

New Title IX Regulations: Investigators

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Today's Speakers



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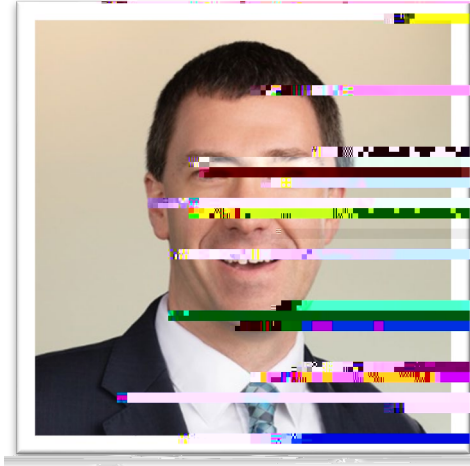


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Proposed Regulations

- Published November 16, 2018. (first Title IX guidance published by OCR to go through a formal notice-and-comment process since 1997)
- Comments were taken until January 30, 2019 (appx. 124,000 comments)
- Final regulations **effective August 14, 2020**
 - Effect of Coronavirus?
- Remember—the regulations are the law!

What's New?

- Mandatory Training
- Roles (the same but different)
- Sexual Harassment Definition
- Scope of Coverage
- Actual Knowledge Standard
- Grievance & Hearing Procedures
- Retention of Records

Key Roles

- Title IX Coordinator (must be an employee)
- Investigator
- Advisor (party permitted to have an advisor of his/her choice)
- Decisionmaker(s)

Key Change The Decisionmaker cannot be the same person as the Title IX Coordinator or the Investigator

Training Requirements

A [University] must ensure that Title IX Coordinators, **investigators**, decision-makers, and any person who facilitates an informal resolution process, receive training on the **definition of sexual harassment** § 106.30, the **scope of the recipient's education program or activity**, **how to conduct an investigation** and grievance process including hearings, appeals, and informal resolution processes, as applicable, and **how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias**. A [University] also must ensure that investigators receive training on **issues of relevance** to create an investigative report that **fairly summarizes** relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.

Sexual Harassment Definition

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;

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Sexual Harassment Definition

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or

Scope of Coverage

- Covers sexual harassment occurring in the school's education program or activity against a person in the United States

Scope of Coverage

- Covers sexual harassment occurring “in the school’s education program or activity, against a person in the United States”
- What is the school’s “education programw 22.945 09f -0.3n the

Who can report?

Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment)

How?

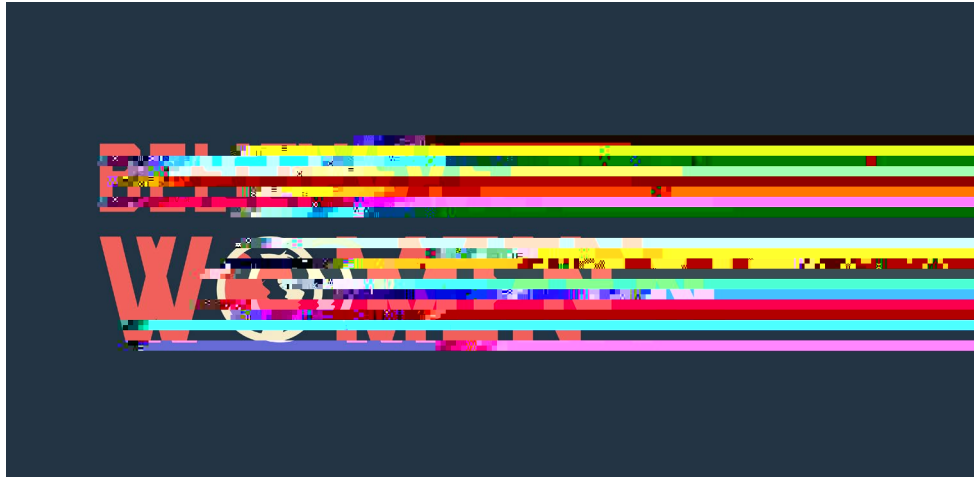
In person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that

Grievance & Hearing Procedures

- “Single Investigator” Model is banned
- Live Hearings
- Advisors
- CrossExamination

Does this situation cause bias?

A member of the Title IX department shares the following image on their personal social media page



Investigation Topics

- Big Picture Items
- Roles Within School's Title IX Department
- Evidence Gathering

Big Picture Items

- Both the investigation and hearing processes have gone through significant changes as a consequence of the regulations
- Cannot be discriminatory on the basis of sex and must apply to complainants and respondents

Roles Within School's Title IX Department

- Single investigator model is no longer allowed
 - Investigators and Decision Maker(s) cannot be the same in any given case
- All individuals in the case must be unbiased

This is one area that could result in requiring additional staff!

