

Title IX Investigator Annual Training

August 15, 2024

Mary Dunnewold & Kari Hohn



BALLAST

Meet Our Team



Sean Somermeyer
Partner



Carl Crosby Lehmann
Partner



Mary Dunnewold
Partner



Nina Harris
Director



Kari Hohn
Director

Ballast Offerings

1

Drafting & Updating

Policy and process development and review

2

Training

Legally compliant Title IX and non-discrimination trainings tailored to individuals' roles and knowledge base

3

Investigators, Alternative Resolution Facilitators, & Decision-makers

Trained, skilled, experienced, and practical

4

Interim Roles

Interim services to fill gaps in various Title IX positions

5

Advice & Coaching

Legal and non-legal advising

Ballast Philosophy & Approach



Collaborative partnerships that honor institutional knowledge and values



Practical solutions that are compliant and make sense for your specific institution and community



Reasonable and fair pricing that acknowledges the financial constraints institutions are facing



First-hand experience and understanding from individuals who have previously worked within higher education institutions

Agenda

- Title IX Overview
- Title IX Scope & Definitions
- Title IX Personnel & Responsibilities
- Title IX Process Overview
- Investigation and Adjudication Overview
- Evidence
- Interviewing
- Trauma-Informed Considerations
- Investigation Report
- Next Steps in the Process
- Discussion & Questions

A Note about 2024 Regs

- Effective August 1, 2024
- Enforcement has been enjoined in some states, but not in Minnesota
- Enforcement has also been enjoined at institutions that have students who are members of some organizations. This includes some Minnesota institutions. In this case, continue to apply 2020 regs.
- 2020 Regs continue to apply to any situations that occurred before August 1, 2024
- OCR is not expecting all the required training to be done by August 1, 2024



Title IX Overview

- Title IX basics and key terms
- Title IX personnel and their roles
- Training mandates
- VAWA Offences
- FERPA
- MN State Law

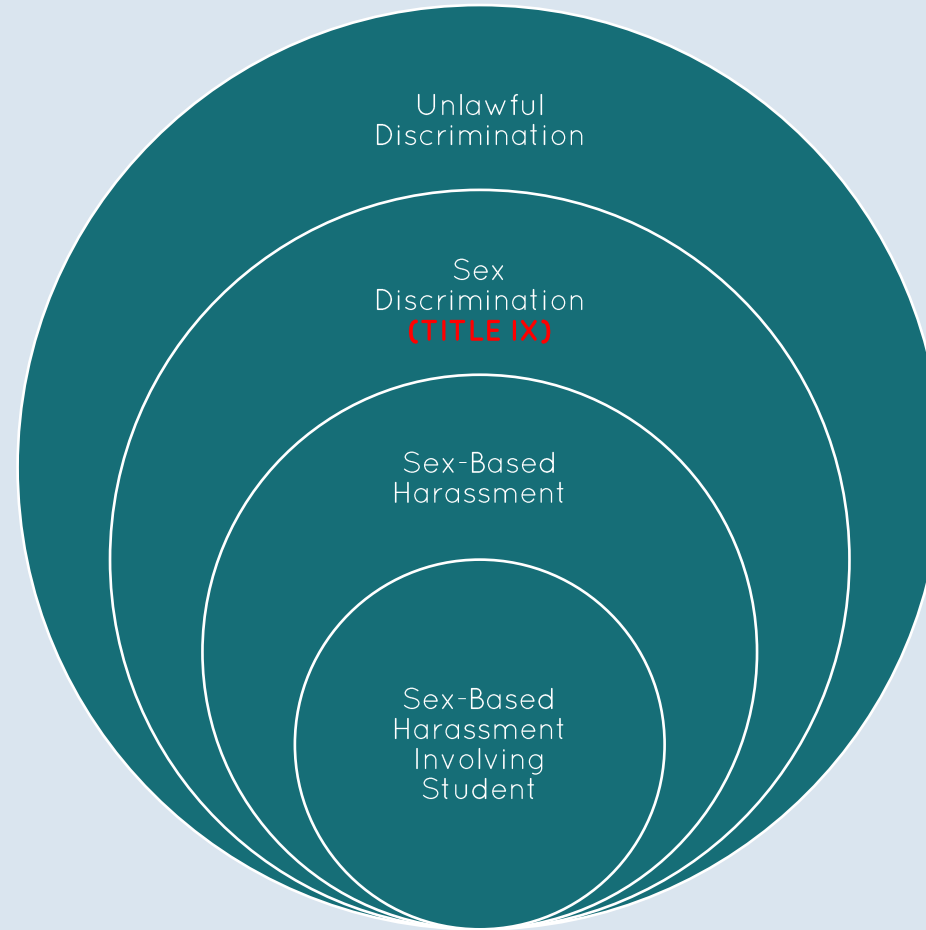
“

No person 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.

”

20 U.S.C. § 1681

UNDERSTANDING HOW THE PIECES FIT TOGETHER



Title IX Basics

Prohibits
gender
discrimination

In any
program or
activity

Applies to
students,
employees,
volunteers, etc.

Types of Discrimination

Discriminatory Treatment

Harassment

Anti-Retaliation

Discriminatory Treatment

Disparate Treatment

Intentional
Discrimination

Legitimate Non-
Discriminatory Purpose

Disparate Impact

Facially Neutral But Results
in Adverse Impact

Discriminatory Intent Not a
Necessary Factor

Bona fide qualification /
Necessity



Harassment

Quid Pro Quo

Something for something

Abuse of position of authority

VAWA Crimes

Sexual Assault

Dating Violence

Domestic Violence

Stalking

Hostile Environment

Conduct relating to protected class status

Unwelcome

Severe **or** pervasive

Purpose or effect of creating a hostile work/educational environment

Reasonable person in complainant's shoes

Retaliation

- Mistreatment directed at employee/student who has:
 - Complained about discrimination
 - Participated in an investigation, hearing or other proceeding
 - Refused to participate in an investigation, hearing or other proceeding
- Includes mistreatment for raising discrimination that affects others
- Also includes mistreatment of individuals closely related to someone who has complained
- Conduct that would dissuade a reasonable person from bringing a complaint or participating in an investigation
- **Must be part of your Title IX grievance process**

Sexual Harassment & Title IX Compliance Requirements

Publish Notice of Nondiscrimination

Designate Title IX Coordinator

Disseminate Policy

Investigate Complaints

Adopt and Publish Fair and Equitable Grievance Procedures

Train Individuals with Heightened Responsibilities

Train Students and Employees

Key terms

- **Reporting party/Complainant:** individual who experienced the sexual harassment
 - **Third-party Report:** A report from someone else about an individual who experienced sexual harassment
 - **Witness:** An individual who may have knowledge about the incident
- **Responding party/Respondent:** individual accused of sexually harassing someone
- **Grievance process:** the investigation process and/or informal process used by an institution to address complaints of sexual harassment
- **Complaint:** document requesting the institution to move forward with the grievance process. Can be filed by either the reporting party or the Title IX Coordinator. [Note change from 2020 regs]
- **Supportive measures:** resources or accommodations that help either party in the aftermath of a report and/or during a grievance process. Access to supportive measures is not contingent upon pursuing a grievance process.

Office for Civil Rights (OCR)

Role

- Establishes compliance standards and guidance
- Enforces Title IX through investigations and compliance reviews

Guidance

- Regulatory and sub-regulatory guidance
- Dear Colleague Letters, Amendments to Title IX Regulations, Q&As, Notices of Interpretation

FERPA



RIGHT TO ACCESS



RIGHT TO CONTROL
DISCLOSURES



RIGHT TO DISPUTE
ACCURACY

MN State Statute 135A.15

Institutions must:

- Incorporate sexual harassment policy requirements
- Inform victims of their rights
- Include reporting procedures and disciplinary processes in their policy
- Incorporate an amnesty policy
- Coordinate with law enforcement
- Health services must be confidential and screen for sexual violence and harassment
- Provide an online reporting system that permits anonymous reports
- Report annual statistics on sexual ~~assault~~ **misconduct**

MN State Statute 135A.15

Misconduct Includes:

- Sexual Assault, Dating Violence, Domestic Violence and Stalking
- Sexual Extortion
- Sex Trafficking
- Nonconsensual Dissemination of Sexual Images and Deepfake Sexual Images

Title IX's Broader Scope

- Distinguishing between sex discrimination and sex-based harassment
- Nondiscrimination Policy & Notice
- New scope of education program or activity
- Parties' relationships with the institution

Broader Scope

Covers all forms of gender discrimination & retaliation

Covers all conduct impacting participation in a program or activity in the U.S.

