An Introduction to the Title IX Grievance Process

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Overview

Title IX of the Education Amendments of 1972

No person shall in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

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	Sexual Harassment under	er Title IX



Introduction to Title IX



Title IX & Sexual Violence on College Campuses

2011: "Dear Colleague" Letter

 Guidance about responding to sexual misconduct, especially for colleges & universities

2020: Final Title IX Regulations

- Specific requirements and procedures for primary, secondary, and postsecondary institutions in response to sexual harassment
- Schools must publish a Sexual Harassment Policy
- All Title IX personnel must be trained

The Biden Administration

• May revise Title IX requirements and/or procedures



Scope of Title IX

Where does it apply?

• Local school districts, postsecondary institutions, charter schools, for-profit schools, libraries & museums

What does it apply to?

- Recruitment, admissions, and counseling; financial assistance; athletics; sex-based harassment; treatment of pregnant & parenting students; discipline; single-sex education; and employment.
- LGBTQ & transgender community members

In this presentation

Sexual Harassment



Education Program or Activity

- All of the operations of the school
 - May be on or off campus
 - Locations, events, or circumstances over which the school exercises substantial control over both:
 - The Respondent, and
 - The context in which an incident of sexual harassment occurs.
 - Any building owned or controlled by student organizations which are officially recognized by the school
 - Includes fraternity & sorority houses
- Computer & internet networks, digital platforms & computer hardware or software owned or operated by, or used in the operations of the school

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Advisor Tip: Understanding WHERE an incident occurred is critical in Title IX cases.



Definitions



Actual Knowledge

What is Actual Knowledge?

- Notice of sexual harassment (or allegations) reported to:
 - Title IX Coordinator
 - Any employee in elementary & secondary school environment
- Includes reports sent to the Title IX Coordinator in person, by mail, by telephone, by email, or by any other means that results in the Title IX Coordinator receiving a person's written or oral report



Report vs. Formal Complaint

Report

- Alleges sexual harassment, sex discrimination, or sexual misconduct
- Written or oral
- Submitted by <u>any person</u>, not just the alleged victim
- Can be anonymous
- May be made at any time
- Made in person or by mail, phone, email or any other means that results in the Title IX Coordinator receiving notice

Formal Complaint

- Alleges Title IX sexual harassment
- Submission <u>REQUIRED</u> to initiate the Title IX grievance process
- Must be filed and signed by the Complainant (or Title IX Coordinator in certain instances)
- **CANNOT** by filed anonymously or by a third-party

Both Reports & Formal Complaints are:

- A means for the school to obtain "actual knowledge"
- NOT equivalent to filing charges with local law enforcement



Supportive Measures

WHAT

- Non-disciplinary, non-punitive services offered to the Complainant & Respondent
- Includes measures designed to protect the safety of all parties or the school's educational environment, or deter sexual harassment

WHEN

• Available before or after filing a formal complaint or where no formal complaint has been filed

HOW

• Offered without fee or charge to the complainant or respondent; as appropriate & reasonably available

WHY

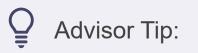
 Designed to restore or preserve equal access to the school's education program or activity <u>without</u> <u>unreasonably burdening the other party</u>



Supportive Measures

EXAMPLES:

- Counseling
- Extensions of deadlines or other course-related adjustments
- Modifications of work or class schedules
- Campus escort services
- No-contact orders between the parties
- Changes in work or housing locations
- Leaves of absence
- Increased security of certain areas on campus, etc.



Ask your party if they need to request supportive measures during the Title IX grievance process



Amnesty Provision

- Not required under Title IX but often included in the policy to encourage reporting
- Means that individuals may not be subject to disciplinary action for a minor violation of other school polies (e.g., Code of Conduct) when participating in a Title IX investigation

Advisor Tip: Remind your party of the amnesty provision if it is referenced in the school's policy.



Confidentiality

- Explicitly stated in Title IX
- Identities of the reporting parties, Complainants, Respondents, alleged Respondents, and witnesses are to remain confidential
- Identities of these individuals will be known to the individuals conducting the Title IX process
 - Advisor Tip: Keep an eye out for confidentiality agreements or something similar from the Title IX Coordinator. You may need to sign this document.



Retaliation

What is retaliation?

Intimidating, threatening, coercing, or discriminating against any individual for either of the following reasons:

- 1. Intention to interfere with the individual's rights under Title IX; or
- 2. Because an individual has submitted a report or formal complaint, testified, assisted, or <u>participated or refused to participate in the investigation</u>, proceeding, or hearing under Title IX.



All persons are prohibited from retaliating against reporting parties, Complainants, Respondents, witnesses, and others who participate in the Title IX process.

- Example One: Friends of the Complainant intimidating the Respondent, or vice versa.
- Example Two: School personnel discriminating against an individual for refusing to participate in the Title IX process.
- Advisor Tip: Listen to your party. Have they experienced retaliation? Do they feel that their friends (witnesses) are being forced, coerced, or threatened?



Standard of Evidence

Standard used to determine if a sexual harassment policy violation occurred.

Preponderance of the Evidence

- Evidence demonstrates that it is "more likely than not" that the alleged conduct or policy violation occurred
- Greater than 50% chance that a policy violation occurred

Clear & Convincing Standard

- Evidence is highly and substantially more likely to be true than untrue
- A higher standard of evidence to meet when compared to the "preponderance of the evidence" standard



Advisor Tip: Identify the standard of evidence used in Title IX cases in the school's sexual harassment policy.



