc.

III. Draft Investigation Plan

Evidence List + Follow Up Tasks

- Includes known and potential sources of evidence
 - Clarify what has already been obtained versus to be obtained
- May include:
 - Communication between Complainant, Respondent, and others
 - Digital evidence & social media
 - Think beyond the specific incident
- List may expand as investigation unfolds!
- Follow up tasks: coordinate with other teachers or club coordinators, ask Parties for evidence

Witnesses? Evidence?

From our hypothetical...

Tyeisha Barnes alleges that Professor Eric Anderson touched her waist/buttocks area and her hair. This incident allegedly occurred on January 10, 2022 while both parties were attending a Chancellor speak Series Event at the Boston World Trade Center. Tyeisha Barnes alleges she was intoxicated and that the touching was unwanted.

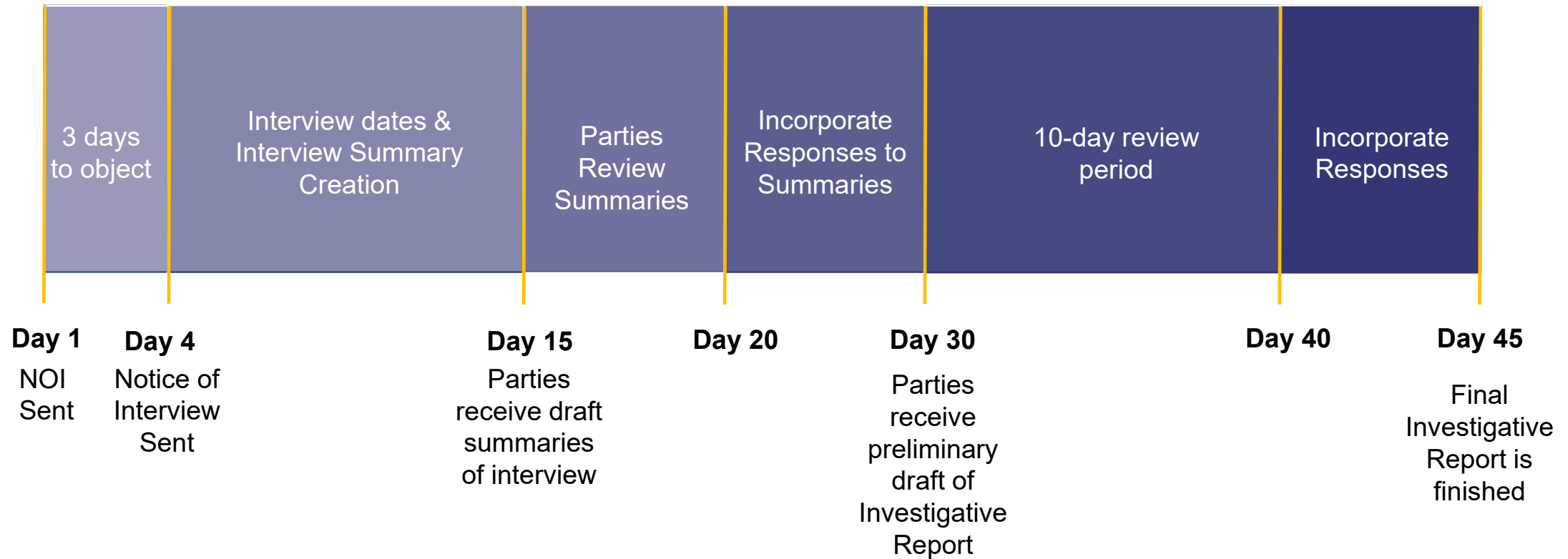
Tyeisha Barnes also alleges that she had previously, (approximately November 29, 2021 to January 11, 2022) received numerous text messages that were sexual in nature from Professor Anderson, despite her asking him not to send those. Administrative Assistant of the Business School, Melissa Gomes, initially reported this series of events to TIX Coordinator Bethany James.

