

Title IX Investigation Process, Evidence, and Relevance



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Part 1: Issues of Relevance and Evidence

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What is “Evidence?”

- ▶ Facts available to the investigator.
 - ▶ Information from complainants, respondents, and witnesses.
 - ▶ Information from school records / files.

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Commentary to Final Rule

- ▶ Title IX grievance processes are not court proceedings.
- ▶ Comprehensive rules of evidence do not apply.
- ▶ Goal of Final Rule is to “achieve a fair, reliable outcome in the context of sexual harassment” in an education program or activity.
 - ▶ School officials not expected to apply comprehensive, complicated rules of evidence.

Kinds of Evidence

- ▶ **Demonstrative Evidence**: Something that preserves physical evidence.
 - ▶ Pictures of a physical injury.
 - ▶ Security footage.
- ▶ **Documentary Evidence**: written evidence (paper or electronic).
 - ▶ Emails.
 - ▶ Text messages.
 - ▶ Attendance records (was the respondent at school or a school activity on the date in question?).
 - ▶ Medical records.

Kinds of Evidence, cont.

- ▶ **Physical Evidence**: Things or objects showing an incident occurred or did not occur.
 - ▶ Emails.
 - ▶ Copies of social media postings.
- ▶ **Verbal Evidence**: Oral report from a witness or party to the incident.

Kinds of Evidence, cont.

- ▶ **Direct**: No need to draw a conclusion to show something happened.
 - ▶ *"I was in the restroom and saw Joseph touching Linda's chest and rear end while trying to kiss her. I heard Linda telling him to 'stop,' but he kept touching her and trying to kiss her."*
 - ▶ Witness provides direct evidence of what was seen.

Kinds of Evidence, cont.

- ▶ **Circumstantial**: Need to draw a conclusion or inference to show something happened.
 - ▶ *"I was in the hallway and saw Joseph follow Linda into an empty room. Two minutes later, I saw Linda run out of the room with her shirt bunched up and she was crying. Joseph came out a few seconds later and kept his head down as he walked down the hallway."*
 - ▶ Witness did not see or hear what happened in the empty room. Would have to infer what may have happened in the room.
 - ▶ Only reasonable inferences are appropriate.

Kinds of Evidence, cont.

- ▶ **Inculpatory evidence**: Evidence that shows, or tends to show, a person's involvement in an act.
 - ▶ Example: security footage showing a respondent physically assaulting the complainant.
- ▶ **Exculpatory evidence**: Evidence that tends to excuse or justify an accused person's actions, or to show a person did not engage in the alleged behavior.
 - ▶ Example: Respondent provides travel records proving she was out of town on the date of an alleged assault, and therefore could not have committed the act in question.

Relevance

- ▶ Only relevant evidence should be considered when preparing an investigative report or determination regarding responsibility.
- ▶ Facts that could potentially explain or describe the incident under investigation.

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Determining Relevance

- 1) Review the evidence.
- 2) Review allegations in the formal complaint.
- 3) Does this evidence have the potential to prove or disprove an allegation in the formal complaint?
- 4) Is the Title IX rape shield protection implicated by this evidence, or is there an exception to the rape shield protection?

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Privileged Records

- ▶ Final Rule recognizes protections for certain privileged records.
 - ▶ Medical / treatment records.
 - ▶ Attorney-client communications.
 - ▶ Implicating yourself in a crime (5th Amendment)
 - ▶ Confessions to clergy members or other religious figures.
 - ▶ Spousal testimony in criminal matters.
- ▶ Investigation must not use, rely on, or seek disclosure of information protected under a legally recognized privilege, unless the person holding the privilege has waived it.

“Rape Shield Protections”

- ▶ The Final Rule provides that questions / evidence about a complainant’s prior sexual history / behavior is not relevant, unless it is offered:
 - ▶ To prove that someone other than the respondent committed the conduct alleged by the complainant, or
 - ▶ To provide details concerning the complainant’s prior sexual behavior with the respondent to prove consent.

Part 2: Title IX Investigation Process

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Why Do Investigations Matter?

- ▶ Compliance with Title IX's requirements.
- ▶ Potential legal exposure.
 - ▶ Potential liability if the school knows or should have known about possible sexual harassment and does nothing about it.
 - ▶ If employees have notice of possible sexual harassment, must follow the Title IX process.
 - ▶ Possible loss of federal funds if a school fails to comply with Title IX's requirements.
- ▶ Also, we want to be sure our school is a safe place for students, employees, and other members of our school community.

