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ATTORNEYS

New Title IX Regulations: Investigator Training

June 24, 2020 Webinar

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This Presentation Will Cover:

I. The essential elements of a title IX investigation
II. Confidentiality
III. Conducting interviews
IV. Making credibility determinations
V. Understanding the "preponderance of the evidence" standard

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This Presentation Will Cover:

VI. Relevance
VII. The Written Report
VIII. Other Issues (Dismissal and Informal Resolution)
IX. Bias and Impartiality

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I. Essential Elements of an Investigation

- An investigation is simply the process the school uses to resolve complaints of sex discrimination or sexual harassment.

- The investigator is the initial fact-finder.
  - Under the final Title IX rules, effective 8/14/2020, the investigator cannot be the individual who makes a determination regarding responsibility, including sanctions.

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I. ESSENTIAL ELEMENTS

ALL investigations must be:

Adequate	**Reliable**	**Unbiased**
Impartial	**Prompt**	**Provide an equal opportunity for both parties to present witnesses and other evidence.**

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I. Essential Elements

- The Investigator
  - Cannot be the decision-maker or appeal decision-maker;
  - Can be internal or external;
  - Can be Title IX Coordinator (although this is not recommended);
  - Must be impartial and unbiased in general and in the specific case;
  - Should be recused if there is a conflict of interest.

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I. Essential Elements

- The specific steps in a Title IX investigation will vary depending on:
  - The nature of the allegation,
  - The age of the student(s) involved,
  - The size and structure of the school,
  - Any applicable state or local requirements, and
  - What the school has learned from past experience.

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I. Essential Elements

- Key procedural elements from final Title IX Rules:
  - Written notice of investigation sent to parties:
    - Identities of the parties involved in the incident;
    - The conduct alleged;
    - The date and location of the incident'
    - Respondent's entitlement to a presumption of innocence;
    - Parties' right to an advisor of their choice, at the party's expense, who may be an attorney; and
    - Parties' right to review and comment on evidence.
- If new allegations added, must issue written notice.

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I. Essential Elements

- Key procedural elements from final Title IX Rules:
  - Prior written notice of interviews to parties with sufficient advance time to prepare:
    - Date
    - Time
    - Location
    - Participants
    - Purpose

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I. Essential Elements

- Key procedural elements from final Title IX Rules:
  - Burden of proof and evidence gathering on school, not parties;
    - May be preponderance of evidence or clear and convincing;
    - Must use same standard for all complaints of sexual harassment against students and employees
  - Respondent entitled to presumption of innocence (must be stated in written notice).

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I. Essential Elements

- No "gag orders" restricting parties from discussing allegations or gathering/producing relevant evidence:
  - Must also protect against retaliation/intimidation of parties/witnesses;
  - Schools can require parties and advisors to sign confidentiality/non-disclosure agreement.

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I. Essential Elements Of An Investigation

Recommended practice: review your school's Title IX policy and procedures prior to initiating an investigation every time a new complaint is made.

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I. Essential Elements

- Additional considerations:
  - Are there any other ongoing school or criminal investigations of the incident? If so, determine the scope of each investigator's role.
  - Consider whether information can be shared among the investigators.
  - If forensic evidence is involved, consider whether to consult with campus law enforcement or forensic expert to ensure evidence is correctly interpreted.

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II. Confidentiality

The recipient must keep confidential the identity of any individual who has made a report or complaint of sex discrimination or sexual harassment, or has been identified as the perpetrator or respondent to any such report or complaint, or is a witness to any complaint or investigation...

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II. Confidentiality

… **except** as required to carry out the purposes of Title IX (including the conduct of any complaint resolution process), applicable law, or as permitted by FERPA.

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II. Confidentiality

- All information must be maintained in a secure manner.
- Do not over-promise confidentiality; due process and other considerations may require disclosure of information obtained through investigation.
- Notify complainant of the information that will be disclosed, to whom it will be disclosed, and why.