III. Draft Investigation Plan

Investigation Timeline – Building it out

- Confirm start date of timeline
- Set investigation milestones
 - Sometimes helpful to work backwards
- Many timeframes are outside of the investigator's control
 - Parties must receive notice several days before an interview
 - Parties and witnesses have 5 days to review interview summaries
 - Parties have 10 days to review preliminary investigative report
- Plus, you have additional responsibilities to juggle while investigating!
- Consider potential roadblocks (school breaks, party or advisor conflicts, personal conflicts, etc.)

Investigation Timeline



III. Draft Investigation Plan

Review and analyze potential policy violations – Sexual Harassment

From CC Policy, Sec. II, page 7

III. Prohibited Conduct & Definitions The College prohibits all forms of sexual harassment, as defined below. ...

A. Definition of Sexual Harassment Under Title IX, sexual harassment is a form of unlawful sex discrimination and consists of three basic types: **1. Quid Pro Quo Harassment**: Any action by a College employee in which submission to conduct of a sexual nature is made either explicitly or implicitly a term or condition of an individual's education, grades, recommendations, or extra-curricular or employment opportunities. **2. Unwelcome Conduct**: 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 College's education program or activity. **3. Sexual Assault**, Dating Violence, or Stalking: "Sexual assault" as defined in 20 U.S.C. §1092(f)(6) (A)(v), namely, "an offense classified as a forcible or non-forcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation. "...

III. Draft Investigation Plan

Review and analyze potential policy violations – Sexual Harassment

From CC Policy, cont'd.

“Examples of behavior that might be considered sexual harassment include, but are not limited to:

- Unwelcome and objectively inappropriate physical contact or suggestive body language, such as touching, patting, pinching, hugging, or kissing, or brushing against an individual's body;
- Undue and unwanted sexual attention, such as repeated flirting, objectively inappropriate or repetitive compliments about clothing or physical attributes, sexual activities, or sexual prowess; objectively inappropriate inquiries into one's sexual activities;”

III. Draft Investigation Plan

Key Questions of Title IX Grievance Process

- What is the alleged incident & did it occur?
- Is the alleged incident a policy violation?
- As investigators, these questions help us:
 - Recognize key words from policy violations to address during the investigation
 - Focus the investigation planning, interview questions, interview summaries & investigative report

Thank you!

Interviewing: Rapport Building and Information Gathering

Susanna Murphy,
Esq.
Title IX Solutions



Preparing for the Interview

Preparing for Interviews



After planning the investigation, you know:

- ✓ Most of whom needs to be interviewed
- ✓ What specific allegations you are investigating/policies are implicated

Every party must be sent a Notice of Interview:

- Date, time, location, expected attendees, and purpose of the interview
- Reminder regarding role of the Advisor
- Confirm with Title IX Coordinator
- How to prepare
- Time commitment
- Location
- Words of support
- **Same to both parties**

Planning Interviews

Participating in an Interview

Interview
Complainant
before the
Respondent or
any witnesses

Typically one to
two interviews
per person

Allow at least
one hour for
each interview

Be patient!

What About the Interview Setting?



Carefully structure the setting and environment for interviews

- Comfort
- Privacy
- Spatial Positioning
- Recording device discrete
- Close to a bathroom
- Provide water, tissues, etc.



Virtual investigations

- A bit harder to control the setting
- Tell the party/witness exactly how to join the meeting
- The appropriate setting for this interview (if possible)
 - Private space, comfortable seating, etc.
- What should they bring?
- Control your own setting
 - Successful eye-contact, appropriate lighting, privacy, etc.

Preparing a Preamble

What is a preamble?



- Read by investigator at the beginning of the interview
- State date, time, purpose of the interview, location, persons present & verbal consent of all persons participating
- Ask each person to state their name for later voice identification during transcription
- Time & date should be read onto the recording at the end of the recorded interview

Why are preambles important in Title IX cases?