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General Investigation Matters

▶ Investigators must:

- ▶ Be impartial throughout the investigation process (free from prejudice of the facts, conflicts of interest, and bias).
- ▶ Provide equal opportunity for complainants and respondents to provide evidence.
- ▶ Be familiar with school policies related to non-discrimination in general, as well as Title IX requirements.
- ▶ Not issue “gag orders” that improperly restrict a party’s ability to discuss the issues being investigated.



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General Investigation Matters, cont.

▶ Investigators must:

- ▶ Provide the parties with an opportunity to have an advisor present during investigative proceedings.
- ▶ Provide written notice to the parties of date, time, location, participants, and purpose of investigative meetings (interviews or other meetings) with sufficient time for the respective parties to prepare.
- ▶ Allow both parties equal chance to review evidence directly related to a formal complaint’s allegations.



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Starting an Investigation

- ▶ Investigator will be assigned by Title IX Coordinator.
 - ▶ Possible to have a pool of persons trained as an investigator to ensure impartiality.
- ▶ If you are in the pool of investigators and you are approached with an allegation of possible sexual harassment, be sure the Title IX Coordinator is informed of the matter.
 - ▶ Title IX Coordinator will conduct initial review of the report and assign an investigator if a formal complaint is filed.

Starting an Investigation, cont.

- ▶ Investigator should review the school's Title IX policy and formal complaint process, noting the applicable timeline for completing an investigation.
- ▶ Review allegations in the formal complaint to determine scope of investigation.
 - ▶ Identify the parties.
 - ▶ Identify policies related to the complaint.

Starting an Investigation, cont.

- ▶ Begin identifying evidence to gather.
 - ▶ Written statements?
 - ▶ Video or audio recording?
 - ▶ Documentary evidence (letters, emails, pictures, or texts provided by the parties)?
- ▶ Begin preparing investigation plan (evidence list, witness list, interview order, etc.).

Starting an Investigation, cont.

- ▶ Be sure complainant is aware of his or her right to have an advisor and to be free from retaliation.
- ▶ Provide a basic overview of the investigation process and anticipated time of completion in accordance with the school's formal complaint process.

Starting an Investigation, cont.

- ▶ DO NOT promise that disciplinary consequences will be issued against a respondent.
- ▶ DO NOT promise to keep the complainant's identity confidential.
- ▶ Recall that your role is to investigate, not to make a determination regarding responsibility.
 - ▶ The designated decision-maker will make that determination.

Begin Collecting Evidence

- ▶ Collect and preserve (sample list):
 - ▶ Electronic communications
 - ▶ Security information (hallway cameras?)
 - ▶ Pictures, videos, audio
 - ▶ Personnel files
 - ▶ Student discipline records
 - ▶ Prior complaints
- ▶ Special considerations if a complainant also refers the matter to law enforcement; be careful not to interfere with law enforcement investigations.

Investigation Process

- ▶ Provide notice to the parties of meetings or interviews involving the other party.
 - ▶ If a party's attendance / participation is necessary, give written notice of the date, time, and location along with summary of who you anticipate being in attendance and basic summary of the meeting's purpose.
 - ▶ Attempt multiple interviews (up to three opportunities) if a witness does not show for an interview.
- ▶ Interview all relevant (and available) witnesses.
 - ▶ Potential for follow-up interviews as investigation progresses.

Investigation Process, cont.

- ▶ School carries burden of gathering evidence and burden of proof.
- ▶ Parties must have equal opportunity to present facts and expert witnesses, and other inculpatory and exculpatory evidence.

Conducting Interviews

- ▶ Identify all relevant (and available) witnesses.
 - ▶ Generally begin with complainant to obtain details about the complaint.
 - ▶ Decide when to interview the respondent and witnesses.
- ▶ If possible, conduct interviews in person.
- ▶ Interview witnesses separately.



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Conducting Interviews, cont.

- ▶ What should you have with you during the interview?
 - ▶ Copy of formal complaint
 - ▶ Investigation log
 - ▶ Sheet for taking notes
 - ▶ Outline of pre-prepared questions
 - ▶ Evidence you may need to reference / show to the witness
 - ▶ Copy of relevant policies or handbooks



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Conducting Interviews, cont.

- ▶ Explain purpose of the interview, and your role in the investigation process.
 - ▶ Duty is to gather information.
- ▶ Do not guarantee confidentiality of information gathered during interview and explain that Title IX allows for limited disclosures of information to others involved in the formal complaint process.
- ▶ Discuss the school's anti-retaliation policies, and requirement under Title IX that the school will not retaliate against those participating in the formal complaint process.
- ▶ Emphasize the need for accurate and truthful information.