Covers students, employees and third parties participating (or attempting to participate) in programs or activities

Pregnancy and Parenting

- Pregnancy or related conditions = pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.
- Institutions must treat pregnancy or related conditions in the same way and under same policies as other temporary medical conditions
- Cannot discriminate on the basis of current, potential, or past pregnancy or related conditions or on the basis of current, potential, or past parental, family, or marital status



Sexual harassment =

conduct on the basis of sex that satisfies at least one of the following:

Quid Pro Quo

- Employee conditions an outcome on an individual's participation in unwelcome sexual conduct

Hostile Environment

- Unwelcome sex-based conduct that is subjectively and objectively offensive and is so severe **or** pervasive that it limits or denies a person's ability to participate in/benefit from program or activity

VAWA Crimes

- Sexual assault
- Dating Violence
- Domestic Violence
- Stalking

Hostile Environment Considerations

- Perspective of a “reasonable person” (consider age, abilities, positions of authority, etc.)
- Does it meet the definition (“so severe or pervasive”)?
- Does the conduct deny “equal access”? Does not need to be a total or complete loss of access, but *equal*?
- Consider the type of misconduct, how often it happened, where it took place, etc.

Sexual Assault

Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.

Rape: Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without their consent, including instances where they are incapable of giving consent because of age or temporary or permanent mental or physical incapacity.

Fondling: The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.

Incest: sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law

Sexual Assault contd.

Any sexual act directed against another person, without the consent of that person, including instances where the individual is incapable of giving consent.

Statutory Rape: Nonforcible sexual intercourse with a person who is under the statutory age of consent

Sexual assault with an object: The use of an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person's will (non-consensually) or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity

Sodomy: Oral or anal sexual intercourse with another person, forcibly and/or against that person's will (non-consensually), or not forcibly or against the person's will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity



Sexual Misconduct

Remember policy must also address **sexual extortion, sex trafficking** and **deepfake images**.

MN Law changed sexual assault to **sexual misconduct**, which is defined to include:

- Sexual assault
- Domestic violence
- Dating violence
- Stalking
- Nonconsensual distribution of sexual images including deepfakes depicting intimate parts or sex acts
- Sexual extortion
- Sex trafficking

Nonconsensual distribution of sexual images including deepfakes depicting intimate parts or sex acts



Revenge porn

Deepfake = “an image or recording that has been convincingly altered and manipulated to misrepresent someone as doing or saying something that was not actually done or said”

Extortion

Subdivision 1. **Crime defined.** (a) A person who engages in sexual contact with another person and compels the other person to submit to the contact by making any of the following threats, directly or indirectly, is guilty of sexual extortion:

- (1) a threat to withhold or harm the complainant's trade, business, profession, position, employment, or calling;
- (2) a threat to make or cause to be made a criminal charge against the complainant, whether true or false;
- (3) a threat to report the complainant's immigration status to immigration or law enforcement authorities;
- (4) a threat to disseminate private sexual images of the complainant as specified in section 617.261, nonconsensual dissemination of private sexual images;
- (5) a threat to expose information that the actor knows the complainant wishes to keep confidential; or
- (6) a threat to withhold complainant's housing, or to cause complainant a loss or disadvantage in the complainant's housing, or a change in the cost of complainant's housing.

Sex trafficking

Subd. 7a. **Sex trafficking.** "Sex trafficking" means:

(1) receiving, recruiting, enticing, harboring, providing, or obtaining by any means an individual to aid in the prostitution of the individual; or

(2) receiving profit or anything of value, knowing or having reason to know it is derived from an act described in clause (1).

Consent

Institutions are not required to maintain a particular definition of consent; however, they should include a definition in their policy.

Consent is words or overt actions by a person clearly and affirmatively communicating a freely-given, present agreement to engage in a particular form of sexual contact.

Incapacitation

- An individual's physical and/or mental inability to make informed, rational judgments
- Incapacitated individuals cannot give consent to sexual contact
- Intoxication vs. Incapacitation
- Examples include: sleep, unconsciousness, or intermittent consciousness
- Signs include: slurred speech, difficulty walking, vomiting
- May also exist due to mental or developmental disability
- **Frequent decision point for adjudicators:** 1) *Was the complainant incapacitated;* and 2) *did or should the respondent (or a reasonable person) know/have known?*

Dating Violence

Violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant's statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship.

- Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.
- Dating violence does not include acts covered under the definition of domestic violence.

Domestic Violence

A felony or misdemeanor crime of violence committed:

- By a current or former spouse or intimate partner of the Complainant;
- By a person with whom the Complainant shares a child in common;
- By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;
- By a person similarly situated to a spouse of the Complainant under domestic or family violence laws;
- By any other person against an adult or youth Complainant who is protected from that person's acts under domestic or family violence laws.

Stalking

Engaging in a course of conduct directed at a specific person that would cause a reasonable person to fear for their safety or the safety of others; or suffer substantial emotional distress.

Course of conduct means **two or more acts**, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

Sexual exploitation



A form of sexual harassment that involves one or more of the following behaviors committed for any purpose, including sexual arousal or gratification, financial gain, or other personal benefit:

- taking sexual advantage of another person without consent;
- taking advantage of another's sexuality; or
- extending the bounds of consensual sexual contact without the knowledge of the other individual.

What are some examples of sexual exploitation?

Program or Activity under Title IX

- All sex discrimination occurring under a recipient's education program or activity in the United States
- Obligation to address a sex-based hostile environment in an education program or activity **even when** some conduct alleged to be **contributing to** the hostile environment occurred (1) outside the recipient's education program or activity or (2) outside the United States.

Parties' relationship with the institution

Reporting Party

Must be a student or employee; or an individual participating or attempting to participate in the institution's education program or activity at the time of alleged discrimination

**Broad interpretation of "participating or attempting to participate in"*

Responding Party

The person alleged to have violated policy prohibiting discrimination. An institution's ability to take disciplinary action under Title IX is limited when the Responding Party is not affiliated with the institution.

**But... should still consider appropriate action steps to facilitate reporting party's participation in education programs and activities.*



Title IX personnel roles and responsibilities

- Title IX Coordinator role and responsibilities
- Training mandates
- Role of the investigator
- Role of decision-makers
- Avoiding bias and conflicts of interest
- Role of advisors

Title IX Coordinator Responsibilities



RESPOND TO
CONCERNS



ACTIVELY MONITOR
FOR BARRIERS



Title IX Coordinator: Role and Responsibilities

Must designate at least one Title IX Coordinator

Should have significant autonomy and seniority

Consider how the Coordinator best fits into the institution's organizational chart

- Creates and implements legally compliant policy and procedures
- Oversees response to reports and complaints as well as informal and grievance procedures
- Implements supportive measures and facilitates connection to resources
- Ensures sanction and remedy compliance
- Monitors campus to identify and address barriers to reporting
- Training oversight
- Recordkeeping

Training Requirements

	All employees	Investigators	Decisionmakers	Persons responsible for grievance procedure or supportive measures	Informal Resolution Facilitators	Title IX Coordinator / Title IX Team
Duty to address sex discrimination in programs and activities	✓	✓	✓	✓	✓	✓
Definitions of sex discrimination and scope of conduct covered (including sex-based harassment and accommodating pregnancy and related conditions)	✓	✓	✓	✓	✓	✓
Reporting obligations including responsibility to provide Title IX Coordinator name, contact and other information when notified of a student's pregnancy or related conditions	✓	✓	✓	✓	✓	✓
Institution's duty to respond promptly and effectively to reports of sex discrimination; duty to identify and address barriers to reporting; duties of non-confidential employees to report or otherwise respond when aware of conduct that may reasonably constitute sex discrimination		✓	✓	✓		✓
Grievance procedures under institution's policy		✓	✓	✓		✓
How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias		✓	✓	✓	✓ – No need to cover avoiding prejudgment of facts	✓

Training Requirements	All employees	Investigators	Decisionmakers	Persons responsible for grievance procedure or supportive measures	Informal Resolution Facilitators	Title IX Coordinator / Title IX Team
Rules and practices surrounding the institution's informal resolution process					✓	✓
Duty to coordinate efforts to comply with Title IX and Coordinator's responsibility for ultimate oversight of institution's Title IX obligations						✓
Specific actions to be taken to prevent discrimination and ensure equal access for students who are pregnant or have a related condition						✓
Overseeing institution's prompt and effective response to sex discrimination reports including: equitable treatment of parties; notifying the complainant of the grievance process and any informal resolution process (and same to the respondent if complaint is made); initiating the grievance process; determining whether institution should initiate a complaint; taking remedial steps regardless of whether a complaint is initiated						✓
Offering and coordinating supportive measures for parties						✓
Recordkeeping for at least 7 years of: all complaints of sex discrimination; institution's response; whether the grievance or informal process used; resulting outcome of any process used; all training materials to be made available to anyone upon request						✓