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III. Conducting Interviews

- The investigator should develop a general investigation plan:
  - Gather and review any relevant documents, policies, or other evidence.
  - Determine where interviews will take place (neutral, private, convenient).
  - Prepare pre-interview points; consider providing in writing.
  - Determine order of interviews.
  - Develop list of questions for each that will help you determine whether more likely than not that complaint is founded under Title IX and school policy.

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III. Conducting Interviews

- Points to review with complainant, respondent, and witnesses:
  - Explain process;
  - Expectation of honest cooperation, and result (if any) of refusal to honestly cooperate;
  - Request or state expectation of confidentiality/discretion as appropriate;
  - Explain policy on non-retaliation and how to report retaliation;
  - Explain school's position on confidentiality.
- Consider reducing to writing and having complainant and respondent sign.

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III. Conducting Interviews

- Basic interview questions:
  - Who committed the alleged acts?
  - Who else was around?
  - What exactly occurred or was said? Include details.
  - When did it occur, and was it a one-time event, repeated event, ongoing?
  - Where did it occur?
  - How did you react? How did it affect you?
  - Are there other individuals who might have relevant information?
  - Did you tell anyone about it?
  - Ask for any available evidence (including social media content).
  - Probe for hidden agendas.

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III. Conducting Interviews

- Other interview tips:
  - Consider personality, tone, and psychological dynamics.
  - Focus on facts, avoid spending too much time discussing "why?" questions.
  - Avoid prejudging evidence.
  - Consider all possibilities.
  - Be an active listener.
  - Take notes or record.
  - Control emotions, be investigative rather than an advocate.

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III. Conducting Interviews

- Obtaining witness statements
  - Written in first person.
  - Focus on facts, not conclusions (may include how the incident affected the individual).
  - If the investigator writes the statement for the witness, get confirmation of accuracy.
  - Consider having it notarized or including statement "based upon my personal knowledge, the above facts are true and correct."

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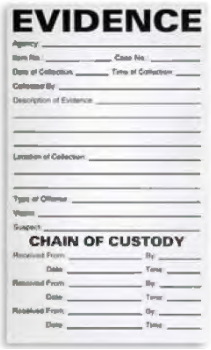
III. Conducting Interviews

- Handling Evidence
  - Beware "chain of custody" issues.
  - Maintain investigation file containing:
    - Investigator's notes (running record of actions taken, interviews conducted).
    - Written statements.
    - Paper and electronic records.
    - Photographs, video, and audio recording.
    - Any other evidence received, both inculpatory and exculpatory.



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IV. Making Credibility Determinations

- Avoid making credibility determinations based on an individual's gender, sexual orientation, gender identity, or other protected characteristic.

- Avoid making credibility determinations based on an individual's status as a complainant, respondent, or witness.

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IV. Making Credibility Determinations

- Questions to ask for assessing credibility:
  - Is the individual's account consistent, or does the individual make conflicting statements on material issues?
  - Does the individual appear to have a hidden agenda?
  - Is the individual cooperative during the investigation process?
  - Does the individual's account generally make sense? Is it plausible?
  - Does the individual have a history of being especially honest and forthright? Or the opposite?

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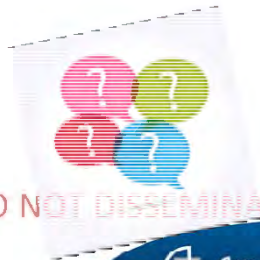
IV. Making Credibility Determinations

- Other strategies for assessing credibility
  - Observe non-verbal cues.
  - Ask the individual to give a chronological account of the incident from beginning to end; later, ask the witness to give a chronological account of the incident in reverse order.
  - Ask questions challenging areas of inconsistency during the interview.



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V. Understanding the "Preponderance Of The Evidence"

Judicial standards of proof:

- Beyond a reasonable doubt (used in criminal cases)
- Clear and convincing evidence (highly likely)
- Preponderance of the evidence (more likely than not)
  - The standard in civil cases.
  - The standard in discrimination and civil rights cases.

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V. Understanding the "Preponderance Of The Evidence"

- A preponderance of the evidence exists when 50.1% of the evidence supports the allegation(s) in the complaint.

