

**HIGHER EDUCATION TITLE IX INVESTIGATOR FOUNDATIONS & PRACTICUM**

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**Take Care**



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**Foundations**



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**How Did We Get Here?  
(To the Investigation,  
That Is)**



4

**Do You Use Title IX?**


- Is it Title IX sexual harassment?



5

**Do You Use Title IX?**

- Is it Title IX sexual harassment?
- Did the harassment occur in an education program or activity?



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### Do You Use Title IX?

7

<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
<input checked="" type="checkbox"/>	Did the harassment occur in an education program or activity?
<input checked="" type="checkbox"/>	Was it in the United States?



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### Do You Use Title IX?

8

<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
<input checked="" type="checkbox"/>	Did the harassment occur in an education program or activity?
<input checked="" type="checkbox"/>	Was it in the United States?

→ Title IX Grievance Process



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### Do You Use Title IX?

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<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
<b>NO</b>	Did the harassment occur in an education program or activity?
<input checked="" type="checkbox"/>	Was it in the United States?



If answer to **any** question is **NO**, the Title IX Grievance Process does not apply  
 Use process for other misconduct



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### Initial Grievance Process Steps

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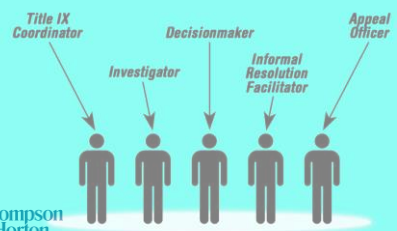
- Step ½:** Contact Complainant (Intake)
- Step 1:** Supportive Measures Meeting With Complainant
- Step 2:** Consider Emergency Removal / Administrative Leave for Respondent
- If Complainant files a Formal Complaint or Title IX Coordinator signs a Formal Complaint**
- Step 3:** Notice of Allegations
- Step 4:** Consider Dismissal
- Step 5:** Informal Resolution (in appropriate cases)



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### Title IX Personnel

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### Polling Access

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**The Title IX Coordinator signs the complaint over the objections of the alleged victim. Who is the complainant?**

The alleged victim

The Title IX Coordinator

The District

No one

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## Complainant

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An individual who is alleged to be the victim of conduct that could constitute sexual harassment

- ❑ Even if report made by parent/guardian or third party
- ❑ Even if Title IX Coordinator signs the Formal Complaint
- ❑ Person considered complainant even if they do not choose to file a Formal Complaint



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## Respondent

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An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment



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## Initial Grievance Process Steps

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- Step ½:** Contact Complainant (Intake)
  - Step 1:** Supportive Measures Meeting With Complainant
  - Step 2:** Consider Emergency Removal / Administrative Leave for Respondent
- If Complainant files a Formal Complaint or Title IX Coordinator signs a Formal Complaint**
- Step 3:** Notice of Allegations
  - Step 4:** Consider Dismissal
  - Step 5:** Informal Resolution (in appropriate cases)



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## Initial Grievance Process Steps

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- Step ½:** Contact Complainant (Intake)
  - Step 1:** Supportive Measures Meeting With Complainant
  - Step 2:** Consider Emergency Removal / Administrative Leave for Respondent
- If Complainant files a Formal Complaint or Title IX Coordinator signs a Formal Complaint**
- Step 3:** **Notice of Allegations**
  - Step 4:** Consider Dismissal
  - Step 5:** Informal Resolution (in appropriate cases)



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## Notice of Allegations (Step #3)



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## Requirements for Notice

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- ▶ Upon receipt of a Formal Complaint, an educational institution must provide written notices to known parties:
  - Title IX Grievance Process (including informal resolution)
  - Allegations of sexual harassment
  - Right to inspect and review evidence
  - Right to have an advisor during the process
  - Any policy / provision of code of conduct that prohibits knowingly making false statements or submitting false information



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## Requirements for Notice

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- ▶ Sufficient details known at the time and sufficient time to prepare a response before any initial interview.
  - Identity of parties involved in incident, if known
  - The conduct allegedly constituting sexual harassment
  - The date and location of the alleged incident, if known



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## Impact on Investigation

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- ▶ Notice of Allegations to the Respondent is required before the educational institution meets with the respondent for an interview
- ▶ If there is not a Notice of Allegations, make sure one is sent before you do anything else in the investigation
- ▶ Supportive measures should have been offered to the parties by this time, as well—verify with the Title IX Coordinator so you can help keep an eye on supportive measures during the investigation



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## Investigator Tip

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- ▶ The Notice of Allegations is your “roadmap” to your investigation
- ▶ Make sure you understand the allegations and the elements necessary to prove them



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**Which is not a required element for rape (a type of sexual assault)?**

- Penetration of the anus or vagina, no matter how slight
- The conduct was non-consensual
- The conduct was done for purposes of sexual gratification
- None - they are all required elements

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**The Investigation**  
(Step #6)

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## Key Investigation Principles

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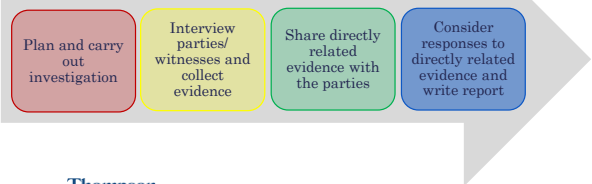
- ▶ Thorough
- ▶ Prompt
- ▶ Impartial
- ▶ Fair