Investigator: Role and Responsibilities

- Can be internal or external
- Burden to collect sufficient evidence
- Conducts fair, prompt, and impartial investigations
 - Identifies witnesses and evidence
 - Provides parties opportunity to submit evidence
 - Identifies factual issues
 - Maintains records, recordings, etc.
 - Creates an investigation report
- Works in coordination with the Title IX Coordinator, particularly around evidence and report review
- Maintains impartiality and avoids bias
- Receives annual training

Decision-maker: Role and Responsibilities

- Could be investigator, adjudication panel, or hearing officers
- Must provide process to question parties and witnesses to adequately assess credibility
- If process includes a hearing, allow advisors to provide opening and closing statements and assist with questions
- Determines whether the institution's policy has been violated under the preponderance of evidence standard of review
- Determine sanctions - could be separate decision-maker(s) from responsibility decision-maker(s)
- Provides a written determination about whether sex discrimination occurred, including a rationale
- Avoids bias and conflicts of interest
- Receives annual training



Appeals Officer: Role and Responsibilities

- Determines party's appeal under relevant appeal process (sex discrimination vs. sex-based harassment involving a student)
- May meet with parties
- Provides written determination that includes a rationale for the outcome
- Avoids bias and conflicts of interest
- Receives annual training



Conflicts of Interest



Biases *for* or *against* reporting or responding parties individually or generally



A material connection to the parties, witnesses, or issues that would cause a reasonable person to question partiality



Immediately disclose any potential conflicts of interest to the Title IX Coordinator



Conflicts of interest may be raised on appeal



Incorporate an avenue for parties to raise potential conflicts of interest early in the process

Avoiding Bias

Bias = tendency
to like or dislike;
may involve
stereotypes

Might be
implicit

Avoid
prejudgment of
the facts

Frequent implicit biases

- Race
- Gender
- Gender identity
- Gender expression
- Sexual orientation
- Religion
- National origin
- Ethnicity
- Age
- Disability
- Marital status
- Veteran status

Avoiding Prejudgment of Facts

- Don't rush to a decision
- Be mindful about keeping an open mind
- Stay rooted in your role
- Step back and check yourself

Advisors

- Advisors assist parties throughout the process; can be attorneys, advocates, friends, family members, mentors, etc.
- Advisors may attend meetings and interviews with the party
- Consider Advisor Guidelines for process, including role in hearing if grievance process includes hearings
- What if an advisor is being overtly disruptive or not adhering to your Advisor Guidelines?

Advisors

Note that under 2024 Regs, a school does not have to allow advisors in the “General” process (but what about VAWA?)

School does have to allow Advisor of choice in “Heightened” process (involving student sexual harassment)

Title IX Process Overview

- Reporting and Initial Steps
- Notice of Allegations
- Informal Resolution Process
- Due Process Rights of the Parties
- Consolidation of Complaints
- Intersections with Law Enforcement

Reporting Methods

Direct communication from the reporting party to the Title IX Coordinator

Third-party reports from faculty, concerned friends, RAs, etc.

Online reports

Anonymous reports

Non-Confidential Employee Reporting Obligations for Sex Discrimination



Authority to institute
corrective measures OR
responsibility for
administrative leadership,
teaching, or advising

*Notify Title IX Coordinator of any
sex discrimination*

All other employees
(except person
experiencing
discrimination)

*Either notify Title IX Coordinator
or provide information on how to
report sex discrimination*

Reporting Obligations for Student Employees

“A postsecondary institution must reasonably determine and specify whether and under what circumstances a person who is both a student and an employee is subject” to these reporting requirements.

Non-Confidential Reporting Obligations for Pregnancy and Related Conditions

Employees who learn about a student's pregnancy or related condition must promptly:

- 1) Provide that student with the Title IX Coordinator's contact information and
- 2) Inform the student that the Title IX Coordinator can coordinate specific actions to prevent discrimination and ensure the student's equal access to programs and activities

*Pregnancy or related conditions = pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.



Confidential Employees

- Must notify community about who are confidential employees and how to contact them
- Confidential employees must:
 - Explain their confidential status
 - Provide contact information for the Title IX Coordinator
 - Provide a description of what the Title IX Coordinator can provide
 - Explain how to report sex discrimination

Responding to a Report

After receiving a report:

- Title IX Coordinator should reach out to the affected individual **quickly**
- Offer the affected individual an initial conversation
- Email resources the individual might need/want to take advantage of right away
- Acknowledge that if the individual does not choose to engage right now, that you will always be available going forward
- However, delaying complaints or law enforcement reports can make investigating more difficult



Initial Conversation with a Reporting Party

Process Options:

- Law enforcement report
- Grievance Process
 - Informal Process
- Taking time to decide what to do next, if anything
- Potential for TIXC Complaint –Grievance Process
- Preservation of evidence
- Other options permitted by your policy, if not Title IX?

Supportive Measures:

- Goal is to restore or preserve access to programs and activities and/or provide support during the grievance or informal processes
- Cannot be punitive
- Individualized assessment (could be counseling, deadline extensions, increased security, leaves, changes in classes, work, housing, etc.)
- Must be kept on need-to-know basis
- Must provide parties with a timely opportunity to seek modification or reversal of an institution's decision to provide, deny, modify, or terminate a supportive measure

Next steps for TIXC:

- Does the reported incident fall within the scope of your policy? If so, which process would apply?
- Notify others at the institution who need to know?
- Timely warning?
- Emergency removal?
- TIXC Complaint if reporting party declines Grievance Process?

**Explain that access to these resources is not contingent upon moving forward with grievance process*

Emergency Removal

- Must undergo an individualized assessment and determine that an “imminent and **serious** threat to the health or safety of a complainant or any students, employees, or other persons arising from the allegations of **sex discrimination** justifies removal”
 - Threat no longer needs to be “physical,” but “serious”
 - Applies to all forms of sex discrimination, not just sex-based harassment
- Must provide respondent with notice and opportunity to challenge immediately following the removal

Administrative Leave

Can place employee respondent on administrative leave during a pending grievance process

Starting the Grievance Process

Initiated by Reporting Party

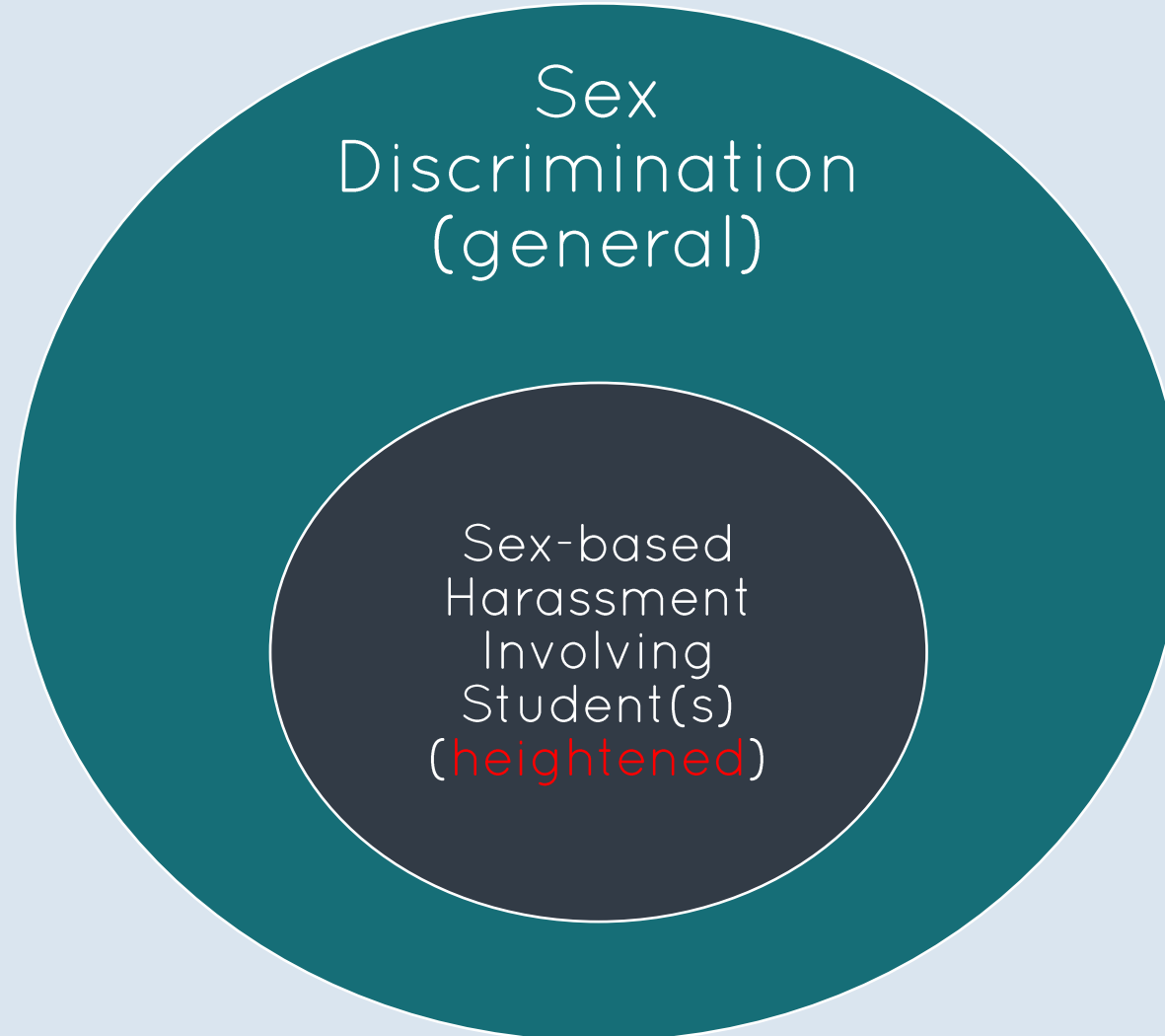
- No more formal complaints
- Can initiate at any time
- Requests an investigation
- Can be an oral or written request; can be electronic (i.e., via email)