Participants in the Title IX Grievance Process

Overview

- All Title IX personnel are prohibited from having a conflict of interest or bias for or against Complainants or Respondents generally or the specific Complainant or Respondent participating in the process.
- As the Title IX Advisor, <u>you</u> may be the only person "on your party's side" during the Title IX process.
 - You will likely be the only person permitted to attend <u>all</u> interviews & meetings.
 - You will be the only person to accompany your party <u>during the hearing & conduct cross-</u> <u>examination.</u>
 - You are the only person permitted under Title IX to be "partial" to your party.



Advisor Tip: Be aware of potential conflicts of interest or biases for or against your party from Title IX personnel during the process.



Except for the Title IX Coordinator, Title IX personnel may be internal (from the campus community) or external (local attorneys, consultants, etc.).

Roles in the Title IX Process

- Title IX Coordinator
- Complainant
- Respondent

- Title IX Investigator
- Decision Maker
- Appeals Decision-Maker
- Informal Resolution Facilitator
- Advisors



Title IX Coordinator

- Every school must have a Title IX Coordinator
- Receives reports of sexual harassment
- Facilitates the Title IX process

Advisor Tip:

The Title IX Coordinator will be your point of contact for all of your questions related to the Title IX process

Can

- Serve as the Title IX investigator
- Serve as the Informal Resolution Facilitator
- Have other roles on campus
 - Dean of Students, Director of Human Resources, etc.

Cannot

- Serve as the Title IX Decision-Maker
- Serve as the Appellate Decision-Maker



Complainant

Alleged to be the victim of conduct that could constitute sexual harassment.

- May be a student, employee, or other community member.
- Must be participating in or attempting to participate in the school's education program or activity with which the formal complaint is filed.



Respondent

Reported to be the perpetrator of conduct that could constitute sexual harassment.

• May be a student, employee, community member, or non-community member.

The school's ability to respond to incidents perpetrated by non-community member Respondents may be limited.

• School may dismiss the complaint if the Respondent is no longer enrolled or employed by the school.



Title IX Investigator

May be Title IX Coordinator, other school employee, or independent contractor

Responsibilities

- Collects evidence & Interviews the parties & witnesses
- Provides all evidence to the parties & their advisors for inspection & review
- Creates an investigative report that fairly summarizes relevant evidence
- Sends the investigative report to the Complainant, Respondent & Advisor

During the investigation, Complainants & Respondents have the equal opportunity to:

- Gather and present relevant evidence & witnesses
- Discuss the allegations
- Have others present during interviews
- Inspect, review, and respond to any evidence obtained as part of the investigation



Decision-Maker



- May be a single decision-maker (also referred to as a Hearing Officer) or a Hearing Panel
- May be school employees or independent contractors
- May NOT be the Title IX Coordinator or Title IX Investigator

- Oversees the Title IX hearing
- Supervises the conduct of the involved parties & their advisors
- Determines the relevance of questions posed during the hearing
- Drafts & issues the written determination regarding responsibility



Appellate Decision-Maker



- May be a single appellate decision-maker or Appellate Panel
- May be school employees or independent contractors
- May NOT be the Title IX Coordinator, Investigator, or Decision-Maker

- Reviews the appeal from the party & the other party's response (if any)
- Drafts and issues the final determination
- Specific appellate procedures vary at every school, so refer to the school's policy for details.



Informal Resolution Facilitator



- May be the Title IX Coordinator
- May be school employees or independent contractors

- Provides information to the parties & advisors about the informal resolution process *Various forms of informal resolution may be available*
- Facilitates the informal resolution process
- Drafts informal resolution settlement agreements at the conclusion of the process (if the complaint is resolved)





Rights

- Complainant & Respondent have the right to an advisor of their choice.
 - An advisor may be, but is not required to be, an attorney.
 - A party's advisor may be a friend, teacher, parent, professor, etc.
- School cannot limit the choice or presence of the advisor for either party in any meeting.
- Parties have the option to include the advisor in any meeting or investigative interview.
 - Schools may set specific expectations or provide guidelines for advisors to follow during meetings, investigative interviews, and the hearing.





- Supports their party during interviews, meetings, the hearing, and after the Title IX grievance process
- Accompanies their party throughout the Title IX grievance process
- Reviews the investigative report and all evidence
- Participates in the hearing & conducts cross-examination
- Helps craft possible appeal
- May even help with informal resolution



A Brief Overview of the Process



Title IX Requirements

Under Title IX, schools are required to:

- Respond to all reports of sex discrimination & sexual harassment
- Offer & coordinate supportive measures
- Determine whether an alleged incident = Title IX sexual harassment
- Apply all school rules & procedures equally to Complainants & Respondents
- Treat Complainants & Respondents equitably



Leading up to the Title IX Process



Report is Submitted to the Title IX Coordinator

- Any person may report sexual harassment
- Responsible Employees & Mandated Reporters



Upon receipt of a report, Title IX Coordinator will:

- Contact & Meet with the Complainant (if known)
- Conduct a safety & risk analysis
- Assess the information from the report & conversation with the Complainant to determine if alleged incident would be considered sexual harassment under Title IX



Leading up to the Title IX Process

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If the alleged incident is preliminary determined to violate Title IX:

• Complainant or Title IX Coordinator may file a formal complaint

After a formal complaint is filed, the Title IX grievance process begins.