Timeline

- Conduct the investigation
 - Interview witnesses, gather evidence, etc.
- Produce the evidence to both sides
- Finalize the report
- Conduct a hearing

Investigation Overview

- Coordinate with law enforcement as needed
 - Never force or discourage a complainant go to the police
- Gather as much evidence as possible
 - Texts, emails, pictures, etc.
- Strategically schedule interviews
 - But surprise interviews are now barred
- Conduct an exhaustive and complete investigation

Evidence Gathering

- Equal opportunities for both parties to have witnesses
- Can't restrict parties from discussing allegations or presenting evidence
- Access to have other people present, including advisors or attorneys
-

Let's watch a few interview interactions...

These first three videos feature the complainant in an investigation, Sophia.

Keep an eye out for the good, the bad, and the ugly.

What are your thoughts?

Type your observations in the chat or unmute yourself and share!



INVESTIGATOR INTERVIEW WITH COMPLAINANT

What are your thoughts?

Type your observations in the chat or unmute yourself and share!



INVESTIGATOR INTERVIEW WITH COMPLAINANT

What are your thoughts?

Type your observations in the chat or unmute yourself and share!



INVESTIGATOR INTERVIEW WITH WITNESS

What are your thoughts?

Type your observations in the chat or unmute yourself and share!



Production of All Evidence to Both Parties

- Universities are required to produce all evidence directly related to the allegations to both sides
- The parties get ten days to respond to this evidence before the investigative report can be finalized

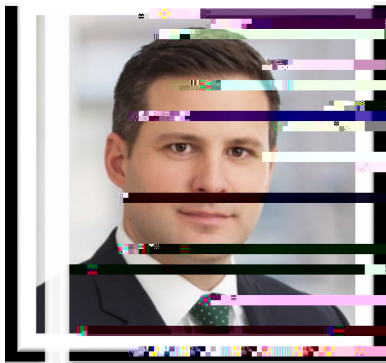
What does this mean for the identity of any witnesses?

Investigative Report Requirements

- Universities must prepare investigative report on the

Some additional evidence for your case file...

- Summary of Interviews
- Additional Evidence:
 - Text messages
 - Snapchats



Presented by Chris Bayh

EVIDENTIARY ISSUES

Two opportunities for parties to weigh in

Opportunity 1: The Evidence

§ 106.45(b)(5)(i):

- Equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
 - including the evidence upon which the recipient does not intend to rely in reaching a determination
 - inculpatory or exculpatory evidence whether obtained from a party or other source
- Send to advisors
- Provide both sides

Common Pitfalls



Relevance & Cross Examination

- All evidence must be “relevant”
- Looking ahead, any admitted “statement” must be subject to cross examination

Relevance- how defined?

- “The final regulations do not define relevance, and the ordinary meaning

Relevance-making the call

- What if we get a relevance call wrong?
 - Chance to reexamine it: “if a party disagrees with an investigator’s determination about relevance, the party can make that argument in the party’s written response to the investigative report under § 106.45(b)(5)(v)i”
- This may suggest erring on the side of inclusion... or not.
 - Impact of changing the call
 - How to responsibly include close-call evidence, if you choose to do it

CrossExamination: how it bears on investigatio

- Conduct your investigation with an eye toward the requirement of cross examination.
- To be admitted, any “statement” must be subject to cross examination.
- “Statement” is broad.
 - It “has its ordinary meaning.”
 - It “would not include evidence (such as videos) that do not constitute a person’s intent to make factual assertions, or to the extent that such evidence does not contain a person’s statements

Hearsay— what about that?

- “the proposed rules do not speak to admissibility of hearsay”
- However, § 106.45(b)(6) “states that the decisionmaker must not rely on the statement of a party or witness who does not submit to cross-examination, resulting in exclusion of statements that remain untested in motion”

Let's take a look at our investigative file...

Relevant or not?

We spoke to both Complainant and Respondent. They both agree that they have had consensual sex on two prior occasions. Complainant says that this latest encounter was not consensual; Respondent says that it was.



Let's take a look at our investigative file...

Relevant or not?

In the investigation, we interviewed Jennifer, a friend of the Complainant. Jennifer stated that her old roommate, Elizabeth, once confided in Jennifer that the Respondent had sex with her while she was unconscious during freshman orientation two years ago. Elizabeth never filed a Title IX complaint, never contacted law enforcement, and never told anyone else about the incident.



Let's take a look at our investigative file...

Relevant or not?



One of Complainant's friends stated that Complainant has a reputation for lying and exaggerating. The friend offered two examples.



Let's take a look at our investigative file...

Relevant or not?