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## Investigator Responsibilities

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## Investigation Roadmap

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### 9 for IX

1. Familiarization with the file
2. Verification of impartiality
3. Introduction to parties



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## Investigation Roadmap

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### 9 for IX

4. Interaction with law enforcement and preservation of evidence
5. Investigation Plan
6. Collection of evidence (interviews and tangible evidence)



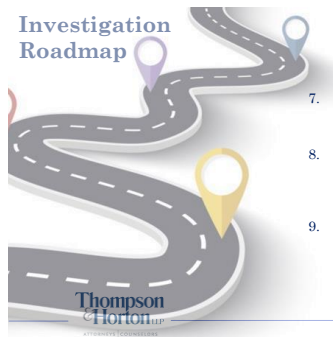
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## Investigation Roadmap

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### 9 for IX

7. Compiling and sharing "directly related evidence" (with 10 days for response)
8. Drafting, finalizing (after responses to DRE) and sharing investigation report (with 10 days for response)
9. Finalizing and transmitting investigation file to Title IX Coordinator

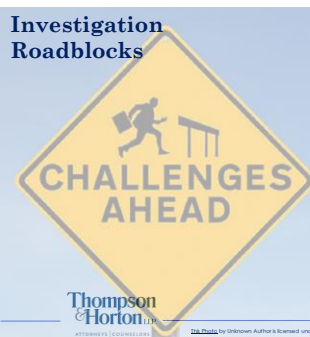


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## Investigation Roadblocks

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- ▶ Coordinating schedules
- ▶ Uncooperative parties and witnesses
- ▶ Meddling advisors
- ▶ Delays/managing timeframes



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## 1. Familiarization with the file

- ▶ Review **all** material provided by the Title IX Coordinator
- ▶ Create a checklist to ensure all steps are met and to document compliance
  - **T&H Guidebook Checklist B – Title IX Investigation Checklist**



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## Case Study

On January 22, 2023, Francis F. requested to speak with me after class about a friend in the class. Francis reported that this friend had been touched in the genital area without consent during a social event on campus. Francis did not initially name the student, but eventually told me it was Carson C., another student in my class.

- Professor Peterson Handwritten Statement January 22, 2023



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From: Carson Complainant  
To: Title IX Coordinator  
Subject: Complaint  
Date: Thursday, January 25, 2023 7:18:28 PM

I know that Francis F. spoke to our professor about what happened to me on campus. I didn't want to tell anyone, but now that it's out, I do think it's important that something be done. I also need you to know that the person who did this to me also has made numerous horrible statements to me, all sexual in nature. Please let me know what you will be doing to deal with this situation.



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## Our Case: More Facts

- ▶ A formal complaint was filed on January 25, 2023 by CP
- ▶ Supportive measures are in place
- ▶ The Title IX Coordinator determined that, if true, the alleged conduct could be "fondling," a type of sexual assault, and severe, pervasive, and objectively offensive "sexual harassment"
- ▶ A notice of allegations was sent on January 30, 2023



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## NOA: Allegations

It is alleged that on or around [dates]:

1. Robin Respondent (the "Respondent") touched Carson Complainant's (the "Complainant's") genitals over the clothing without consent, and
2. The Respondent repeatedly made sex-based comments to the Complainant.



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## Our Case: Allegations

The alleged conduct, if true, could be sexual harassment in an education program or activity of a recipient of federal funding and against a person in the United States. Specifically:

1. Touching the private body parts of another without consent and for purposes of sexual gratification is “fondling,” which is a type of sexual assault under Title IX, and
2. Unwelcome sex-based conduct that is so severe, pervasive, and objectively offensive that it effectively denies equal access to the educational institution’s educational program or activity is “sexual harassment” prohibited under Title IX.



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## 2. Verification of impartiality

Any individual designated as an Investigator may not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent

34 C.F.R. § 106.45(b)(1)(iii)



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## An impartial investigator ...

- ▶ Is unbiased
- ▶ Has no conflict of interest
- ▶ Does not prejudice
- ▶ Is well trained



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## Impartial Approach

- ▶ The preamble to the 2020 Title IX rules call for educational institutions to use an objective, “common sense approach” to evaluating whether bias, conflict of interest, or prejudice exists
- ▶ Remember that “objective” means whether a reasonable person would believe partiality exists
- ▶ The preamble says not to apply “generalizations” that might unreasonably conclude partiality exists



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**The investigator has a disciplinary role in the school and has imposed discipline on Robin in the past; can they be impartial?**

Yes, imposing discipline on a student does not create an impermissible risk of bias.
No, but only if the discipline was for prior sexual misconduct.
No, imposing discipline on a student creates an impermissible risk of bias.

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**The investigator attends the same religious institution as Robin; can they be impartial?**

Yes, attending the same religious institution with someone does not create a conflict of interest.

Yes, as long as there is no close personal or church-business relationship between the investigator and Robin or their family.

No, attending the same religious institution with someone creates a conflict of interest.

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**The investigator has raised money and marched for victims-rights advocacy groups; can they be impartial?**

Yes, engaging in such advocacy work does not create impermissible bias or conflict of interest

Yes, as long as the investigator has been trained

Yes, as long as the investigator has not made statements suggesting they are incapable of being impartial

Yes, a person who has engaged in such advocacy work can never be impartial.