Title IX Grievance Process

► Notice of Allegations sent to the parties

• This is when advisors will likely come into the process

► Investigation

• Parties & their advisors review the investigative report

► Hearing (colleges & universities)

Advisors conducts cross-examination

► Written determination of Responsibility (or non-) Issued

- Opportunity to Appeal
- ► Optional: Informal Resolution Process



What is Sexual Harassment under Title IX?

Considerations

Sexual harassment is a form of sex discrimination

To be considered sexual harassment **under Title IX**, the Title IX Coordinator & Complainant must consider:

The Type of Incident
 The Location of the Incident



Part 1: Type of Incident

Conduct on the basis of sex that satisfies one of more of the following three types of behavior:

- Quid Pro Quo Harassment
 - Involves school employees
- 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
 - Does not require a "concrete injury"
- Sexual Assault, Dating Violence, Domestic Violence & Stalking
 - Importance of <u>consent</u>





Title IX does not define consent, but it does require schools to adopt a definition of consent.

- Advisor Tip: Advisors need to review the school's definition of "consent" in the sexual harassment policy.
 - Definitions of consent vary and are often influenced by state laws
 - Lack of consent or inability to give consent is important
 - Evidence or witness statements supporting or refuting the parties' statements about consent are important



SFCM Definition of Consent

- Consent means "affirmative consent," which means affirmative, conscious, and voluntary
 agreement to engage in sexual activity.
- It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other person(s) to engage in the sexual activity.
- Lack of protest or resistance does not mean consent, nor does silence mean consent.
- Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time.
- The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent.
- In the determination of whether consent was given to sexual activity, it shall not be a valid excuse to an alleged lack of affirmative consent that the person whose conduct is at issue ("Respondent") believed that the person who experienced the Respondent's conduct ("Complainant") consented to the sexual activity under either of the following circumstances: A. Respondent's belief in affirmative consent arose from the intoxication or recklessness of the Respondent. B. Respondent did not take reasonable steps, in the circumstances known to the respondent at the time, to ascertain whether the Complainant affirmatively consented....(next pg)



SFCM Definition of Consent (cont'd)

- It shall not be a valid excuse that the Respondent believed that the Complainant affirmatively consented to the sexual activity if the Respondent knew or reasonably should have known that the Complainant was unable to consent to the sexual activity under any of the following circumstances:
 - A. Complainant was asleep or unconscious.
 - B. Complainant was incapacitated due to the influence of drugs, alcohol, or medication, so that the complainant could not understand the fact, nature, or extent of the sexual activity.
 - C. Complainant was unable to communicate due to a mental or physical condition.
- Consent is given by words or conduct, as long as those words or conduct create mutually understandable clear permission regarding willingness to engage in sexual activity of a given kind under given terms.
 Because consent is active, stopping only when a person says, "No," rather than when the person says, "I'm not sure I want to," or "I don't think we should do this," is not enough.
 Failure to resist is not consent.
 Consent to one form of sexual activity is not consent to other forms of sexual activity.
 Previous relationships or prior consent is not consent to future sexual acts.
 Consent is not possible by persons under age 18.
 Consent is not possible by persons who are incapacitated.
 Resistance is a demonstration of non-consent.
 Resistance is at times not reasonable to expect of a person who does not wish to, or is not able to, consent.



Consent

Questions to ask yourself that relate to consent:

Was the Complainant incapacitated?

- Consent cannot be given by someone who is incapacitated for any reason
- Incapacitation because of victim's age, disability, consciousness, of use of drugs or alcohol

Why is consent perceived to be present or absent in this case?

 In some definitions, consent cannot be implied by silence, the absence of resistance, or past consent with the same or another person, even if a person has given their consent to engage in sexual activity in the past.

Was consent given under coercion, force, or threats?



Part 2: Location of the Incident

For Title IX to apply, the incident must have occurred in both:



The school's own education program or activity
 As defined in the school's policy



2) The United States

- Title IX does not apply to study abroad

programs



Schools typically address non-Title IX incidents, often referred to as "sexual misconduct."

- May be "sexual harassment" but occurred outside of the U.S. or school's program or activity; or
- May have occurred in an educational program or activity but is not defined as "sexual harassment."
- School may follow a parallel Title IX grievance process or a completely different process (referenced in Code of Conduct, Employee Handbook, etc.).



Advisor Tip: Advisors may be included in these processes. You must clearly understand which grievance process taking place and the parties' rights in each process.



Final Determination

After the Hearing the final determination regarding responsibility will be issued, the parties then have the right to an appeal.



Determination of Responsibility & Appeals



After the determination of responsibility has been issued, advisors should read through it, confirm that it contains all necessary information, and consider if the determination should be appealed.

Step 1: Review the Determination & Consider the Bases for Appeal:

- Procedural irregularity that affected the outcome of the matter;
- New evidence that was not reasonably available at the time the determination regarding responsibility was made, that could affect the outcome of the matter; and
- The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias for or against Complainants or Respondents generally or the individual Complainant or Respondent that affected the outcome of the matter.
- Additional bases of appeal provided in the school's policy

Step 2: Ask your party if they want to appeal the determination



After the Determination is Issued

Other questions to consider:

- Has the other party appealed & does your party need to respond?
- If there is no appeal, has the Title IX Coordinator communicated with your party to explain how sanctions or remedies will be implemented?