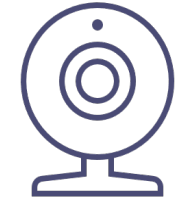
- Consistency throughout interviews
- Consent to record, policy violations in question, relevant sections of the policy in question are on the record
- Helpful should you be called as a witness during the hearing or litigation
- Helps put the party or witness at ease – gives a moment to settle in

What else might you consider putting in preamble?

- Explain investigative process (refer to policy) and Roles
- Your opportunity to share what actually happened
- Interruptions
- Remind of advisor's role
- Clarify
- Circle back
- Don't guess
- Ask for a break
- You've heard it all before
- Ready to get started?

Recording Interviews

Recording



- Only investigator may record interviews
- Transcript and recording of interview is shared with the parties and advisors
- Frees up the investigator to focus on the interview and interviewee
- Obtain consent from the interviewed party!
- Least intimidating option in-person: HD recording app on a phone
- Have the interview transcribed
 - Transcription and audio recording will be included in the investigative report

Starting the interview



- Before walking in the room, visualize yourself conducting a successful interview
- Consider how the interviewee perceives you
- Making the interviewee feel comfortable
 - DO NO HARM
- Start with non-threatening questions help to put the interviewee at ease

Empathy-Based Interviewing

Empathy Based Techniques

This is an interview not an interrogation!

- Respondents are not presumed “guilty” or “responsible”
- ALL parties should be treated with respect
- School must presume that Respondent is not responsible for the alleged conduct unless and until a determination of responsibility for a violation of the sexual misconduct policy is made at the conclusion of the grievance process
- Good cop/bad cop DOES NOT WORK

Title IX Advisors

Advisors

- Investigator to maintain authority in the room
- Advisor is for emotional support and private consultation
- Do not allow the advisor to speak on behalf of the party

This is the party's interview, and you need to hear their story from them

Information Gathering: Digging Deep

Unload first

Chronology of interview- topic or chronological

Ask clarifying questions-shyness has no place here

Explain why asking

Information to support answers- eg consent, intoxication

What would we ask the Complainant in our hypothetical case when we get to the topics of:



Intoxication

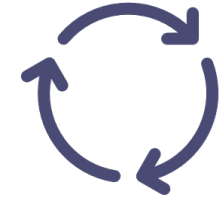


Messages



Touching

Circling Back After Interviews



- Do not be afraid to re-interview a party or witness if you require more information
- Make your contact information available to interviewees
- After completing your first round of interviews, you may become aware of new witnesses
 - Promptly contact and schedule interviews with those witnesses!

Conclusion

Search for truth, NOT a confession

Maintain control over yourself

Keep calm, remain objective, professional, unbiased, and non-judgmental

You are a neutral gatherer of information

Thank you!

Investigative Report Writing

Speaker: Susanna Murphy, JD



Overview

Drafting the
Investigative
Report

Investigative
Report
vs.
Investigative
File

Sample
Report
Work using
your template

Drafting the Investigation Report

- 1 How to summarize interviews
- 2 How to summarize evidence
- 3 Final review

What should be included?

- Allegations being investigated
- Relevant Policies and Procedures
- Standard of Proof used
- Procedural steps
- Summary of relevant evidence, including interviews
- Summary of Interviews

Procedural Steps



Use
templates



WHAT should
be
documented?