Conducting Interviews, cont.

- ▶ Remember your role.
 - ▶ Do not share your personal thoughts about the complaint, or what you think the outcome may be.
 - ▶ Do not agree (or disagree) with the witness. Duty is to gather information.
 - ▶ Do allow each witness to suggest other people who may have knowledge about the complaint.

Conducting Interviews, cont.

- ▶ Have the interviewee provide details.
 - ▶ What happened before the incident?
 - ▶ What happened during the incident?
 - ▶ What happened after the incident?
- ▶ Have the interviewee “freeze frame” on moments to describe details.
 - ▶ What could you feel? See? Smell? Hear?
 - ▶ How were you positioned? Where was the other person in relation to you?
 - ▶ What did you say? What did the other person say to you?
 - ▶ Elicit details about tone, demeanor, body language, etc.

Conducting the Interview, cont.

- ▶ Allow witnesses to speak for themselves; don't ask “leading” questions or put words into their mouth.
- ▶ Review your notes and ask follow-up questions.
 - ▶ Focus on details in the formal complaint, and review if you have elicited all of the information the witness may have about the complaint.
 - ▶ Check for understanding and ask any clarifying questions you may have.
- ▶ Review your notes to determine if the witness may have inculpatory or exculpatory evidence related to the complaint.

Conducting Interviews, cont.

- ▶ Considerations when interviewing a respondent:
 - ▶ Emphasize that the school has not made a determination regarding responsibility.
 - ▶ Emphasize presumption of innocence and the evidentiary standard that will be used (preponderance of the evidence or clear and convincing evidence standard).

Documenting Interviews

- ▶ Document the interview (questions asked, responses, etc.).
 - ▶ Note time, date, location of meeting, individuals present, etc.
 - ▶ Document facts and observations provided by the interviewee.
 - ▶ Implausible or impossible statements?
 - ▶ Inconsistencies in responses?
 - ▶ Do not make conclusions or document your opinions.
- ▶ Consider that your notes may be considered by a decision-maker or an appeal officer, as well as by a court in a legal proceeding.

After the Interview

- ▶ Update investigation log.
- ▶ Update witness list.
- ▶ Update list of evidence.
- ▶ Formulate questions to ask of other witnesses.
- ▶ Follow up on issues / questions raised during the interview.
- ▶ Is law enforcement involved? Should they be?
- ▶ Ensure physical evidence is stored and documented.



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Part 3: Investigative Reports

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Before Preparing Investigative Report

- ▶ When the investigation is completed, but before the investigative report is written, the investigator(s) must send the parties (and their advisors, if any) evidence directly related to the allegations, in electronic format or hard copy, with at least 10 days for the parties to inspect, review, and respond to the evidence.
 - ▶ Include evidence you may not rely on, but that is relevant to the claims in the formal complaint.
 - ▶ Include inculpatory and exculpatory evidence, whether obtained from a party or another source.
- ▶ Investigator must consider a party's response, if any, and begin the process of preparing an investigative report.

Investigative Report

- ▶ After the parties have had a chance to review and respond to the relevant evidence, prepare an investigative report that includes:
 - ▶ Procedural history of the formal complaint and the investigative process.
 - ▶ Summary of the allegations that could constitute sexual harassment.
 - ▶ Summary of relevant policies and the evidentiary standard chosen by the school.

Investigative Report, cont.

- ▶ Report must include:
 - ▶ Information about witness interviews (date of interviews, attendees, summary of interview).
 - ▶ Summary of all relevant evidence, inculpatory and exculpatory.
 - ▶ Investigation timeline.
 - ▶ Identify any irregularities in the timeline for completing the investigation.
 - ▶ Appendices with relevant physical or documentary evidence.

Investigative Report, cont.

- ▶ Investigative report does not include a conclusion or a recommendation concerning responsibility.
 - ▶ Report is to summarize the facts for the decision-maker.
 - ▶ If your report includes a conclusion or determination regarding responsibility, take it out!
- ▶ Remember both parties will read the report and want to be "heard."
- ▶ Road map for the decision-maker to reach a determination regarding responsibility.

Sending the Investigative Report

- ▶ Investigative report must be sent to the parties (and advisors, if any), in electronic format or hard copy, with at least 10 days for the parties to review and respond.
 - ▶ Incorporate relevant portions of a party's response to the final investigative report and document the rationale for any changes to the report after the parties have an opportunity to review and respond.
- ▶ Investigator sends copy of the final investigative report to the Title IX Coordinator.
 - ▶ Title IX Coordinator then assigns decision-maker.