TIXC Discretion to Initiate Complaint

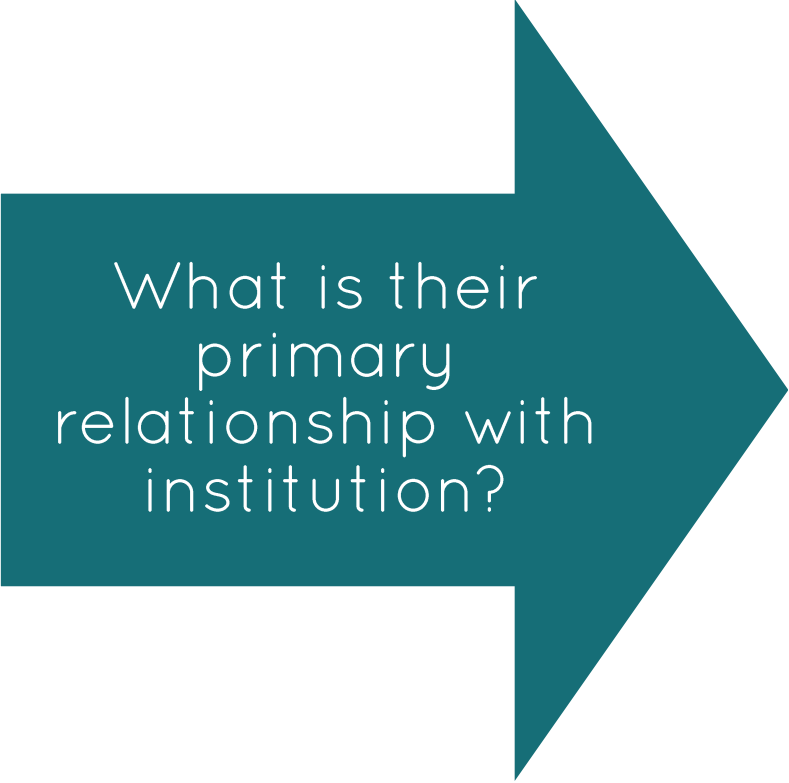
Coordinator must consider, at a minimum, the following factors:

1. Complainant's request not to proceed
2. Complainant's reasonable safety concerns regarding initiation of a complaint
3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated
4. The severity of the allegations, including potential sanctions if substantiated
5. The age and relationship of the parties
6. The scope of the discrimination (patterns, how many impacted, etc.)
7. The availability of evidence
8. Whether the institution could end and prevent the discrimination without a grievance process

Grievance Processes



Student or Employee?



What is their
primary
relationship with
institution?



Was the incident
related to their
employment with
institution?



Requirements for General Grievance Process

- Must be in writing and provide for prompt equitable resolution
- Complainants may be a student, employee or third party participating or seeking to participate in program or activity
- Requirements relating to respondents not applicable when institution is accused of sex discrimination
- Treat parties equitably, respondent presumed not responsible, burden on institution to conduct sufficient investigation
- Decisionmaker may be the same person as the Title IX Coordinator or investigator
- No conflicts of interest or bias
- Exclude certain types of evidence unless provided voluntary consent (privileged evidence, health records, etc.)
- Exclude evidence that relates to the complainant's sexual interests or prior sexual conduct, unless used to prove consent or identity
- Take reasonable steps to protect privacy of the parties and witnesses
- Reasonably prompt time frames for each major stage:
 - Evaluation
 - Informal resolution
 - Determination
 - Appeal

Notice of Allegations: General

Provide written notice to parties including:

- Grievance procedures, including informal process (if applicable)
- Sufficient information to permit response
- Anti-retaliation statement
- Statement that parties will have opportunity to access **relevant** evidence or description of relevant evidence (evidence available upon request)

*Must update if additional allegations later added to investigation. ***Investigators should therefore alert TIXCs immediately if they learn of any new allegations from either party.***



Notice of Allegations: Heightened

- All General Notice requirements
- Allegations potentially constituting sex-based harassment
- Respondent presumed not responsible
- Parties will have opportunity to present evidence to a trained impartial decisionmaker
- May have an advisor who may be an attorney
- Will have access to **relevant** evidence or an investigation report (with evidence available upon request)
- Notice of prohibition against knowingly making false statements/ submitting false information

*May delay providing written notice of allegations if there are safety concerns of those receiving the notice (use individualized safety and risk analysis, not speculation or stereotypes)



The Informal Resolution Process

- Can take the shape of shuttle diplomacy, mediation, etc.
- The opportunity to pursue Informal Resolution can be available up until a responsibility determination is made.
- It is possible that an investigator would need to pause/stop their investigation while the parties attempt Informal Resolution OR that an investigation would follow an unsuccessful Informal Resolution.
- Investigators should not utilize any information that may have been gleaned by the Informal Process facilitator as part of the investigation – keep these processes separate.

Due Process & Rights of the Parties

Notice of policies,
meetings,
investigation,
outcome, etc.*

Supportive measures
*(cannot penalize
responding party in
any way unless and
until they are found
responsible)*

Impartial Title IX
personnel

Ability to discuss
allegations

Advisor of choice (in
heightened process)

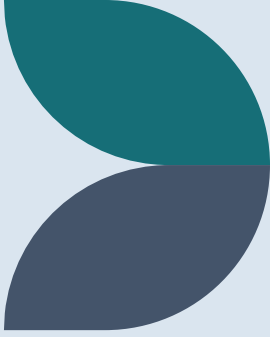
Opportunity to
identify witnesses
and provide
evidence

Ability to review
evidence and
investigation report

Ability to appeal

**Must include that the responding party is presumed not responsible until a determination is made at the end of the grievance process.*

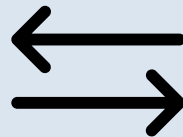
Consolidation of Complaints



- Consolidation allowed if the allegations arise out of the same facts or circumstances.
- If any of the allegations involve sex-based harassment and a student, must use heightened grievance process for all allegations you're consolidating.

Cross-Complaints

How does your institution handle situations where both parties have complaints against the other?