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**The investigator believes traumatic stress affects brain function and, in turn, memory and behavior; can they be impartial?**

Yes, belief in "trauma informed practices" does not create a conflict of interest or bias

Yes, if the investigator does not rely on apparent trauma as evidence.

No if the investigator uses trauma-informed investigative techniques.

No, belief in "trauma informed practices" renders someone biased toward victims

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## Impartiality Tips

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- ▶ Be open with the Title IX Coordinator or their designee about any concerns—better to report something that turns out to be nothing than to ignore something that turns out to be a big deal
- ▶ When in doubt, disclose any concerns to the parties and get their agreement to allow you to continue in the role (with Title IX Coordinator)
- ▶ Show your work! The best way to avoid a claim of bias, conflict of interest, or prejudice is to methodically work your case and write a solid report



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**INTRODUCTIONS**



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**3. Introduction to parties**

- ▶ Not required, but best practice
- ▶ Benefits:
  - Notice to the parties of the "rules" for the investigation
  - Notice to the parties that there may be periods where they do not hear from you, and how they can contact you

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## Introduction to Parties

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- ▶ T&H Guidebook Document 28 – Investigator Introduction to Party
- ▶ Send to parties, parents/guardians of minor parties, and advisors, if any



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## 4. Interaction with law enforcement

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- ▶ Law enforcement is often involved when reported conduct is criminal in nature
- ▶ Child protective services may also be involved/investigating where abuse or neglect is suspected



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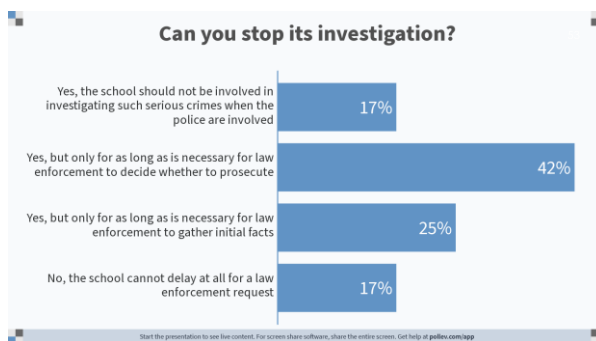
## Our Case: The Police

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- Carson files a police report regarding the alleged fondling on January 31, 2023
- Officer Ogletree contacts you upon finding out that you are investigating and is quite angry that you are “screwing up their investigation”
- The Officer says the educational institution must turn over the investigation to the police and stop “meddling” in police business



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### The Police are the Beginning, Not the End

"[A] law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct."

"Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation."

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## Delay for Concurrent Law Enforcement Investigation



- ▶ An educational institution must conduct its Title IX investigation in a "reasonably prompt" manner but may **temporarily delay the investigation** for good cause, which may include concurrent law enforcement activity
- ▶ No long or indefinite delay or extension of timeframes, regardless of whether a concurrent law enforcement investigation is still pending

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## Notice of Delay



- ▶ A Title IX team member must send written notice to both parties regarding the delay or extension and the reason(s) for the delay or extension
- ▶ Concurrent law enforcement activity is **not** good cause to delay sending the written notice of allegations of delay to the complainant or respondent
- ▶ **T&H Guidebook Document 23 – Notice of Extension of Timeframes**

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### What can justify a delay for concurrent law enforcement purposes?

- An oral request from law enforcement to delay
- Notice that law enforcement plans to release evidence that would be material to your determination at a particular future time
- The arrest and incarceration of the Respondent
- All of the above
- None of the above

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### The police decided not to prosecute Robin because it's a "they said, they said" case. How does it impact your investigation?

- You can rely on the police's finding to dismiss the complaint
- You can rely on the factual information gathered by the police, but not their finding
- You cannot rely at all on any information from the police

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## Police Results as Evidence?

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- ▶ Police evidence may be useful for fact-gathering
  - ▶ But the standards for and purposes of criminal investigations are different from educational institution investigations
  - ▶ Police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX
- OCR 2011 DCL and 2020 TITLE IX REGS



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## When the Police Call

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- ▶ Document **everything!**
  - Ask police to put request for delay in writing
  - Reduce verbal (e.g., telephone) conversations in writing
  - Best practice is to respond with summary: "If my summary is incorrect please let me know by [date] or I will assume it is correct."
- ▶ Explain in writing the educational institution's obligation to conduct its own Title IX investigation and ask for notification when you can begin your investigation
- ▶ Follow up, then follow up again, then again



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## 5. Investigation Plan

- ▶ What questions need to be answered for a thorough and impartial investigation?
- ▶ Who should you interview and what evidence should you collect to allow the decision-maker to answer those questions?
- ▶ In what order should you collect evidence, including witness interviews?
- ▶ Prepare interview outlines



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## Planning the Investigation

- ▶ What questions need to be answered for a thorough and impartial investigation?
  - What evidence do you need to collect?
  - Who should you interview?
- ▶ In what order will you conduct witness interviews?
- ▶ Think: What information do you need to obtain to allow the decisionmaker to answer the key questions and make a reliable determination



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## What Are the Questions?