Right to Appeal

Both parties have the opportunity to appeal the determination of responsibility.

Refer to the school's policy to learn about how to file an appeal.

• Parties are often required to submit a written appeal to the Title IX Coordinator within a specific number of days following the issuance of the written determination.

What happens if an appeal is filed?

- The school will notify the other party in writing, implement appellate procedure for both parties equally, and give parties a reasonable, equal opportunity to submit a written statement.
- The Appellate Decision-Maker will review the appeal, the other party's response (if any), and other case information.
- The Appellate Decision-Maker will issue a written decision to the parties.
- Then, Title IX Grievance Process is complete



Sanctions & Remedies

After the conclusion of the grievance process, check on your party.

1.) Have the sanctions been clearly explained & issued?

2.) Are the remedies in place?



Optional Elements of the Title IX Process

Inform al R esolution

Title IX permits Informal Resolution.

- It must be voluntary.
- Informal resolution cannot be required as a condition of enrollment, continuing enrollment, employment, or continuing employment.
- A school cannot require the parties to participate.
- A school may not offer informal resolution unless a formal complaint is filed.







Schools CANNOT offer or facilitate an informal resolution process to resolve allegations that an employee sexual harassed a student.

If informal resolution takes place, the school must:

1. Provide the parties a written notice disclosing:

- The allegations;
- Requirements of the informal resolution process;
- Preclusion from resuming a formal complaint arising from the same allegations;
- Right to withdraw from the informal resolution process prior to agreeing to a resolution and resume the grievance process; and
- Consequences resulting from participating in the process (records).

2. Obtain the parties' voluntary, written consent to the process.



Schools are required to investigate the allegations in a formal complaint. However, the investigation may uncover new information about the incident.

Under Title IX, a school <u>MUST dismiss</u> the formal complaint of sexual harassment under Title IX if at any point during the investigation or hearing process it is determined that the alleged conduct:

- 1. Would not constitute sexual harassment under Title IX, even if proven;
- 2. Did not occur in a school education program or activity; or
- 3. Did not occur against a person in the United States.



Optional Dismissal of a Formal Complaint

A school <u>MAY dismiss</u> the formal complaint of sexual harassment under Title IX if at any point during the investigation or hearing process the following occurs:

- 1. The Complainant notifies the Title IX Coordinator in writing that they would like to withdraw the formal complaint;
- 2. The Respondent is no longer enrolled or employed by the school; or
- 3. Specific circumstances prevent the school from gathering evidence sufficient to reach a determination.



A dismissal must contain specific information, such as:

- Statement of dismissal;
- Reason(s) for dismissal;
- Alternate complaint resolution procedures (if applicable); and
- Statement that each party has the right to appeal.



If a Complaint is Dismissed

How to Respond to the Dismissal as an Advisor

- 1. Communicate with your party
 - If a Complainant, did they request the dismissal?
 - Would they like to appeal the dismissal? On what basis?
 - Would they like the incident to be addressed under a different school policy?
 - Would they still like supportive measures?
- 1. Contact the Title IX Coordinator to better understand the dismissal, if necessary.



Consolidation of Formal Complaints

Consolidation occurs when the allegations of sexual harassment arise out of the same facts or circumstances.

Reasons for Title IX Coordinator to consolidate allegations:

- 1. Allegations of sexual harassment are against more than one respondent;
- 2. Allegations of sexual harassment are by more than one Complainant against one or more Respondents; or
- 3. Allegations of sexual harassment are by one party against another party.



Thank you!



Time for a break!



Role of the Title IX Advisor

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What are we there for?

- Help the party understand their rights
- Help the party understand the policy
- Help the party understand and prepare for the process
- Help the party put their best foot forward
 - -Strengths and weakness
 - -What evidence might support their position
- Moral support

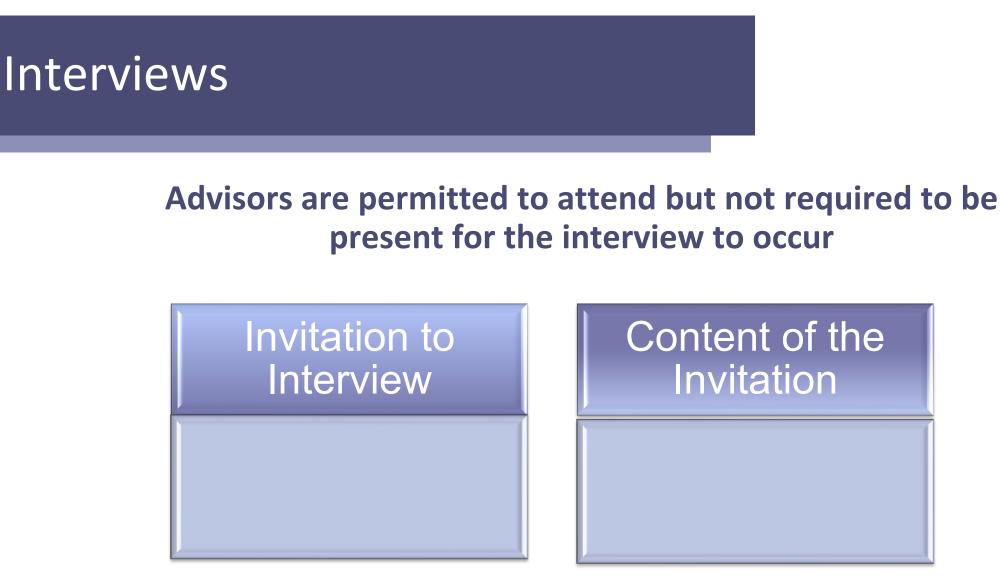


Elements of the investigation process



- A) Investigator conducts interviews
- B) Investigator collects evidence
- C) Party and Advisor review evidence
- D) Investigator creates investigative report
- E) Party and **Advisor** review and respond to investigative report