Intersections with Law Enforcement

- Potential for evidence from law enforcement to be incorporated into Title IX investigation (police reports, medical forensic exam reports, etc.)
- Even with concurrent processes, it is oftentimes difficult to get evidence from open law enforcement cases
- Investigations are sometimes delayed in order to accommodate law enforcement investigations



Investigation and Adjudication Process Overview

- Investigation process overview
- Role of the Coordinator during Investigations
- Adjudication Process—Overview
- “Reasonably prompt” timeframes

The Investigation



Complaint Investigation: General

- Must ensure burden is on recipient to conduct investigation that gathers sufficient evidence
- Provide same opportunity to all parties to present witnesses and evidence
- Review all evidence gathered and determine what is relevant and whether impermissible (privileged, treatment records, or complainant's "sexual interests or prior sexual conduct")
- Provide each party an opportunity to access relevant evidence or a description of evidence* and a reasonable opportunity to respond
 - Institution must take steps to prevent and address parties' unauthorized disclosure of evidence during review process
- Institution may adopt additional provisions, but must apply equally to both parties

*If providing a description of the evidence, must provide access to evidence upon request



Complaint Investigation: Heightened

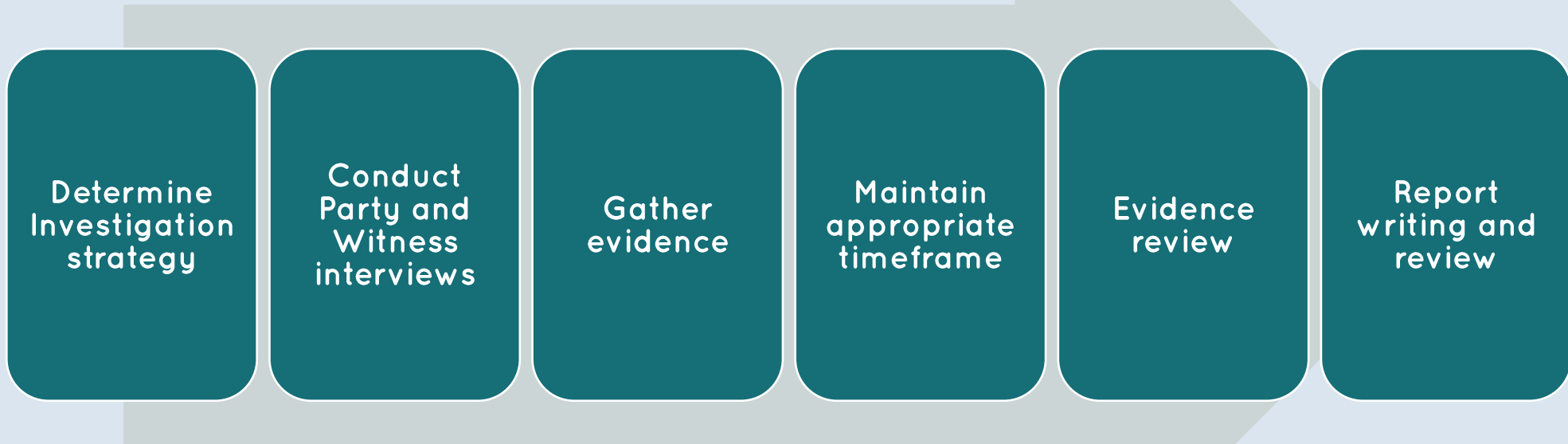
- All requirements under General process
- Provide each party an opportunity to access relevant evidence or an investigation report*, and a reasonable opportunity to respond
 - Review period must be provided in advance of a live hearing, if having one, but response can occur prior to, during, or both prior to and during the live hearing
- Date, time, location, participants and purpose of all meetings where party is invited to attend, with sufficient time to prepare to participate
- Opportunity to be accompanied by advisor – may impose limits on extent of participation
- Same opportunity, if any, to have others present
- Decide whether to permit expert witnesses
- Permit reasonable extensions of timelines for good cause

*If providing an investigation report, must provide access to evidence upon request



An Investigator's job is to conduct a thorough, prompt, and impartial investigation.

Investigation steps include:



Responsibilities of the TIXC During an Investigation

- Update Notice of Allegations if new allegations arise
- Dismiss complaints if information learned by investigator constitutes a dismissal
- Assist with any unexpected information learned by the Investigator (new potential complainants, significant mental health concerns, unrelated conduct concerns, etc.)
- Help hold Advisors accountable to institutional guidelines
- Assist with investigation strategy if needed
- Provide notices of meetings to the parties
- Provide contact information to parties and witnesses, and help with scheduling interviews if needed
- Help setting up interview rooms/virtual meeting links if needed
- Transmit any evidence already provided by the parties to the Investigator
- Facilitate the evidence and report review stage
- Work with Investigator regarding investigation timeline and close of evidence



Adjudication Process: General

- Must provide a process that enables decisionmaker to adequately assess the credibility of witnesses
- Use preponderance of evidence standard unless institution uses clear and convincing standard in all other comparable proceedings
- Notify parties of outcome in writing, include rationale, procedures for appeal (if applicable), and any disciplinary sanctions imposed on the respondent
- Provide remedies
- Require Title IX Coordinator to take other appropriate actions



Adjudication Process: Heightened

- All requirements under General process
- Must provide a process that enables the decisionmaker to question parties and witnesses to adequately assess a party's or witness's credibility to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.
- Have decisionmaker determine whether proposed questions are relevant/impermissible prior to the question being posed and must explain decision to exclude.
- Must give party opportunity to clarify or revise a question that decisionmaker determined is unclear or harassing.
- Other rules, as long as applied equally, allowed.
- Decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to relevant questions but cannot draw inference about whether sex-based harassment occurred based solely on party's or witness's refusal to respond.



Adjudication Process: Heightened contd.

- If no hearing, must:
 - Allow the investigator or decisionmaker to ask questions during individual meetings with a party or witness;
 - Allow each party to propose questions that they want asked of any party or witness and have those questions asked by the investigator or decisionmaker during one or more individual meetings, including follow-up meetings; and
 - Provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions.
- If hearing, must:
 - Allow each party to propose questions they want asked of any party or witness and have those questions asked by decisionmaker;
 - Allow each party's advisor to ask any party or witness questions on party's behalf;
 - Provide an advisor for parties who do not have one; and
 - Be virtual or in-person (party may request virtual). Must be recorded.

Adjudication Process: Heightened contd.

Notify parties of outcome in writing including:

- description of alleged harassment;
- information about grievance process;
- evaluation of the evidence;
- any disciplinary sanctions;
- any remedies provided, including any remedies provided to other students identified to be experiencing the effects of the sex-based harassment;
- process for appeal



Must establish “reasonably prompt” timeframes for all stages of the process



What are “reasonably prompt”
timeframes?



Temporary delays for “good
cause” are ok, as long as they’re
accompanied with written notice
of the delay to the parties



Incorporate grievance process
timeframes into your policy for
each stage of process, but build
in opportunity for discretion
(case complexity, law
enforcement investigation,
breaks, etc.)



Consider incorporating weekly
updates to the parties

Conducting an Effective Investigation

- Investigation Philosophy
- Investigation Strategy

Investigation Legal Requirements

Regs say the institution must “conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred.”





Investigation goals, philosophy, and background info

1. An investigation involves an impartial collection of information aimed at assisting the decision-maker in arriving at a conclusion.





Investigation goals, philosophy, and background info

2. Not “sides” of a
“story.”

Instead, we’re doing our
best to understand:
What happened?

(I use the word
“account.”)





Investigation goals, philosophy, and background info

3. I take in and review anything offered (for the most part) unless it is clearly beyond the scope of the investigation or not related.





Investigation goals, philosophy, and background info

4. Transparency—I let parties know as I take in evidence and always give them the opportunity to respond.





Investigation goals, philosophy, and background info

5. Evaluating and weighing evidence and determining credibility is up to decision makers.

Even if not the decision maker, investigator needs to think about these issues and test evidence during the investigation process.





Investigation goals, philosophy, and background info

6. Because a Title IX investigation is not a criminal investigation, we may not have access to some kinds of information or some witnesses.

Goal is to be thorough, complete within our powers, and fair.



Investigation Strategy: Initial Steps

Evaluate intake
materials

Think through
types of
evidence
available

Think about any
time constraints
- evidence that
may disappear?

Create a list of
witnesses

Think through
challenges to
evidence
collection



Prepare a file that allows easy tracking, including evidence log, witness list with contact info and dates, etc.



Identify the likely issues in the case, e.g. incapacitation, coercion, consent.

Think through the information needed to make good decisions about those issues, then draft questions for each witness focused on eliciting that information.

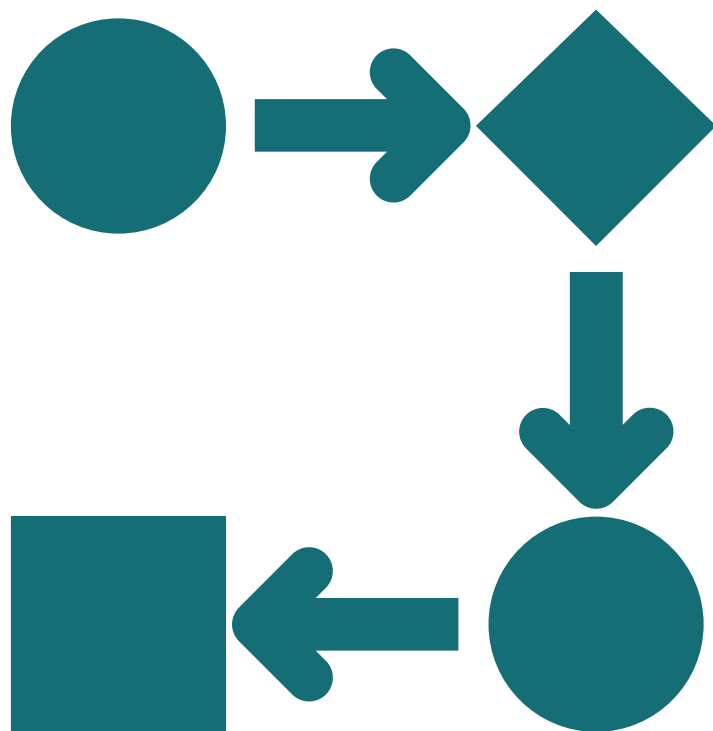


For example: Consent

What clear words or actions by the complainant gave the respondent permission for the specific sexual activity that took place?