- Think back to the Title IX definitions of “Title IX sexual harassment” “in an educational program or activity” and “against a person in the U.S.”
- Look at the allegations and consider what the elements for each claim are
- Consider information needed to craft a remedy if a violation is found



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## Fondling

- ▶ Was there touching of the private body parts of another?
- ▶ Was it without consent?
- ▶ Was it for purposes of sexual gratification?
- ▶ Was it in an “educational program or activity”
- ▶ Was it “against a person in the U.S.”



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## Hostile Environment

- Was there:
- ▶ Unwelcome conduct?
  - ▶ Based on Sex?
- Was it so:
- Severe?
  - Pervasive? and
  - Objectively Offensive?
- That it would effectively deny equal access?
- ▶ Was it in an “educational program or activity”
  - ▶ Was it “against a person in the U.S.”



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## Impact – Effective Denial

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- ▶ What were the effects on the Complainant, if any?
  - ▶ What were the effects on the larger educational community, if any?
  - ▶ What issues may need to be addressed with the Respondent, if any?
- \*\* Some institutions will separate this process from the initial investigation



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## Types of Evidence

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- ▶ Direct Evidence
- ▶ Circumstantial Evidence
- ▶ Hearsay

**Rumor / innuendo  
(NOT evidence)**



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## Direct Evidence

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Evidence that is based on personal knowledge or observation and that, if true, proves a fact without inference or presumption.

BLACK'S LAW DICTIONARY 675 (10<sup>th</sup> ed. 2014)

- ▶ What a witness directly experienced
- ▶ Eyewitness testimony
- ▶ Admissions—written or oral
- ▶ Surveillance tape or cell phone video captures the incident



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## Circumstantial Evidence

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Evidence based on inference and not on personal knowledge or observation ... all evidence that is not given by eyewitness testimony.

Black's Law Dictionary 674 (10<sup>th</sup> ed. 2014)



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## Circumstantial Evidence

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## Hearsay Evidence

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A statement (oral or written) made by someone NOT WHILE TESTIFYING and that is offered to prove the truth of the matter asserted in the statement.

FED. R. EVID. 801(c)



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## Sources of Evidence

- ▶ Testimony
- ▶ Documents
- ▶ Education records
- ▶ Campus files
- ▶ Personnel files
- ▶ Investigation records
- ▶ Student files
- ▶ Police Reports
- ▶ Emails
- ▶ Handwritten notes
- ▶ Calendars
- ▶ Photographs
- ▶ Videos
- ▶ Text & instant Messages
- ▶ Other electronic files/ cloud storage
- ▶ Journal entries
- ▶ Medical records (ONLY with written consent)
- ▶ Interviews



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## Preserving Evidence

- ▶ If there is evidence that could be at risk of loss, take steps to preserve evidence
- ▶ Contact law enforcement immediately if there is knowledge of illegal or illicit evidence



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### Thinking back to Carson & Robin: What evidence can you seek?

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### They-Said / They-Said What Do You Do?



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### They-Said / They-Said No Other Witnesses

- ▶ Sexual harassment often occurs behind closed doors
- ▶ There are often no witnesses to the alleged harassment
- ▶ Many cases are going to involve the complainant making certain allegations, the responding denying them, with no other witness
- ▶ The fact that there are no witnesses to the alleged harassment does not mean it is automatically a "50/50"
- ▶ A thorough investigation and a complete summary of all relevant evidence can help a decisionmaker assess credibility and reach a reliable determination

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### What if there is really no evidence other than "they said, they said"?

- A finding in favor of the Complainant
- A finding in favor of the Respondent
- Dismissal of the complaint with no finding

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### Who is responsible for finding and providing evidence in a Title IX sexual harassment investigation?

- The Complainant must provide evidence to support the complaint
- The Respondent must provide evidence to refute the complaint
- Both parties must provide evidence to support their side
- Neither side must provide evidence to support their side

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## It's Your Job!

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- ▶ The burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the educational institution, not the parties
- ▶ Off limits: medical treatment records without voluntary, written consent



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## But if the Parties Want to Share...

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- ▶ Let them! Do not discourage parties from submitting evidence
- ▶ Give them the same opportunity to present evidence, suggest witnesses, recommend directions for your investigation
- ▶ If you decide not to pursue a suggested route, record your reasons and summarize in your report



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## Interviews – Outline

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- ▶ Prepare an interview outline for each witness
  - Bullet points and lists can help you stay on track
  - But they don't help with word choice
  - Consider writing out (at least the most tricky) questions
- ▶ But you must always be flexible



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## Interview Outline

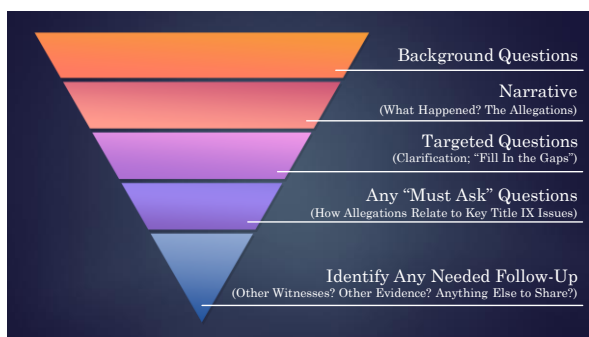
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- ▶ Determine how you are going to establish rapport
- ▶ Focus on the allegations in the Formal Complaint and prepare questions to obtain a reliable chronology of events and all relevant information the witness has
- ▶ Identify "must ask" questions to elicit information related to Title IX sexual harassment definitions or to fill in gaps in chronology
- ▶ Identify evidence to discuss with witness

**Good Preparation Is Key!**



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## “Must-Ask” Questions

- ▶ Is the conduct on the basis of sex?
- ▶ Is the conduct at issue Title IX sexual harassment?
  - If hostile environment harassment, was the conduct “unwelcome”?
  - If student-on-student Title IX Big 5, was there consent?
- ▶ Did the conduct occur in the education program and activities?
- ▶ How was the complainant denied equal access to educational programs or activities?