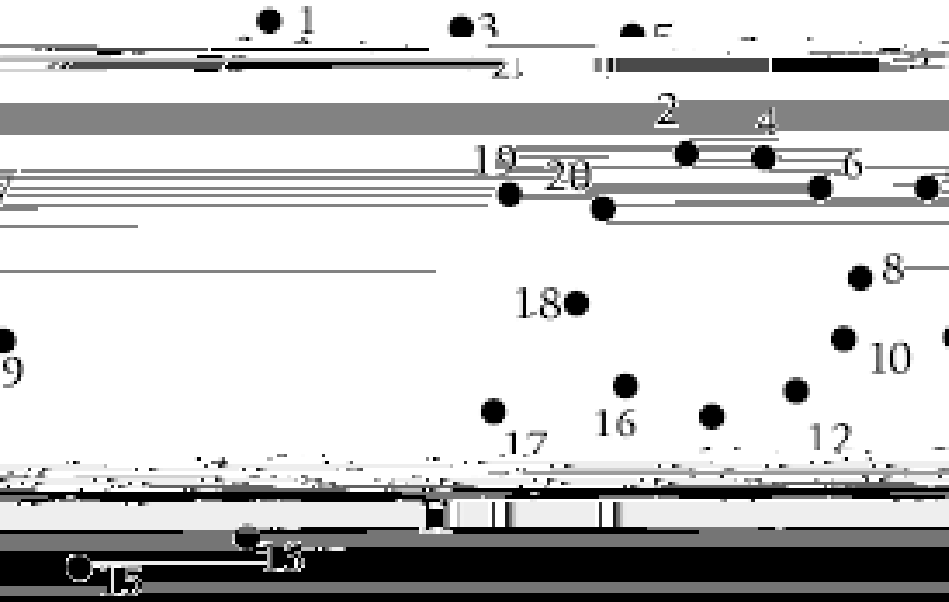
Respondent has some criminal history. Last year he was arrested and charged with public intoxication and underage consumption when police found him staggering home alone late one night. He paid a fine and the charge was expunged. The year before, he was charged with credit card fraud. He pleaded to a Class A misdemeanor and received probation and a fine.



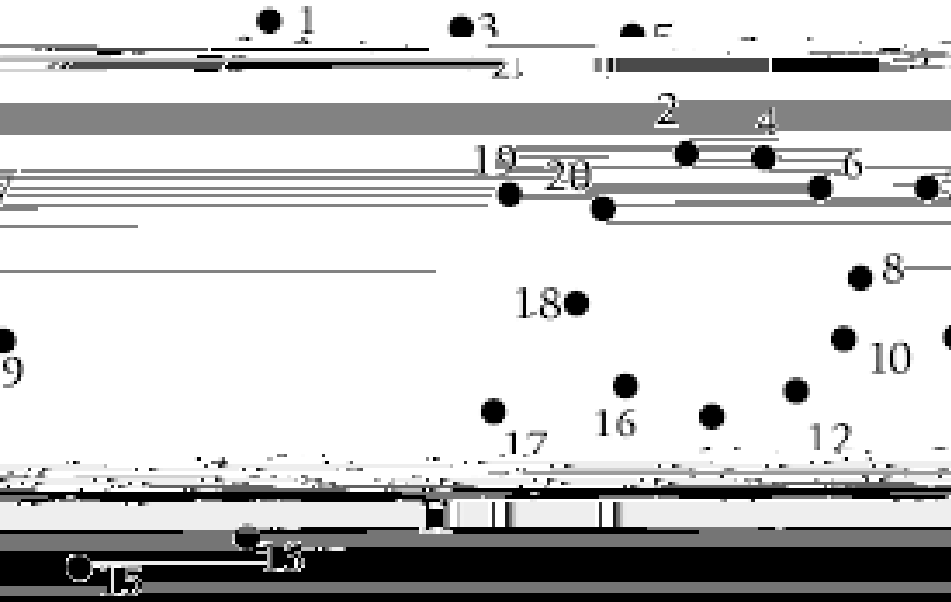
Importance of the Investigative Report

- Foundation for the hearing
- Pre-hearing opportunity for Complainant and Respondent to “litigate” what, exactly, are the facts and what facts should come into evidence at the hearing
- Laying ground for eventual appeal

Writing a Strong Investigative Report



Writing a Strong Investigative Report



It's important to connect ALL of the dots in order to paint a complete picture that fully supports any future conclusions.

Keep an eye out for gaps or missing connections in order to produce the strongest investigative report possible.

Key Takeaways

- There have been significant changes in both the investigation and hearing processes as a result of the new regulations.
- We must do our best to provide an impartial, unbiased process for all parties involved.
- Always keep relevance in mind!
- Develop an investigative report that connects the dots and sets you up for success should there be a future appeal.

NEXTUP: DECISION MAKER/ADVISOR TRAINING

THANK YOU FOR ATTENDING