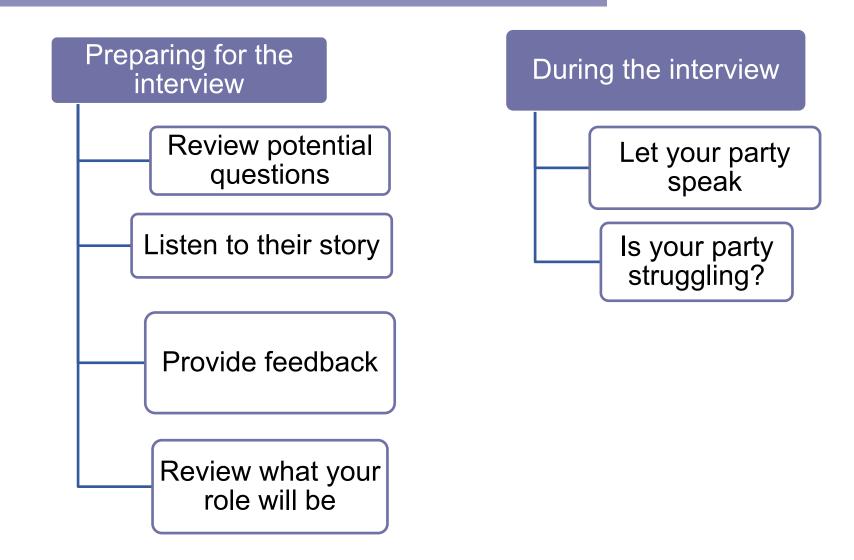


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Do you or your party foresee a potential conflict of interest or bias on the part of the Title IX Investigator?



Interviews





Evidence Collection

Complainant and Respondent have an equal opportunity to:





evidence



Discuss the allegations under investigation



Evidence Collection

Burden of proof

The burden of proof and the burden of gathering evidence sufficient to reach a determination rest on the school, *not on the parties or their advisors.*

Prohibited Evidence

The school cannot access, consider, disclose, or use treatment records made or maintained by a physician, psychiatrist, psychologist or other recognized professional acting in this capacity.

The school can only obtain such records with the party's voluntary, written consent



Party and Advisor Review Evidence

The Title IX Investigator must provide both Parties & their Advisors an equal opportunity to inspect and review any evidence obtained as part of their investigation that is directly related to the allegations raised in the formal complaint.

This is known as the **Investigation File**



Investigation File

What is it?

- Evidence directly related to the allegations
- Includes evidence that the school does not intend to rely upon when reaching a determination
- Inculpatory and exculpatory evidence

What to do with it

- Carefully review the investigation file
- Understand what is "relevant" vs. "directly related"
- Inspect and review within 10 days
- Submit a written response to the investigative report

Advisor Tip: All evidence must be made available to the Parties, but not all evidence may be "relevant". Reviewing the Investigation File provides you and your party the opportunity to argue that certain is or is not relevant.



Tips for Reviewing the Investigation File

Does it contain evidence of past sexual misconduct?

Is there evidence of consent?

Is there evidence of past behavior? Were all relevant witnesses interviewed?

Were all documents submitted and considered?



Investigator Prepares Investigative Report

- Considers the Parties (and Advisors') responses to the Investigation File
- Creates the Investigative Report to fairly summarize relevant evidence
- If hearing is required, sends the report to the Parties and Advisors at least 10 days prior to the hearing
- If hearing is not required, sends the report to the Parties and Advisors at least 10 days prior to determination



At least ten (10) days before the hearing takes place, both the Complainant and the Respondent will have equal opportunity to review the investigative file subject to any parameters set by the Title IX Coordinator. This information will also be available at the hearing.*

*SFCM Student Handbook, Temporary supplement to Student Misconduct Policy, pg 54



Parties and Advisors Review & Respond to Investigative Report

Disagree with what investigator determines as "relevant" evidence, and therefore includes or excludes that evidence in the investigative report?

- Make the argument for/against consideration in your written response
- Argue for/against that evidence's consideration to the decision-maker at the hearing

What is NEVER "relevant" under Title IX

- Evidence about a Complainant's sexual predisposition
- Evidence about a Complainant's prior sexual behavior, except when:

a) Questions and evidence are offered to prove someone other than the Respondent committed the alleged conduct

b) Questions and evidence concern specific incidents of the Complainant's prior sexual behavior with respect to the Respondent are offered to prove consent.



Review

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Evidence must be included in Investigation File

Parties and Advisors review Evidence Investigation File. Argue relevance determination.