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## Writing Out Questions

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- ▶ Tell me about your relationship with Robin/Carson.
- ▶ Would you say you were friends or more than friends?
- ▶ Did your relationship change at any time?
- ▶ How did it change?

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## Writing Out Questions

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- ▶ Did you and Robin/Carson ever touch each other sexually?
- ▶ How frequently did that happen?
- ▶ Ok, let’s talk about the first time it happened, who was present, where were you, how was the conduct initiated, what did you say/they say?
- ▶ Let’s talk about the next time it happened... (etc.)

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## Before Interviews

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- ▶ Decide how you will record information from the interviews
- ▶ Recordings may have to be shared (see later discussion of Directly Related Evidence)
- ▶ Consider having a note-taker attend

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## Before Interviews

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Schools must provide the parties written notice of the date, time, location, participants, and purpose of **all investigative interviews or other meetings** with sufficient time to prepare



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## Before Interviews

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- ▶ Recommended to do the same for non-party witnesses (not required)
- ▶ Use **T&H Guidebook Document 30 – Notice to Party of Investigative Interview or Other Meeting** and **Document 31 – Notice to Witness of Investigative Interview of Other Meeting**

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**In what order will you interview the witnesses?**

- Carson
- Robin
- Professor Patterson
- Law Enforcement Witness
- Student Witness

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## Remember...

- ▶ Your job is not to weigh the evidence
- ▶ Keep in mind the standard of proof (preponderance of the evidence) in planning the investigation
- ▶ But you will not apply it directly

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## Standard of Evidence

- ▶ Most educational institutions uses the “preponderance of the evidence” standard
- ▶ Preponderance of Evidence:
  - > A fact is more likely than not to be true; a proposition is more probably true than false
  - > At least 51% of evidence favors the Complainant (50% and a feather)  
Probability of Truth > 50%
- ▶ Where the evidence is equipoise (“50/50”), the result is a determination that respondent is not responsible



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**COLLECTION OF EVIDENCE**

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## 6. Collection of Evidence

- ▶ Includes interviews and reviews of tangible evidence
- ▶ Remember that this is your burden – think creatively, broadly, and evenhandedly

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## Start of Interviews

- ▶ Explain background information
  - > Explain expectations for parents/guardians and advisors
  - > Use [T&H Guidebook Document 34 – Party Interview Intro](#) or [T&H Guidebook Document 35 – Witness Interview Intro](#)
- ▶ Take notes using memorandum of interview or finalize notes in a memo after
  - > [T&H Guidebook Document 33 – Memorandum of Interview](#)

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### An investigator can put the following limits on a party regarding advisors

None; a party must be allowed their advisor of choice

The investigator can deny a request for an additional advisor if a minor party's parent attends meetings or interviews with them

The investigator can deny a request for a party to have a witness as an advisor with them

The investigator can deny a request to have a student or employee unconnected with the case as an advisor

None of the above

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97

## Right to an Advisor

98

- ▶ Complainant and Respondent must be given the opportunity to select an advisor of their choice
- ▶ The advisor may be present for any meeting or interview during the investigation
- ▶ Advisor may inspect and review the evidence and report



98

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### What if a parent or advisor is unruly during an interview

The investigator can't do anything; a party has the right to the advisor of their choice

The investigator can warn the person to stop and remove them if they don't

The investigator can automatically remove the person if they were given a notice of expectations before the meeting or interview

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99

## Advisor Expectations

100

- ▶ The educational institution may establish reasonable restrictions regarding the extent to which the advisor may participate in the proceedings, but the restrictions must be equally applied to both parties
- ▶ Recommended to provide an advisor (and party/parent) expectations document early on – in writing before the first interview or meeting
- ▶ Go over the expectations at the beginning of the first interview or meeting and secure confirmation of understanding
- ▶ Example is available in our [Guidebook – Document 3](#)



100

## During Interviews

101

- ▶ Your goal is to obtain information, not share information
- ▶ Begin with open ended questions
- ▶ Probe more specifically if necessary



101

## During Interviews

102

- ▶ Do not use terms that suggest prejudice or bias, like “victim” and “perpetrator”
- ▶ Do not use sex stereotypes
- ▶ Do not require one party to carry the burden of presenting or identifying evidence
- ▶ Do not be swayed in the evidence you collect and document by party status



102

## Words Matter

- ▶ Avoid suggesting belief or disbelief (“I’m so sorry this happened to you”)
- ▶ You can be empathetic, though (“I can tell this is difficult, would you like a break” or “I don’t expect you to be able to tell me every detail”)
- ▶ Avoid words that seem to blame a party (“Why didn’t you report it”)



103

103



104

## Don't Ask...

Unless you have written consent:

- ▶ Medical records
- ▶ Privileged information
- ▶ Information about the Complainant’s sexual predisposition or prior sexual behavior (“rape shield”)

For consent, use [T&H Guidebook Document 36 – Authorization to Use Otherwise Irrelevant Information](#)



105

105

## It's Not Relevant

- ▶ **Medical Record Information:** Cannot access, consider, disclose, or otherwise use a party’s records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional’s or paraprofessional’s capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party’s voluntary, written consent to do so for a grievance process
  - For a minor, consent of parent is required



106

106

## It's Not Relevant

- ▶ **Legally Privileged Information:** No information protected by a legal privilege may be used during an investigation unless waived in writing by the person holding the privilege (party and, for a minor, their parent/guardian)
  - Attorney-Client Privilege
  - Physician-Patient or Psychotherapist Patient Privilege – records maintained in connection with the provision of the treatment of the party



107

107

## It's Not Relevant

- ▶ **Complainant Sexual History or Behavior:** Questions and evidence related to a complainant’s prior sexual history or sexual behavior are not relevant and may not be asked or sought
  - Exceptions in two narrow circumstances



108

108

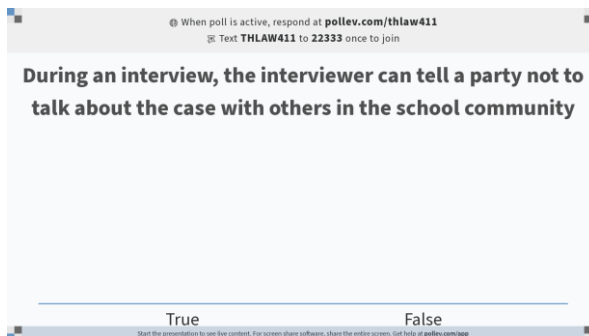
## “Rape Shield” Exceptions

109

- ▶ To show that someone other than the Respondent engaged in the alleged conduct
- ▶ Prior conduct between the parties to be used to show consent



109



110

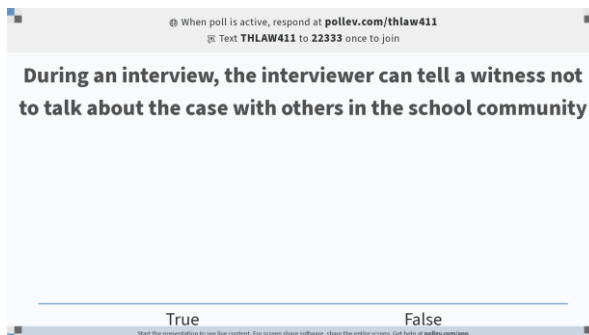
## Don't Tell...

111

- ▶ Gag orders are not allowed in the Title IX process
- ▶ You can express the need to maintain confidentiality



111



112

## Retaliation Warning

113

- ▶ Investigators can (and should) warn parties and witnesses of risks that sharing information could lead to retaliation
- ▶ Also inform parties and witnesses that they should report if they feel they are retaliated against



113

## Closing Interviews

114

- ▶ Ask “anything else”
- ▶ Consider allowing parents/guardians and/or advisor to ask questions
- ▶ Ask for questions, including about process
- ▶ Always discuss retaliation – both against them and against the other party
- ▶ Explain next steps
- ▶ Ask the witness to reach out if they think of anything else later



114

## After the Interview

115

- ▶ Finalize your notes as soon as possible
- ▶ Assess whether to update the investigation plan with other witnesses or evidence identified during the interview
- ▶ Gather any remaining evidence that is relevant to the allegations
- ▶ Assess whether any factual or chronological gaps exist and, if so, complete additional interviews and/or evidence collection



115

## Uncooperative Witnesses

116

- ▶ What if a party or witness refuses to show up?
- ▶ Cannot make a decision solely based on a party's non-cooperation



116

## Uncooperative Witnesses

117

- ▶ For parties, use **T&H Guidebook Document 32 – Party Non Response to Interview Request**
- ▶ For witnesses, there is less leverage; get creative
- ▶ Consider:
  - Why the non-cooperation?
  - Explain the consequences
  - Involve others



117

## Remember...

118

- ▶ Presumption that respondent is not responsible



118

## You've Gathered the Evidence and Conducted the Interviews, Now What?



119

## "Fill In the Gaps"

- ▶ Are there any gaps in your chronology of events?
- ▶ Is there any evidence missing?
- ▶ Did you obtain all the documents and information the parties and witnesses referenced?
- ▶ Are there any follow-up questions you need to ask the parties or witnesses?
- ▶ Is there anything else you need to track down to prepare a thorough investigation report that will allow the Decisionmaker to reach a reliable determination?



120

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### What must the investigator provide the parties after the end of evidence collection?