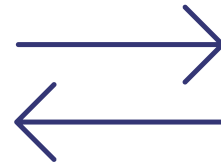
Summary of Relevant Evidence



Interviews



Evidence



~~Conclusions/Inconsistencies~~

How to **Summarize** Interviews

Introduction

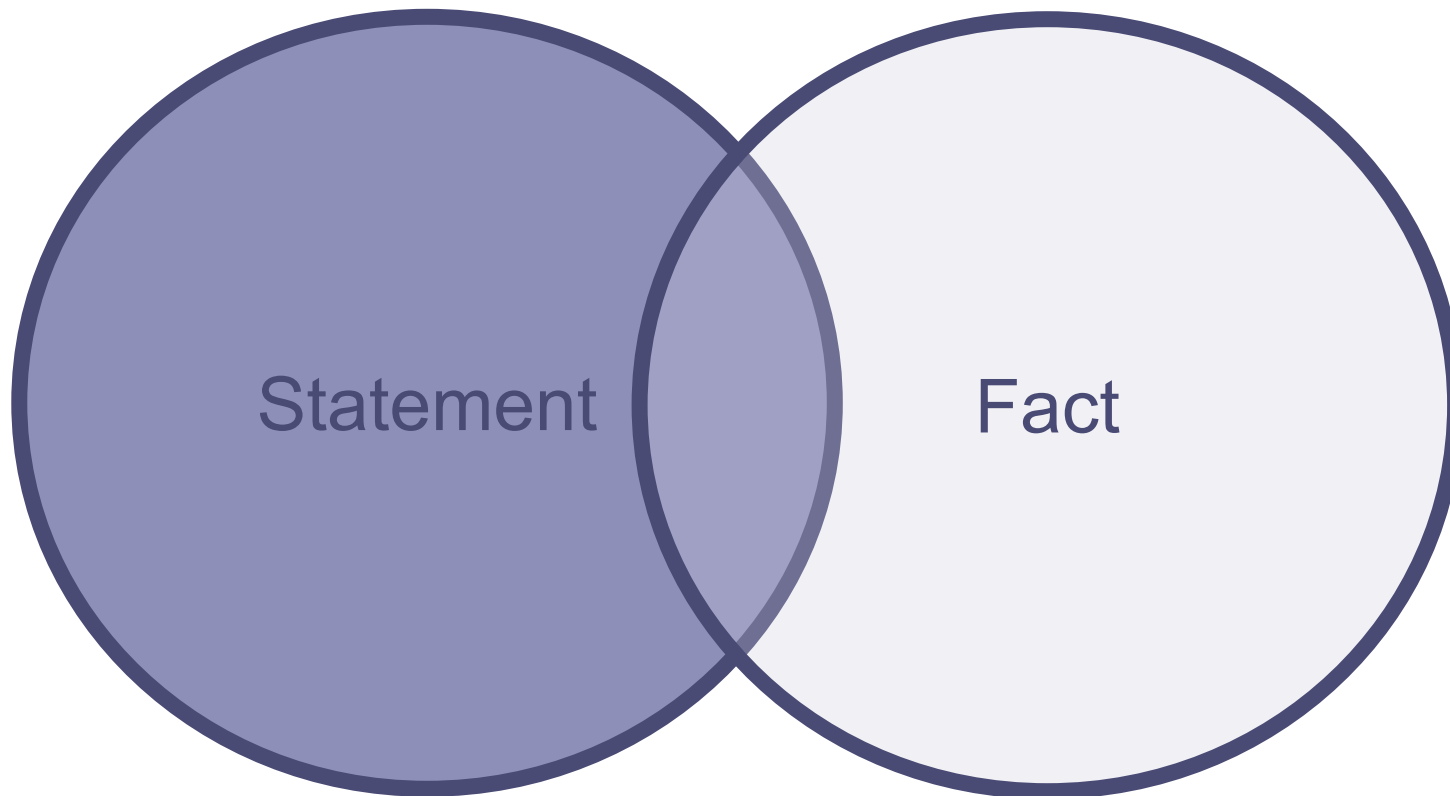
Logical sequence-
chronology vs breakdown by
allegation

Consider undisputed facts

Items to include for each witness

- Breakdown of interview
- Intro to witness
- Summary of story
- Quotations
- Sub-sections?
- Reference evidence provided
- Question- your observations during interview? Consistency!