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Part 4: Decision-Makers

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Decision-Makers

- ▶ Role is to objectively evaluate the evidence and reach a determination regarding responsibility.
 - ▶ *Did the respondent engage in conduct prohibited by Title IX as alleged in the formal complaint?*
- ▶ Properly apply:
 - ▶ Presumption of innocence.
 - ▶ Burden of proof (remains on the school throughout the process).
 - ▶ Relevancy and credibility determinations.
 - ▶ Privilege / medical record protections.

Decision-Makers, cont.

- ▶ Look for consistency, accuracy, memory, credibility or lack of credibility, implausibility, unreliability, ulterior motive, etc.
 - ▶ Investigator should prepare an objective report to assist with this process.
- ▶ Consider evidence in total, and make determination based on weight and credibility.

Decision-Makers, cont.

- ▶ Provide the complainant and respondent an opportunity to submit written relevant questions to ask of the other party.
 - ▶ Provide the questions and answers to each party.
 - ▶ Allow for limited follow-up questions.
- ▶ If you decide to exclude a question as not relevant, provide a written explanation as to why the question will be excluded.

Written Determinations

Decision-maker must review relevant evidence and issue a written determination regarding responsibility, which must include:

- ▶ Identification of the allegations that could constitute prohibited conduct under Title IX.
- ▶ Description of procedural steps taken from receipt of formal complaint through the determination:
 - ▶ Notices provided to parties
 - ▶ Interviews with parties and witnesses
 - ▶ Methods used to gather other evidence

Written Determinations, cont.

- ▶ Findings of fact supporting the determination.
- ▶ Application to the school's code of conduct to the facts.
- ▶ Statement / rationale for the results as to each allegation, including a determination regarding responsibility.
- ▶ Disciplinary sanctions and remedies to implement.
- ▶ Procedures and permissible bases for either party to appeal.

Written Determinations, cont.

- ▶ Procedural anomalies to explain?
- ▶ Are all elements of the allegations accounted for?
- ▶ Are all relevant disputed facts resolved in the final analysis?
- ▶ Is there a clear connection between the charges, the investigation, the evidence, and the conclusions?
- ▶ Would an unfamiliar reader be able to connect the dots?

Written Determinations, cont.

- ▶ Determination must be sent simultaneously to both parties (and their advisors, if any), along with information on the process to appeal.
- ▶ Determination becomes final:
 - ▶ If no appeal filed, the date on which an appeal would no longer be timely.
 - ▶ If appeal filed, the date on which a written appeal decision is provided to the parties.

Implementation

- ▶ Title IX Coordinator is responsible for effectively implementing remedies provided through the determination regarding responsibility.

Reminders for Decision-Makers

- ▶ Render a sound and reasoned decision on every charge.
- ▶ Identify actual or perceived conflict of evidence.
- ▶ Determine which evidence to believe, the importance of the evidence, and conclusions to draw from the evidence.
- ▶ Make a determination based solely on relevant evidence.
- ▶ Do not be swayed by prejudice, sympathy, or a personal view that you may have of the claim or any party.

Reminders for Decision-Makers

- ▶ Give information provided by the parties and witnesses appropriate weight.
- ▶ Evaluate witness credibility.
 - ▶ Consider reasonableness or unreasonableness of the testimony.
 - ▶ Does a witness have an improper / ulterior motive?
 - ▶ Is there a bias?
 - ▶ Consistency, memory, accuracy?
- ▶ Rely on the school's chosen standard of proof to guide decision-making process.

Part 5: Appeals

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Bases for Appeal

- ▶ Procedural irregularity that affected the outcome of the matter.
- ▶ New evidence not reasonably available at the time the determination of responsibility was made and that could affect the outcome of the matter.
- ▶ Any of the Title IX team members had a bias for or against one of the parties that affected the outcome.
- ▶ Any other bases for appeal allowed by the school, so long as they apply equally to both parties.

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Appeal Procedure

- ▶ Designate appeal officer.
 - ▶ Cannot be Title IX Coordinator or anyone who was involved in investigation / decision-making process.
 - ▶ Must be trained in the same manner as a decision-maker.
- ▶ Let both parties know when an appeal has been filed.
- ▶ Allow both parties a reasonable and equal opportunity to submit a written statement in support of or challenging the appeal.



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Appeal Outcome

- ▶ For all appeals, school must:
 - ▶ Issue a written decision describing the result of the appeal and the rationale for the result.
 - ▶ Provide the written decision simultaneously to both parties.



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