- A copy of all evidence obtained in the investigation
- A summary of all evidence obtained in the investigation
- A copy of all directly related evidence obtained in the investigation
- A summary of all directly related evidence obtained in the investigation

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121

## DIRECTLY RELATED EVIDENCE

Thompson & Horton LLP

122

## 7. Compiling and sharing the DRE

- ▶ “Directly related evidence” is not defined in the rules
- ▶ Statements, notes of interviews, and other types of evidence collected in the investigation are likely covered



123

## Directly Related Evidence

- ▶ Even evidence the educational institution doesn't think it will use
- ▶ The parties must be given at least 10 days to review all the evidence and submit written responses about the evidence to the investigator
- ▶ The investigator must consider the responses when writing the investigative report
- ▶ Use **T&H Guidebook Document 37 – Notice of Right to Review and Respond to DRE**



124

### What is not directly related evidence related to Carson's formal complaint?

- "Sexting" messages between Robin and Carson before the conduct in the allegations
- Draft interview notes or recordings once notes have been finalized
- A written statement from another classmate saying Robin did the same thing to them the year before
- Evidence of the specifics of Robin's disability services

All of the above are directly related

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125

## Does DRE include...??

Evidence subject to legal privilege

Evidence related to a complainant's past sexual history not related to:

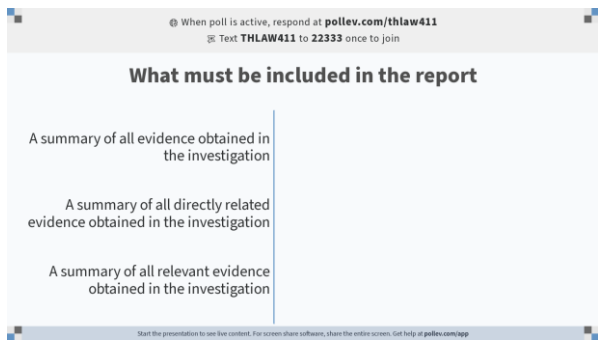
1. The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
2. The evidence relates to the sexual behavior between the complainant and respondent and is offered to prove consent



126



127



128

## 8. Drafting, finalizing, and sharing the report

- ▶ The report must summarize all “relevant evidence”
- ▶ You can (and should) begin drafting the report during the 10-day DRE period
- ▶ The report must be shared with the parties who have 10 days to respond before a decision



129

## Investigation Report

- ▶ Summarizes the *relevant evidence*
  - ▶ Different from *directly related evidence* shared in the previous step
- Use **T&H Guidebook Document 38 – Investigative Report Template**



130

## Relevant Evidence

Evidence is relevant if  
 (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and;  
 (b) the fact is of consequence in determining the action.

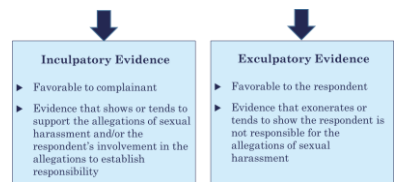


Fed. R. Evid. 401



131

## Relevant Evidence



132

**Rank the evidence from most relevant to least/not relevant**

- "Sexting" between the parties during the spring and summer
- A written statement from a classmate saying Robin did the same thing to them
- A text message in which Robin apologizes to Carson for "going too far" and "not listening"
- Francis's statement that Robin told Francis to apologize to Carson for "going too far" and "not listening"
- Evidence that Carson "made out" with another classmate as justification for asking Carson to make out

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133

**Remember – not relevant without consent**

134

- Evidence subject to legal privilege
- Evidence related to a complainant's past sexual history unless:
  - The evidence is offered to prove someone other than the respondent committed the alleged sexual harassment
  - The evidence relates to the sexual behavior between the complainant and respondent and is offered to prove consent
- A party's records made or maintained by a medical professional or paraprofessional made and maintained in connection with the provision of treatment of the party



134

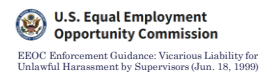
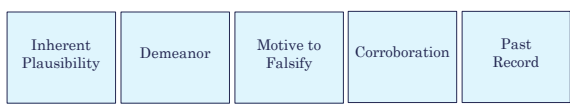
**Credibility Determinations**



The investigator does not make **findings** regarding credibility, but the investigator should include information related to credibility in the investigative report to help the decisionmaker assess credibility and reach a reliable determination that the respondent is or is not responsible for the alleged sexual harassment

135

**Credibility Determinations**



136

**Credibility Factors**

- |  |  |
|--|--|
| ▶ Corroborating evidence                     | ▶ Witness's memory (impact of time, outside influence, trauma, intoxicant) |
| ▶ Contradictory evidence                     | ▶ Witness's demeanor   |
| ▶ Source of information (and source motive)  | ▶ Witness's motivations or interest in the outcome                         |
| ▶ Body language and demeanor                 | ▶ Witness's bias or prejudice  |
| ▶ Specific details                           | ▶ Internal consistency   |
| ▶ Reasonableness of testimony / plausibility | ▶ Other factors of believability   |

137

**Example**

138

The parties do not dispute that in the Fall semester of 2022 and during the first weeks of the Spring 2023 semester, Robin touched Carson for purposes of sexual gratification on three occasions. The main dispute is whether that conduct was consensual.



138

## Example

139

According to Carson, Carson and Robin had discussed previously that Carson had never done anything sexual and did not want to do so. Carson says when Robin asked to “make out” or touch Carson, Carson always said no. Carson said they really like Robin and their families are friends, so Carson did not want to do anything to put that at risk. Carson also said that their parents are very strict and Carson was afraid if they knew anything happened, they would blame Carson. So, despite having said they did not want to, Carson said they eventually said “ok fine” on the occasions when the touching occurred.