Collect information that will help decision makers arrive at a conclusion in the context of the Policy's definition.



Loop through
this process
as many times
as needed
during the
investigation.





Consult with others who may have knowledge

Public safety officers can be a big help.

Who are your go-to people that help you think through evidence?



Evidence

- Standards of evidence
- Guidelines and rules of evidence
- Relevance
- Weight of evidence
- Types of evidence
- Other considerations

Standards of Evidence

- **Preponderance of the evidence:** “more likely than not” that the policy was violated (50.1% and above).
- **Clear and convincing standard:** highly and substantially more likely to be true than untrue.

Big Picture: Evidence Guidelines



- All relevant evidence – both inculpatory and exculpatory – must be objectively evaluated and considered.
- No “gag-orders”
- No restriction on parties gathering evidence
- Equal opportunity to present witnesses and evidence, and to review all evidence
- No limits to the types or amount of evidence that may be offered by parties

Big Picture: Taking in evidence

Taking in evidence/information does not mean that the evidence must or will be used in the Investigation Report or in the decision-making process.

Throughout the process, including at the determination stage, the evidence will be evaluated for

- **Relevance—first**
- **Reliability**
- **Weight**



No General Rules of Evidence Apply in Title IX Processes

The regs broadly allow any evidence that is “relevant” under the Regs definition, except three categories of evidence deemed “impermissible.”



Relevant Evidence

Regs definition:

“Related to the allegations of sex discrimination under investigation . . . Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.”



Relevant Evidence

Tends to prove a fact at issue in the hearing, such as

- whether a disputed incident occurred;
- witness credibility;
- the impact of any misconduct on the complainant (e.g. mental or emotional distress, physical injury, or academic difficulty); and
- what sanctions or remedies might be appropriate.



Under the Regs, a school must exclude as “impermissible”:

- A party’s treatment records (unless the party gives prior written consent)
- Information protected by a legally recognized privilege
- Questions or evidence about a complainant’s sexual interests or prior sexual conduct, **unless** offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent



A school must accept other “relevant evidence,” which may include:

- Expert witness testimony, reports, or findings.
- Evidence related to character.
- Evidence related to the findings of a polygraph examination.
- Evidence gathered by law enforcement during a concurrent criminal investigation, if available.

But...

...admissibility of relevant evidence is different from weight, reliability, and/or persuasiveness of that evidence.

Regs provide no comment on how relevant evidence must be evaluated for weight or reliability.

School may adopt “other rules” as long as they apply equally to both parties.



Example

A school MAY adopt a rule regarding the weight (but not the admissibility) of polygraph evidence, as long as the rule applies to complainants and respondents equally.

Regs do comment on Pattern Evidence

“Pattern evidence may be permissible for use in Title IX grievance procedures, as the recipient must objectively evaluate pattern evidence to the extent it is relevant, *i.e.*, related to the allegations of sex discrimination under investigation and may aid a decisionmaker in determining whether the alleged sex discrimination occurred.”

Regs do comment on excluding questions or evidence

A school “will still be permitted to exclude questions or evidence that are related to allegations of sex discrimination but would not aid a decisionmaker in determining whether the alleged sex discrimination occurred.”

Relevant Evidence Summary

In summary:

Does the evidence tend to **prove** or **disprove** the allegations?

A determination regarding relevancy can rely on logic, experience, or science.

FED. R. EVID. (401), Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/rules/fre/rule_401



Weight of evidence is the believability or persuasiveness of evidence in probative value, not the quantity or amount of evidence. Weight of evidence is not determined by mathematics but depends on its effect in inducing belief.

Legal Information Institute, Cornell Law School,
https://www.law.cornell.edu/wex/weight_of_evidence

Remember...

Parties may make arguments about the weight of certain pieces of evidence during the evidence review opportunity.

Types of Evidence

Direct or
testimonial
evidence

Documentary
evidence

Real evidence

Circumstantial
evidence

Hearsay
evidence

Character
evidence

Evidence Examples

- Interviews or statements
- Texts
- Emails
- Social media posts
- Journal entries or letters
- Dating apps
- Videos
- Photographs
- Public Safety reports
- Expert reports
- Medical reports
- Keycard swipes
- Voicemails
- Wi-Fi pings
- Phone records
- Polygraph results
- Clothing
- Physical items (weapons, trash, etc.)



Direct or testimonial evidence: personal observation or experience

- Interviews or statements
- Generally, a primary source of information in a Title IX investigation



Questions about Direct or Testimonial Evidence

Accept written
statement instead
of interview?

What about
uncooperative
witnesses?

Documentary evidence: supportive writings or documents

A long list of examples:

- Texts
- Emails
- social media posts
- Journal entries
- Videos
- Public safety reports
- Expert reports
- Medical reports
- Keycard swipes
- Wi-Fi pings
- Polygraph results
- Phone records
- Etc.

Documentary Evidence: Thoughts and Questions

Can often be especially
persuasive.

Think about evidence here that
might be time sensitive and act
accordingly (security videos,
card swipes, texts, social media).

Validate certain types of
documents, like journals and
texts.



Documentary Evidence: Thoughts and Questions



Can I get social media info?



Do I have to read through all these texts?

Documentary Evidence: Thoughts and Questions

Should I seek out experts?



“Real” Evidence: Physical Objects

- Clothing
- Weapons
- Trash
- Miscellaneous items





Do I have to take things in?



What do I do with objects I'm given?



Work with the Title IX Coordinator on a storage solution for the institution.

Real Evidence: Thoughts and Questions

Hearsay Evidence



Definition: Testimony given by a witness who relates not what they know personally, but what others have told them, or what they have heard said by others.

(Black's Law Dictionary)



Hearsay Evidence: Thoughts and Questions



No prohibition against accepting it in Title IX processes.



Fact that it is hearsay can be taken into account in weighing the evidence.

Character Evidence: Thoughts and Questions



Must take character evidence in if it is offered and can consider whether it is relevant.



Should be weighed accordingly.



I would not independently pursue character evidence.



A few words about Circumstantial Evidence

Circumstantial evidence is:

Indirect evidence that does not, on its face, prove a fact in issue but gives rise to a logical **inference** that the fact exists.

Another way to think about it:

Evidence not drawn from direct observation of a fact in issue.



Anything that is not direct evidence—direct observation—is circumstantial.

Circumstantial evidence can be powerful.

In the legal context, there is no distinction between circumstantial evidence and direct evidence in terms of weight or importance.

Examples: security videos, card swipes, fingerprints, text conversations, weapon at the scene, etc.

Circumstantial Evidence



Which kinds of evidence carry the most weight?

Direct or testimonial evidence

Documentary evidence

Real evidence

Hearsay evidence

Character evidence



Interviewing

- Interview preparation and set up
- Interviewing basics
- Questioning skills
- Interview process
- Interviewing the Complainant
- Interviewing the Respondent
- Witness interviews
- Working with Advisors
- Wrapping up the interview stage

Interview preparation

- Review Notices of Allegations to get general overview
- Think through who you need to talk to and in what order
- Know what is at issue (as best you can)
- Prepare questions for each interview in advance
- Background check (Google) parties and witnesses



Physical set up

- In person or virtual?
- Importance of private, comfortable, neutral space
- If in person: water, fidget toys, candy, nice chairs
- Ensure there's enough space for the advisor
- If virtual, ask if they are in a private, comfortable space



Making an investigation record

- Record the interview. Parties have the right to access all evidence, if requested.
- OK to take notes if that helps you.
- Maintain all investigation files in coordination with the Title IX Office.
- Investigation Reports and notes are occasionally subpoenaed by a court.

Questioning Skills

Simple, direct
questions

No compound
questions

Don't assume an
answer in how
question is
phrased

Have a purpose
for asking every
question

Examples

- Help me understand ...
- Talk to me about ...
- Tell me more about ...
- A few minutes ago, you told me x, but I think you just told me y. I want to make sure I have that right ...
- There seems to be disagreement on x. Can you help me make sense of that?