Opinions vs Observations



Observations-
discuss as an
institution

Evidence and Exhibits

- Can be a list
- May need to be explained or given context
- Share who provided each piece of evidence or how it was obtained

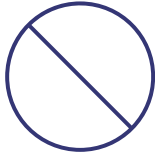
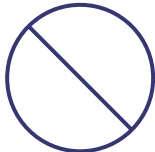
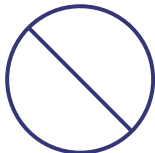
Essential Review

- Review with the 5 W's
 - May require going back
- Pronouns
- Proofread/print
- Formatting

Investigation File

Directly Related
Vs.
Relevant

Never Relevant

-  Complainant's sexual predisposition
-  Complainant's prior sexual behavior (with exceptions)
-  Prohibited evidence

Elements of Investigation File

- Table of contents
- Investigation Report
- All allegations, policies, procedures
- Procedural steps
- Standard of Proof
- Summary of evidence: interviews and evidence
- List of all interviewed/submitted evidence
- Communications Log
- Evidence log
- Witness interviews (recordings/transcripts if applicable)
- Appendix of evidence

Sample Report

Not a one-size-fits-all
institutions

Consistency matters,
be consistent



This template report format/content is for guidance purposes only, and may be changed to reflect the individual circumstances/needs of a case.



Allegation/Issue	
Name/Designation of employee subject to investigation (if appropriate)	<Name, Job title>
Name of complainant (if appropriate)	
Investigator(s)	<Name 1, Job title, Department>, <Name 2, Job title, Department (if appropriate)>
HR Support/Link	<Name, Job title, contact number>

Background

- *Identify how the situation came to light (based on the factual information provided by the instigating manager); what actions have already been taken prior to the investigation commencing; what communications have taken place.*
- *Provide brief details of the 'subject' of the investigation, their employment history, current role and how long held etc.*
- *Note if employee suspended and when, whether redeployed for duration of investigation or if there are any specific changes in place to allow the investigation to take place i.e. line management responsibility removed, budget responsibility suspended, taken off usual duties but still within department etc.*

Executive Summary (Optional - delete if appropriate)

- *This may be suitable for complex investigations and should provide a brief summary of the main findings/conclusions.*

Remit of Investigation

- *Define remit of investigation, i.e. what allegations/concerns were identified as in need of investigation (provide concise bullet points list of all allegations, that will be expanded upon in “Findings” section).*
- *State policy under which the investigation was carried out (e.g. University Disciplinary Policy, Research Misconduct etc).*

Investigation Process

Explain how the investigation progressed, including reasons for decisions which were made and the direction the investigation went including:

- *A brief description of the method(s) used to gather information.*
- *Use table template ‘Appendix 1’ to record what interviews/statements were undertaken, when, and their appendix number within the bundled of evidence*
- *If the investigator has not interviewed all individuals suggested by the ‘subject’ of the investigation the decision should be recorded in this section (including reasons e.g. character reference only).*
- *A timetable of events. (Detailing any delays in the investigations).*
- *What documents/evidence were reviewed (Appendix 2: Record of Evidence)*

Possible sections to add

Reliability Analysis

You may choose to include factors such as:

- party's cooperation or demeanor during the interview
- the number of breaks
- constantly turning to the advisor or a parent before answering (only if that becomes significant)

This is not normally included, but some schools request it.

Possible sections to add

Discussion

- **Pose the questions of whether each of the elements of each policy is met**

Read the policy even if you know it inside and out-break down the policy

- Was the conduct severe?
- Was the conduct pervasive?
- Was the conduct committed by the named Respondent?
- Was affirmative consent given?
- Absent affirmative consent, did the Respondent take such steps as necessary to obtain affirmative consent?
- Was the conduct patently offensive?
- Was the Complainant too intoxicated to consent.
- Did the conduct deny Complainant equal access to the benefits of a Cambridge College education?

Wrap-up

- Signature

example: Respectfully submitted,
 Jane Investigator
 Title IX Investigator

- Final Proof

Check for spelling, punctuation, pronouns, formatting

(Roman numerals, letters, etc? Fix this at the end- can look unprofessional)

Self-Care

- Important investigations
- Important to be meticulous
 - Take your time
 - Complete as quickly as possible
 - Complete your own work
 - Be sensitive
 - TAKE CARE OF YOURSELF – this is a lot to take on!
 - Ask for help
 - Communicate delays, obstacles, or concerns
 - Be flexible
 - Set aside time