Investigator considers Parties' responses and either includes or excludes the evidence

Parties and Advisors disagree about the relevance of the evidence

Party argues the relevance or irrelevance of the evidence to the decisionmaker



Thank you!



Time for a break!



Advisors: How to prepare for Title IX Hearings & Crossexamination



Preparing for a Title IX Hearing

The burden to determine responsibility is on the school.

During the hearing, Advisors may demonstrate to the Decision-Maker that the allegations in the formal complaint are true or untrue.

If advising a Complainant, the Advisor helps the Party present facts to support the Complainant's allegations & help the school determine that a policy violation did, in fact, occur.

If advising a Respondent, the Advisor helps the Respondent present facts to refute the allegations & help the school determine that your party did not violate Title IX.



What do Advisors do during the hearing?

During the hearing, the Party may support or refute the Investigative Report, depending upon the evidence reflected in the report.

If an investigative report supports the Complainant's allegations:

- Complainant will present evidence & witnesses to support the Investigative Report.
- Respondent will present evidence & witnesses to refute the facts developed during the investigation.

If an investigative report supports the Respondent's denial of the allegations:

- Complainant will present evidence & witnesses to refute the facts developed during the investigation.
- Respondent will present evidence & witnesses to support the Investigative Report.



Why Support or Refute the Investigative Report?

All parties, advisors, and the Decision-Maker will have read the Investigative Report prior to the hearing.

The hearing provides each party the opportunity to challenge evidence included in the Report, particularly through challenging the credibility of witnesses and/or the other party.

Don't need to challenge evidence in the Investigative Report? Advisors are not required to challenge the credibility of the other party or witnesses through cross-examination. Discuss this with your party.



Steps to Prepare for the Hearing

	Review school's procedural rules or guidelines
2	Identify if you need to support or refute the Investigative Report
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3	Craft cross-examination questions
4	Prepare for & attend the pre-hearing meeting (if any)



Review School's Rules & Guidelines





Review the school's procedural rules or guidelines for the hearing.

These rules may address:

- 1. Written responses to the Investigative Report
- 2. Pre-hearing briefs
- 3. Pre-hearing meetings
- 4. Acceptable & unacceptable conduct during the hearing
- 5. Submission of an impact statement



SFCM Policy specifically states:

- Each party's advisor will be permitted an opportunity to ask the other party and any witness who testifies, relevant questions and follow-up questions, including those challenging credibility, but only upon the advance approval
- Direct questioning of any witness by a **party** is **not** permitted. If a party does not have an advisor, (*they may inform the Title IX Coordinator in advance of the hearing, who will determine how to proceed*.)
- The fact-finder(s) will decide questions of relevance at the hearing.
- Complainants and Respondents will be treated **equitably**.
- All relevant evidence at the hearing and in the hearing file will be objectively evaluated, including both inculpatory and exculpatory evidence.
- A determination will not be based on a party's status as a Complainant, a Respondent, or a witness, or any preconceived notions or biases.

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Should I Support or Refute the Investigative Report?

To make this determination, consider the following steps:

- 1. Review the full Investigation File
- 2. Compare the Investigation File with the Investigative Report
- 3. Outline what should be refuted or supported during the hearing
- 4. Identify & prepare witnesses that will support your party's statements
- 5. Prepare your party for the hearing
- 6. Prepare cross-examination questions to challenge the other party & their witnesses



1. Review the Full Investigation File

Potential Contents of the Investigation File:

- Investigator's notes, summary of the investigation, etc.
- Communication between the parties
 - Text messages, emails, direct messages via social media, etc.
- Interview transcripts (recordings may be available)
- Additional evidence such as security footage, call history, etc.

REMINDER: Investigation file is all "directly related" evidence, not just "relevant" evidence included in the Investigative Report.





Investigation File versus Investigative Report

- Does the Investigative Report support or refute your party's statements?
- Is the information in the Report consistent and fair to your party?
- Do you agree about what has been included in the Report?
 - How might you support or refute this information during the hearing?
 - Does your party have additional evidence to submit?



3. Outline what can be Supported or Refuted

For example, ask yourself:

- Is any evidence included in the Report privileged and obtained without the party's consent?
- Is any evidence or statement clearly irrelevant under Title IX but included in the Report?
- Are witnesses' statements consistent or do they conflict? Why?
 - Such witnesses may need to have their credibility challenged at the hearing.
- What elements of the other party's statement do not align with your party's statements?
 - Can you identify witnesses or evidence that support your party and refute the other party's statements?



4. Identify & Prepare Supporting Witnesses

Who might be able to support your party's statements?

- Were they with your party when the alleged incident occurred?
- Did your party see someone immediately before or after the alleged incident?
- Would a character witness be appropriate?

How will they support your party's statements?

- Practice questioning each witness
 - Tell them the exact questions you will ask them at the hearing & ask them to respond
- Prepare them for cross-examination
 - Ask them potential questions & help them prepare responses

Avoid surprises from your own witnesses!



5. Prepare Your Party for the Hearing

Will you or your party be expected to provide opening & closing statements?

Should you consider "direct examination" of your party?

- Direct examination is asking your own party questions to clarify or refute elements of the Investigation R eport.
- This may not always be necessary or appropriate, based on your party's willingness and/or statements regarding the allegations.
- If it is appropriate, what specific information should you ask to support your party's statements?