Initial Interview Phase



Establish rapport to the extent possible but try to avoid small talk.



Have a checklist of information to cover initially.

Witness Information Checklist

- Are you in a private place where you can talk freely?
- RECORDING – pursuant to College’s policy, this conversation will be audio recorded today. Parties will be able to review the recording as part of the evidence review process.
- ADVISOR IF ONE NOT PRESENT
- PRONOUNS, NAME, ETC—How should I address you?
- MY ROLE
 - I am an attorney, but not representing you, the College, or the parties; our conversation today is not privileged.
 - I am retained by the College to conduct a neutral, fact-finding investigation. It is not my job to determine whether there has been a policy violation
 - Currently, I am gathering relevant facts and will prepare a report of those facts for the parties to review before a panel/decision maker determines whether there has been a policy violation. The panel will use my report to help them make a determination after a hearing.
 - Your name and any relevant information you provide to me will be a part of the report. You may be called as a witness at the hearing.
- College prohibits RETALIATION in any way against anyone who participates in this process. IF you witness, experience, or otherwise have concerns relating to retaliation, please contact the Title IX Coordinator.
- AMNESTY POLICY
- Confidentiality
- QUESTIONS, BREAKS, ETC. If you need clarification on anything I ask you today, please let me know. Please let me know if you need a break, water, etc.
- I request that you commit to telling me the truth today, and throughout this process.
- “I don’t know” or “I don’t remember” is an okay answer.
- If Northfield: I live in town—won’t acknowledge you if we run into each other.

Basic Interview Process

- Start with broad questions, providing opportunity to talk through the events:
 - “Tell me how you know ____ person....”
 - Follow up with “I’d like to open it up and let you talk about your experience on ____ day...”
- Encourage free flow of information, not necessarily chronological. Can come back to work out/confirm chronology and other details.
- Encourage sharing of details that are important to them – may lead to other memories or information.

Narrowing the focus

- Ask follow up questions, focusing on areas of conflicting evidence or gaps in information.
- Ask for more specific details if vagueness or lack of clarity.
- Fill gaps, answer remaining questions.
- Switch to “close-ended,” directive questions towards the end.
- Check preparation notes to see if you’ve covered all info identified up front.
- Take your time. Don’t be afraid of silence.

Interview Wrap Up

Who else should I talk to?

Any relevant documentation (texts, social media messages, emails) not already discussed?

Anything else you want me to know?

Let them know you may need to follow up as the investigation progresses.

Complainant's Interview



First interview is likely to be pretty open-ended.



Will follow up with more focused, direct questioning in second interview (usually a hard interview).



Also open-ended to start with but may get more directive more quickly because you already have information from Complainant.



Focus on listening. The more you can get them to talk, the better information you'll get.



Respondents should have same opportunity to share their experience as Complainant.



More directed focus later in interview.

Respondent's Interview

Overview of Witness Interviews

Same basic approach as with C and R interviews.

May need to be more directive to keep witness on track.

Interview all witnesses either party asks you to.

Interviewing Witnesses

Starting the
witness
interview

Anticipating
witness
questions

Resistant
and quiet
witnesses

Lying
witnesses

Working with Advisors

- Be respectful and expect the same of them.
- Identify them for the record.
- Stop and remind them of rules if necessary.
- Special cases: parents, attorneys, friends
- What if no advisor is present?

Wrapping up the Interview Stage

- Determine whether follow-up interviews are needed as you write up your report and prepare for evidence review.
- Listen to/check recordings if you need clarity about something a witness or party said.
- Decide on relevance of documents and other evidence. Parties get to review all evidence, but you get to determine what you believe is relevant to include in or with the report.

Closing Evidence—Not Required, but may be helpful



- Close of evidence can occur when you've completed all evidence collection and are no longer taking in additional evidence.
- Determine a close of evidence date with the TIXC and notify both parties well in advance of the date.
- Follow up on any promised evidence that you haven't yet received from parties/witnesses prior to the close of evidence.
- New evidence might arise during the evidence review stage. Consider closing evidence after that review period, and prior to the report review.

Trauma-Informed Considerations

- Impact of trauma on functioning and memory
- Neurobiology of Trauma
- Interviewing from a trauma-informed lens
- Cultural implications

The Impact of Trauma on the Body and Brain



Trauma overwhelms our normal coping responses, which provide a sense of control and safety.

Trauma can impact individuals in multiple, significant ways:

- Neurologically
- Emotionally
- Psychologically
- Socially
- Biologically

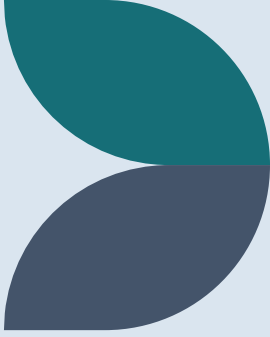
Neurobiology of Trauma

- Growing body of research on this, specifically within the context of sexual violence
- During a traumatic event, an individual's ability to control their physical movements, to think rationally, and to encode memories may be significantly impaired
- This is a hard-wired response that is meant to offer protection
- This mainly has to do with the release of specific hormones during a traumatic event

Interviewing through a trauma-informed lens

- Helps you be a better investigator
- Puts interviewees at ease
- May provide context for counterintuitive reactions or occurrences
- Does NOT mean that you don't probe for credibility

Tips for being trauma-informed



- Be an authentic, non-judgmental human. Work on fostering trust, especially during an initial interview
- Slow down; silence is ok. Remember that memory recall may be slow or out of order.
- Be thoughtful about the language you use and phrasing of questions (avoid “why?” questions)
- Emphasize transparency to the extent you are able
- Help parties understand what to expect, ideally in advance
- Consider the physical (or virtual) environment of the interview
- Don’t automatically draw negative inferences based on a behavior or reaction that may be related to trauma
- Don’t use evidence of trauma as evidence that a policy violation occurred
- A trauma-informed approach should not unfairly favor the complainant OR prejudice you against the respondent

Cultural Implications

- Cultural norms and background may impact the way parties react to an incident and how they present during the investigation process
- Be aware of these potential influences; however...
- Beware of biases and stereotypes
- Consider additional training or seeking out appropriate expertise if necessary

The Investigation Report

- Overview of the Report
- Parts of the report
- Preparation

Investigation Report

“Report that accurately summarizes the evidence”



Remember

Investigation report not required under general process: “access [to] either the relevant and not otherwise impermissible evidence, or an accurate description of this evidence.”

Heightened process: “access [to] either the relevant and not otherwise impermissible evidence, or the same written investigative report that accurately summarizes this evidence.”

Investigative Report

- If report is provided, it will be the primary basis for the decision, supplemented by parties' response and questioning opportunities.
- Report should be detailed—include all relevant evidence.
- Investigator makes initial decisions about relevance of information. Parties can challenge in responses.
- Investigator will finalize report after considering parties' responses to report/evidence.

Parts of a Report

- Heading
- Procedural summary
- Definitions
- People interviewed
- Documents/evidence reviewed (attachments)
- Interview methodology
- Summary of Interviews (may be complex subdivisions)
- Analysis/commentary (under some policies)
- Conclusion

Preparation

- Take your time.
- Good proof reading, grammar, clarity establishes your credibility as a professional and makes reading easier for everyone.
- How long will it take to write?
- Write at the end or as you go through interview process?

Next Steps in the Process

- Evidence/Report Review
- Questioning Opportunities
- Decisionmaking
- Appeals
- Recordkeeping

Evidence/Report Review

- Provide each party an equal opportunity to access **relevant evidence or a description of evidence*** and a reasonable opportunity to respond
 - Institution must take steps to prevent and address parties' unauthorized disclosure of evidence during review process
- Provide each party an equal opportunity to access **relevant evidence or an investigation report*** and a reasonable opportunity to respond
 - Review period must be provided in advance of a live hearing, if having one, but response can occur prior to, during, or both prior to and during the live hearing
- Consider having the TIXC review the report prior to review by parties to ensure adherence to the institution's policies and procedures and catch any issues or questions
- Written responses to the report are permitted and provided to the decisionmaker(s)

*If providing a description of the evidence/**investigation report**, must provide access to evidence upon request

Questioning Opportunity: Hearing or...

Heightened Process

- Can be hearing or individual meetings with decisionmaker
- Must provide opportunity for parties to submit questions for the other party and witnesses
- If live hearing, school must provide an advisor to parties who do not have an advisor during the hearing specifically for asking questions
- Can have a single decision-maker or multiple, but someone must make relevancy determinations regarding submitted questions
- If live hearing, TIXC or another individual may be present to enforce hearing decorum and process
- Must be recorded

General Process

- Must provide a process that enables decisionmaker to adequately assess the credibility of witnesses

The Decision-making Process

Preponderance of the evidence (“more likely than not” = 50.1 percent likely) OR the clear and convincing standard

Apply the applicable policy definitions to the evidence provided.