- A preponderance is not based on the amount of evidence, but based on the credibility determinations and weight given to the evidence by the investigator.

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V. Understanding the "Preponderance Of The Evidence"

Either preponderance or clear and convincing is acceptable as long as:

- Same standard is applied to all complaints of sex discrimination or sexual harassment;
- Same standard applies to complaints against students as against employees.

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VI. Relevance

- What is "relevant evidence"?
- Evidence that is of consequence to the outcome of the investigation;
- Evidence that makes any fact more or less probable than it would be without the evidence.

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VI. Relevance

- Relevance does not exist in a vacuum – the relevance of any particular piece of evidence is determined in relation to what is required to make a determination regarding responsibility.

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VI. Relevance

- Determining relevance is different that determining how much weight to give the evidence
  - Irrelevant evidence: Exclude from consideration
  - Relevant: Include for consideration
    - Determine how much weight to be given compared to other evidence – reliability

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VI. Relevance

Note: Questions of a complainant's prior sexual behavior or sexual predisposition are **not relevant**

except to the limited extent they are offered to prove that someone other than respondent committed the conduct, or as related to specific incidents between complainant and respondent to prove consent.

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VI. Relevance

Example: John Roe alleges that Jim Roe sexually assaulted him at a BBQ hosted by a school-recognized student organization off-campus. Jim Roe denies the assault and claims he left the BBQ before the time of the alleged assault.

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VI. Relevance

Questions to ask include, but are not limited to:

- Date, start and end time, and location of the BBQ;
- Time of the alleged assault;
- Location of the alleged assault;
- Description of the alleged assault;
- Names of others who attended BBQ and their relationships with the parties;

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VI. Relevance

Questions to ask:

- Do any witnesses recall seeing Jim at the BBQ? When?
- Do any witnesses recall when Jim left?
- Did Jim leave alone or with anyone else?
- Where does Jim claim to be during the alleged assault? Does he have witnesses?
- Do any witnesses recall seeing John around or after the time of the alleged assault? What do they recall?

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VI. Relevance

Questions to ask:

- Did John tell anyone about the alleged assault? Who? When? What did he tell them?
- Were any parties or witnesses drinking alcohol or using any substance that could affect their recall? (consider offering amnesty)
- Where was the location of the alleged assault compared to where others were during the BBQ? (consider having parties/witnesses diagram)

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VI. Relevance

Compare:

- One or more witnesses state that Jim stayed until the end of the party;
- The alleged assault took place in a secluded location away from the BBQ;
- John was seen by one or more witnesses appearing distressed and physically disheveled;
- Mutual friends stated that John appeared withdrawn and fearful of Jim after the BBQ.

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VI. Relevance

With:

- Jim left the BBQ an hour before the alleged assault with two friends;
- Friends confirmed that they went to a movie and were together for the next several hours;
- Witnesses recall John joking around and playing lawn darts after the time of the alleged assault;
- John was highly intoxicated and says his memory of the night is spotty.

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VI. Relevance

What about…?

- John's prior sexual conduct.
- The fact that Jim has a girlfriend.
- John's alcohol use at prior BBQs.
- Weight given to witnesses of varying degrees of intoxication.
- Weight given to witnesses with varying degrees of recall.

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VII. The Written Report

The Investigator must ask questions and sort through evidence, both inculpatory and exculpatory, to produce a summary of relevant evidence.

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VII. The Written Report

- After conducting all interviews and receiving all evidence, but prior to completion of the investigative report, each party must be provided with copies of any evidence directly related to the allegations in the complaint
  - Each party must have 10 days to submit a written response to the investigator
  - The investigator must "consider" written responses prior to completing investigative report.

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VII. The Written Report

- Investigative report must "fairly summarize relevant evidence".
- Must be provided to each party and the party's advisor, if any, at least 10 days prior to hearing or determination regarding responsibility.
- Parties must be given an opportunity to review and provide written response to investigative report.