Prepare your party for cross-examination

- Brainstorm potential cross-examination questions from the other party's advisor
- Help your party prepare responses to the other party's questions
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Crafting Cross-Examination Questions



Do you need to Cross-Examine?

- Will cross-examination help you reach your goal of supporting or refuting the Investigative Report?
 - If no, you are not obligated to cross-examine the other party or witnesses.
 - Reasons cross-examination may not be useful: the individual has been untruthful and will continue to be untruthful, the Investigative Report provides adequate information, or unpredictable responses may do more harm than good.
 - If yes, be intentional about who you cross-examine & how.



Preparing to Cross-Examine

- Identify who you will cross-examine.
- Ask yourself why you are questioning the other party or witness.
 - What element of their credibility do you need to challenge?
- How will you cross-examine the party or witness?
 - What do you need to ask to reach your goal?
 - Confrontation is not required. This is not a courtroom.
 - Questions should be <u>relevant.</u>
 - Respect is important, even during cross-examination.



Why are you cross-examining the party or witness?

What specific information should you focus on while questioning the party or witness?

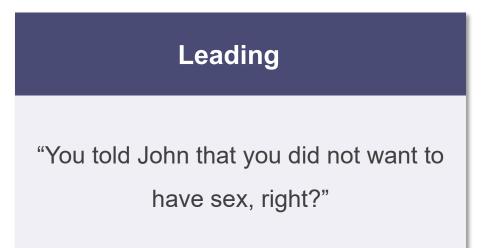
Considerations:

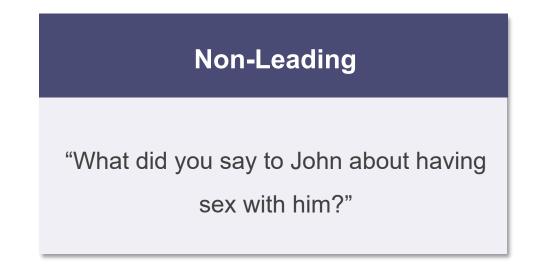
- Trauma experienced by the other party or witness
- Trauma experienced by your party as you cross-examine
- Potential for confrontational or adversarial moments during this time
- These are students or employees of your party's community. This is not a courtroom.



Leading Questions

- Suggest the desired answer
- Prompt the witness or party's response
- Examples:







Leading Questions

In **court** cases, leading questions <u>may not be asked</u> during direct examination (questioning your own party or witness) but <u>may be asked</u> during crossexamination of the other party or witness.

Title IX hearings are not court cases.

You may consider a less confrontational manner of cross-examination.



Opinions & Conclusions

- Do not ask witnesses or parties for their opinions or conclusions about issues that are not within their personal scope of knowledge
- Examples:

Seeking Opinion:

"Did John know that you did not want to have sex with him?"







 Generally, witnesses may not be asked about what other people have said about a topic if the purpose of the question is to prove that the other person's statement is true

- Example hearsay question to roommate of Complainant (Mary):
 - "What did Mary tell you about John's conduct on the night of the alleged incident?"



Understanding Relevance



Decision-Makers Rule on Relevance



> Only relevant questions may be asked during the hearing process.

► Before a witness or party answers the question, the Decision-Maker must first determine whether the question is relevant.

► The Decision-Maker must explain any decision to exclude a question as irrelevant.

Schools may approach this requirement in various ways:

- Questions may be submitted to the Decision-Maker to review prior to the hearing.
- Decision-Makers may rule of each question before a witness or party answers at the hearing.



Concerned that a Question is not Relevant?

Advisors may respectfully object to questions asked by the other party's advisor or by the Decision-Maker.

Advisors typically object for one of two reasons:

- 1. Relevance of the question
 - "That question is not relevant."
- 2. Type of question asked
 - "That question is leading, calls for an opinion, or calls for hearsay."



Not R elevant under Title IX

X Questions about a Complainant's sexual predisposition

X Questions about a Complainant's prior sexual behavior, except when:

a) Questions are offered to prove someone other than Respondent committed by alleged conduct; or

b) Questions concern specific incidents of the Complainant's prior sexual behavior with respect to the R espondent are offered to prove consent.



Medical and similar privileged records are not unavailable unless the party (or parent) provide their written consent.







Are character witnesses relevant or irrelevant?

- They may be relevant, but their purpose is limited.
- Character witnesses typically speak to the credibility of a party.
 - Consider calling character witnesses that speak to the **credibility** of your own party.
 - You may challenge the credibility and/or scope of knowledge of the other party's character witnesses during cross-examination.
- The Decision-Maker should know how to **weigh** the relevance of a character witness's statement while reviewing the Investigative Report and/or during the hearing.



• Advisors need to be thoughtful when preparing for the hearing.

• How can you further convince the Decision-Maker that your party's statements are true?

• Consider the "big picture" and the details.



Pre-Hearing Meetings



Pre-Hearing Meeting

The Decision-Maker may invite the parties and their advisors to a pre-hearing meeting.

If the Decision-Maker does not call for a meeting, the Advisor may request it.



What is a Pre-Hearing Meeting?