Must provide a detailed, written rationale for your decision; must include evidence supporting the conclusions.

Questions to think through

- What are the undisputed facts and what are the disputed facts?
- What does the evidence show regarding the disputed facts? Which evidence is most credible? Why?
- What is the weight of the evidence provided?
- Using the appropriate standard of evidence, did a policy violation occur? **Analyze each element of a policy definition under the evidence standard.**
- What is the rationale for your decision?

Assessing Credibility

Credibility: The extent to which the decision-maker can rely on a witness's testimony to be accurate and helpful in their understanding of the case.

EEOC Statement on credibility in Sexual Harassment Cases (1999)

Inherent plausibility

Is the testimony believable on its face?
Does it make sense?

Demeanor

Did the person seem to be telling the truth or lying?

Motive to falsify

Did the person have a reason to lie?

Past record

Did the alleged harasser have a history of similar behavior in the past?

Corroboration

Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with them at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?



Remember!

None of these factors are determinative as to credibility.

For example:

- the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility.
- the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that they did so again.

Assessing Credibility Contd.

Possible Factors:

- Logic/Consistency of information provided
- Corroborating evidence
- Consistency of information– substance of statements
- Plausibility of all information given
- Amount of detail provided. Factual detail assessed against assertions that have no supporting detail. (But consider whether there may be other reasons.)

A Note about Demeanor

Be careful about relying on demeanor when it comes to credibility.

Much of what you hear about “how to tell if someone is lying” is not based on actual research and has been debunked or is considered pseudoscience.



It's not easy to spot a liar



Associated with lying



No significant relationship



Associated with truth-telling

CUES	ASSUMED RELATIONSHIP	ACTUAL RELATIONSHIP
VOCAL		
Hesitations (use of speech fillers, e.g., “ah,” “um,” “er,” “uh,” and “hmmm”)	✓	X
Speech errors (grammatical errors, word or sentence repetition, false starts, sentence change, sentence incompletions, slips of the tongue, etc.)	✓	X
High-pitched voice	✓	✓
Speech rate (number of spoken words in a certain period of time)	X	X
Latency period (period of silence between question and answer)	X	X
Pauses (silent, filled, or mixed)	✓	X
VISUAL		
Gaze aversion (looking away from the conversation partner)	✓	X
Smiles (smiling and laughing)	X	X
Facial fidgeting (face touching or rubbing hair)	✓	X
Self-fidgeting (touching, rubbing, or scratching body or face)	✓	X
Fidgeting (undifferentiated)	✓	✓
Illustrators (hand and arm movements designed to modify or supplement what is being said verbally)	X	✓
Leg and foot movements	✓	X
Posture shifts (movements made to change seating position)	✓	X
Head movements (head nods and head shakes)	✓	X
Eye blinks (blinking of the eyes)	✓	X

<https://www.smithsonianmag.com/science-nature/why-you-cant-spot-liar-just-looking-180977359/>

A Note about Memory



Memory errors do not
necessarily destroy credibility

Most people's memories are not that great

Trauma affects memory

Substance use may affect memory

A Note about Eyewitness Accounts

Can be powerful.

BUT

Well-intentioned eyewitness testimony can be problematic because our brains are not always great at accurately interpreting and remembering what we see.

And eyewitness testimony can be “contaminated.”

Assessing Credibility: Final Thoughts

- It's important to have **reasons** supporting credibility decisions.
- Remember that **unlikable** is not the same as **not credible**.
- Credibility determinations should not be based on gender, sexual orientation, race, ethnicity, nationality, ability, religion, etc.
- Reach conclusions based on the evidence/information provided, **NOT** based on speculation, rumors, character assessment, etc.

Sanctions & Remedies

Determining Sanctions as the Decision-Maker

- First determine your finding(s) about the allegation(s); then move on to sanctioning if applicable.
- Impact statements may be helpful when considering sanctions.

Investigators: Keep in Mind

Investigator should be sure to ask questions during interviews and include information in the report that decision-makers need to determine sanctions.

Sanctions

Need to stop,
prevent, and remedy!

Consider educational
and developmental
sanctions

Engage in a risk
assessment to help
determine
appropriate
sanctions

Sanctions should
reflect the severity of
the behavior
(consider prior
misconduct)

Consider any
loss/injuries to the
Reporting Party or
the institution and
how to rectify those,
if possible

Can consider past
cases of similar
misconduct with
assistance from Title
IX Coordinator

Common Sanctions & Remedies

Students

- Probation
- Loss of leadership positions
- Loss of privileges
- Housing changes
- Limited access to campus
- Counseling or required education
- Suspension
- Expulsion

Employees

- Loss of leadership positions
- Loss of privileges
- Required education
- Disciplinary letter
- Unpaid suspension
- Demotion
- Termination

Notice of Decision

Heightened

- Description of allegations
- Policy and procedures used
- Decisionmaker's evaluation of evidence
- Decisionmaker's determination
- Sanctions & whether remedies will be provided, if applicable
- Procedures for appeal

General

- Whether sex discrimination occurred under TIX
- Rationale
- Procedures and permissible bases for appeal, if applicable

Other Notice Requirements

- Deliver written notice simultaneously to the parties
- Decision/sanctions become final when parties are notified of the appeal decision OR when the deadline to submit an appeal has passed (or, if there is no appeal, on the date when the parties are notified of the determination)

Appeals

General: Must provide appeal process that, at a minimum, is the same as offered in other comparable proceedings, if any, including other discrimination complaint proceedings.

Heightened: Must provide for appeal on the following bases:

Procedural error that would have changed the outcome of the proceeding;

New evidence that was not available at the time of the determination and would have changed the outcome; and

Title IX Coordinator, investigator or decisionmaker had a conflict of interest or bias
(Can offer additional bases if desired)

Heightened procedure also applies to appeals of **dismissals** under either procedure.

Determination of responsibility becomes final either on date institution notifies parties of appeal decision or date when an appeal would no longer be timely.



Appeal Process contd.

- Appeal decision-maker cannot have been previously involved in the process
- Timeframe for accepting appeals?
- Let parties know if an appeal was received and that the other party has an opportunity to respond
- Must send appeal decision and rationale to parties simultaneously
- Possible outcomes?
 - Affirm previous decision
 - Reverse previous decision
 - Return for further investigation or adjudication

Steps once the Process is Over

Notice to parties that the process is over

Sanction and remedy adherence and monitoring; respond to violations

Checking in with parties as appropriate, particularly regarding ongoing supportive measures

Additional prevention measures? School-wide messages, campaigns, training, etc.?

Recordkeeping

Feedback mechanism regarding the Title IX process?

Recordkeeping

Must maintain all records for at least **7 years**

- All training materials made available to the public **upon request**
- Records of efforts to prevent discrimination on basis of pregnancy and related conditions
- Records for each **report** of sex discrimination:
 - Efforts to encourage alleged victims to meet with Title IX Coordinator;
 - If crime alleged, efforts to encourage alleged victim to notify law enforcement;
 - If met with Title IX Coordinator, notes of intake meeting, including whether complainant decided to proceed with grievance process, informal resolution process, or no process;
 - Supportive measures offered and received by complainant (and respondent if applicable), and any documentation relating to concerns raised or challenges to supportive measures;

Recordkeeping contd.

- Additional records for each **complaint** of sex discrimination:
 - Information about each incident;
 - Where the incident(s) took place;
 - Names of the individuals involved and whether alleged victim, alleged perpetrator or witness;
 - When the incident(s) occurred;
- All documentation surrounding the informal resolution process (if applicable), including the parties' consent to participate and any written agreement reached;
- All documentation surrounding grievance process including any investigation report, witness interviews, evidence gathered, and correspondence relating to grievance process;
- Decision reached by adjudicator(s) including whether respondent found responsible, notice of decision, what actions taken in response to the determination including remedies taken

Helpful Resources (all free!)

- Ballast Title IX Policy & Procedure Implementation Guide (2024)
- Ballast 2024 Title IX Regulations Webinar
 - <https://somsull.com/ballast/ballast-resources/>
- Ballast Office Hours
 - <https://somsull.com/ballast/ballast-trainings/>
- U.S. Department of Education Policy Resource
 - [resource-nondiscrimination-policies.pdf \(ed.gov\)](https://www.ed.gov/resource-nondiscrimination-policies.pdf)

Keep in touch!

 ballast@somsull.com

 www.somsull.com/ballast

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