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VII. The Written Report

- Recommended report contents:
  1. List each allegation;
  2. Summary of procedural history (document compliance with process);
  3. Summary of any applicable policies governing the complaint (and/or link to same);
  4. The applicable evidentiary standard (preponderance or clear and convincing)

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VII. The Written Report

- Recommended report contents:
  5. Summary of relevant evidence:
     - Party statements and interviews
     - Witness statements and interviews
     - Other evidence obtained
     - Party written responses to evidence
  6. Statement of undisputed material facts for each allegation
  7. Statement of disputed material facts and summarize relevant evidence for each allegation

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VII. The Written Report

Be aware of new record-keeping requirements!

Investigation materials must be maintained for <u>seven years.</u>

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VIII. Other Issues

- Dismissal
  - What is the Investigator's role if it looks like mandatory or optional dismissal may be warranted? For example:
    - *It becomes clear during the investigation that the alleged conduct would not constitute sexual harassment, even if proven (mandatory); or*
    - *Complainant stops participating in process (optional).*

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VIII. Other Issues

- Informal resolution
  - If your agency's policy provides for informal resolution, the parties may opt for informal resolution at any point prior to a determination of responsibility.
    - What does the investigator need to do?

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VIII. Other Issues

- Informal resolution
  - Conversely, the parties may withdraw from informal resolution and complainant may choose to pursue a formal investigation at that point.
    - What does the recipient's policy say about the confidentiality of discussions during the informal resolution process as it may impact the investigation?

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IX. Bias and Impartiality

- The Investigator must be unbiased and impartial
- Bias = prejudice in favor of or against one person or group compared with another
  - Opposites of bias = fair, objective

USDE's perception of anti-male, anti-respondent bias is a theme throughout the comments

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IX. Bias and Impartiality

- An Investigator is not on anyone's "side"
  - Your goal is to help the decision-maker reach a determination of responsibility based on reliable, relevant evidence;
  - Your goal is not to achieve any particular outcome;
  - Avoid becoming emotionally invested or slipping into advocacy – this is not your role.

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IX. Bias and Impartiality

- Conflicts of interest
  - A conflict of interest exists when the Investigator has a personal or professional interest in a case that prevents them from discharging their duties in a fair, neutral, and impartial manner

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IX. Bias and Impartiality

- Conflicts of interest may arise due to Investigator's relationship to a party or witness;
- Where the Investigator has a stake in the outcome of the process (e.g., personnel evaluations based on increasing or reducing number of founded complaints);
- Other circumstances that negatively affect the Investigator's neutrality.

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IX. Bias and Impartiality

- The comments quote Justice Ruth Bader Ginsburg, saying that with respect to the balance between sex equality and due process, "it's not one or the other. It's both."
- Must avoid the intentional or unintentional injection of sex-based biases and stereotypes into Title IX proceedings.

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IX. Bias and Impartiality

Examples of bias:

- Assuming that complainants or respondents generally are more likely to tell the truth
- Assuming that respondents are presumptively responsible for alleged sexual misconduct
- Assuming that a victim was "asking for it" based on what they wore, how much they had to drink, how they were dancing, etc…

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IX. Bias and Impartiality

- An unbiased process:
  - Gives parties equal opportunities for participation at every stage;
  - Presumes innocence until a determination regarding responsibility is made;
  - Results in a determination made based on an objective review of all relevant, available evidence

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IX. Bias and Impartiality

- An unbiased investigation provides both parties with equivalent rights to:
  - Written notices;
  - Introduce witnesses and evidence for your consideration;
  - Review and respond to the other party's evidence; and
  - Credibility determinations based on specific factors, not a party's status as complainant or respondent.

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Next Step: Determination Of Responsibility

Determination cannot be made by the Investigator or Title IX Coordinator.

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Poll Question # 1

How many Title IX investigations have you personally investigated in the past five years?

a. None
b. 1-3
c. 4-6
d. 7-10
e. More than 10

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Poll Question # 2

Regarding your Title IX grievance procedure:

a. The investigation process is explained in great detail;
b. The investigation process is explained in some detail;
c. The investigation process is not explained and investigators have discretion to conduct the investigation as they see fit;
d. I don't know/not sure.

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