An opportunity for the parties and their advisors to:

- Review the rules of the hearing
- Understand the expectations for the hearing
- Finalize the hearing agenda
- Request preliminary information from the parties and their advisors



What to Prepare for the Pre-Hearing Meeting

Decision-Makers may invite the parties & their advisors to submit the following information at the pre-hearing meeting:

- Questions or topics the parties wish to ask or discuss at the hearing
 - Decision-Maker may rule on relevance at this time
- A list of witness to be called at the hearing
- A list of questions the advisor plans to ask their own witnesses at the hearing
- A list of questions the advisor plans to ask while cross-examining the other party
- A response to the investigation report



Participating in the Title IX Hearing

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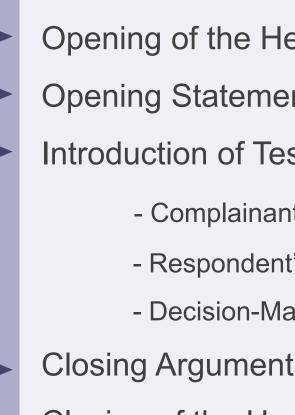
SFCM Policy States:

- The hearing will take place in real-time, however, participants may be located in separate rooms using audio and/or video technology that allows simultaneous viewing and listening.
- The hearing fact-finder(s) shall decide who is allowed at the hearing and the order of the proceedings.
- SFCM may retain an external person to be the neutral fact-finder.
- The live hearing is held by the fact-finder(s) who is appointed by the Title IX Coordinator and who is not otherwise involved in the case.
- The person will be appropriately trained.
- The fact-finder(s) will not have a conflict of interest or any bias for one side or the other.
- All parties will receive 20 days or more notice of the date, time and location for the hearing, and a reminder of the equal opportunity for bringing an advisor/support person to the hearing.



Hearing Agenda





- **Opening of the Hearing (Decision-Maker)**
- **Opening Statements (Party or Advisor)**
- Introduction of Testimonial Evidence
 - Complainant's case
 - Respondent's case
 - Decision-Maker's Examination of Parties & Witnesses



- Closing Arguments or Statements (Party or Advisor)
- Closing of the Hearing



Opening Statements

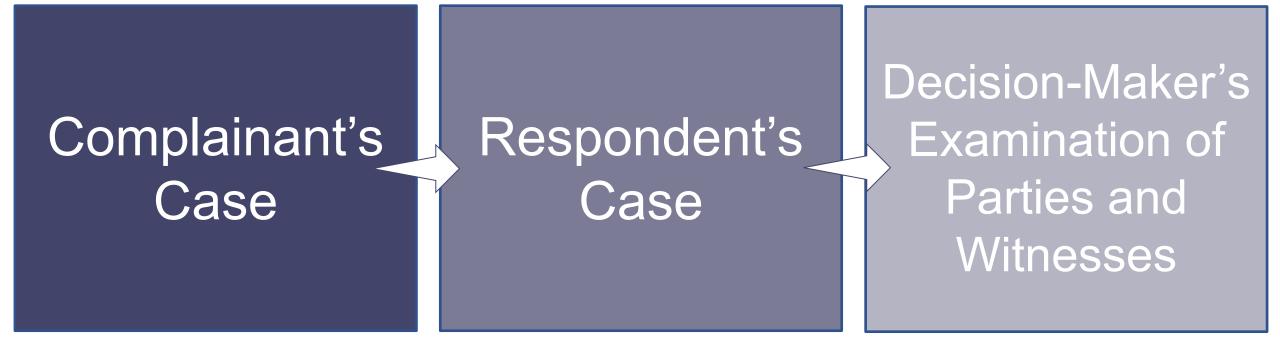
Decision-Maker may ask the parties or their advisors for an opening statement.

What is an opening statement?

- Outlines the issues that the party & their advisor would like to refute
- Provides an overview of the facts & evidence
- Describes the evidence that supports their statements (or their party's statements)
- Presents what the party and their advisor expect to prove during the hearing
- Typically, the Complainant gives the first opening statement, followed by the Respondent

Parties may waive their opening statement







1. Complainant's Case

- Typically, the Decision-Maker will ask the Complainant's advisor to provide testimonial evidence first.
- Opportunity to present witnesses & party for direct examination
- Present new evidence (if any)
- Cross-examination of the Complainant & witnesses by the Respondent's advisor
 - Be alert & watch for irrelevant questions asked of your party or witnesses



2. Respondent's Case

- Opportunity to present witnesses & party for direct examination
- Present new evidence (if any)
- Cross-examination of the Respondent & witnesses by the Complainant's advisor
 - Be alert & watch for irrelevant questions asked of your party or witnesses



3. Decision-Maker's Examination of Parties & Witnesses

• May ask questions of any witness or party



Closing Statements

Decision-Maker may ask the parties or their advisors for a closing

What is a closing statement?

- Final statement by the parties or their advisors to the Decision-Maker
- Summarizes the relevant evidence & arguments
- Asks the Decision-Maker to find that the evidence will support the determination in that party's favor
- Typically, the Complainant gives the first closing, followed by the Respondent
 - Parties may waive their closing statement



Closing of the Hearing

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Facilitated by the Decision-Maker, who will:

- Announce that the parties have completed the submission of all evidence
 - States the time
- Announce the hearing is closed
- Leave the hearing & prepare the written determination of responsibility



Alternative to Formal Process

Informal Resolution

In considering informal resolution, remind your party:

Either Party can request Both Parties must agree Either Party can withdraw at ANY time Process can take many forms What is your party's primary objective?

Thank you!