139

## Finalize the Report

140

- ▶ After the 10 day DRE review period, consider and address any responses to DRE in the report
- ▶ The report does not reach a decision/determination, that is the decision-maker’s role
- ▶ The educational institution must share the final report with both parties and their advisors (Use [T&H Guidebook Document 39 – Notice to Parties to Review Investigative Report](#))
- ▶ Both parties must be given at least 10 days to review and respond before a final decision



140

## Considering the Parties’ Response to the Evidence



- ▶ Did either party identify evidence that was absent or not gathered *and that should be?*
- ▶ Did either party identify new witnesses or new evidence *that should be considered?*
- ▶ Did either party point out inconsistencies in the evidence *that are material to facts or issues in dispute?*
- ▶ Did either party raise concerns regarding the relevance of the evidence *that should be considered?*

141

## Investigator Tips

142



DOs



DON'Ts



142

## Investigator “DOs”

143

Ensure you have no conflict of interest or bias & remain impartial	Treat all parties equitably	Provide equal opportunity to the parties to present evidence and witnesses	Objectively evaluate all evidence	Conduct a complete and thorough investigation
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143

## Investigator “DONTs”

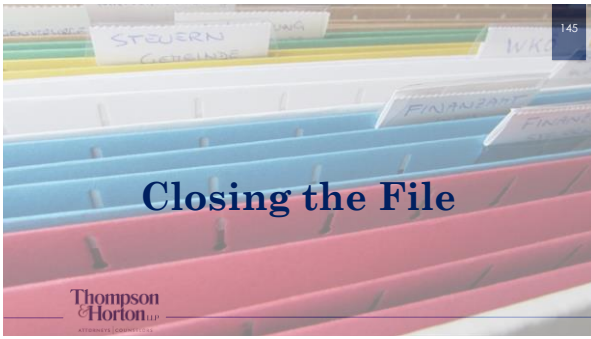
144

Conduct surprise interviews	Discriminate in the investigation or rely on stereotypes or preconceived notions	Restrict the parties’ ability to discuss allegations or gather evidence	Use privileged or other irrelevant information	Determine credibility or make a finding regarding responsibility
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144





145

- Finalize the file
- Transmit the file to the Title IX Coordinator or their designee for the case

146



147

## Notice of Allegations

On [dates 6-8 weeks ago] during class, Remi Respondent engaged in unwelcome sex-based conduct toward Cary Complainant, including sexual flirtation and advances, propositions or requests for sexual activity, verbal abuse of a sexual nature, and suggestive comments, even after the Complainant asked the Respondent to stop.

148

## Notice of Allegations

The conduct alleged, if true, could be 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 education program or activity.

149

## Brainstorm

- ▶ What witnesses can you interview? What questions will you ask.
- ▶ What evidence can you seek and how will you obtain it?

150

## Mock Interview of CP

151

Investigator: [HE Investigator Brainstorming Session #1 and Notes.docx](#)

Complainant: [HE Investigator Complainant Script.docx](#)

Parent: [HE Investigator Parent Script.docx](#)



151

## CP Interview

152

- ▶ Remi would point at Cary's backside and make a round gesture like a butt.
- ▶ Would drop pencils say "bend over" almost every day, then stare at Cary's backside
- ▶ On one occasion, Remi grabbed Cary's waist from behind with both hands, pulled Cary toward them to where their bodies were touching and then touched Cary's behind.



152

## CP Interview

153

- ▶ Remi would comment that they wanted to "break your back" to Cary and make gestures like sexual thrusting
- ▶ Whenever Cary would yawn Remi would make comments about "giving head"



153

## CP Interview

154

- ▶ Wei Witness sat next to Remi Respondent in class.
- ▶ Wynn Witness sits next to Cary.



154

## CP Interview

155

- ▶ Cary says that the conduct occurred in Professor Powell's class.
- ▶ Cary reported an initial incident to Professor Powell, who said they would talk to Remi. Because nothing stopped, Cary didn't report again.



155

## Brainstorm

156

- ▶ How will you revise your investigation plan
- ▶ Who will you interview other than the RP?
- ▶ What questions will you ask witnesses?



156

## Wei Witness Interview

157

- ▶ Wei and Remi are close friends.
- ▶ Wei only saw one interaction of a sexual nature between Cary and Remi, when they kissed during the first few days of the academic year. Wei says that both parties did it willingly.
- ▶ After the interview, Wei's roommate emailed to say they didn't think Wei was telling all they knew, but that when they asked Wei the same questions the night before Wei said the same thing as in the interview.



157

## Wynn Witness Interview

158

- ▶ Wynn and Cary are friends.
- ▶ Wynn reported hearing jokes and comments like those Cary reported from Remi and other students in the class (Robin and Ryan)
- ▶ Professor Powell sees it sometimes and tells the students to stop
- ▶ Wynn did not see Remi touch Cary on the behind, but Cary told Wynn about it right after it happened. Cary seemed stunned and was tearful when reporting it to Wynn.
- ▶ Wynn denied that Cary ever kissed Remi.



158

## Professor Powell Interview

159

- ▶ Thought that Remi and Cary were dating because they always seemed to be flirting.
- ▶ Cary did report once that Remi had made an inappropriate joke. Professor Powell spoke to Remi and told them to stop. Cary didn't report anything further.
- ▶ Professor Powell denied seeing or hearing inappropriate comments or touching.



159

## Brainstorm

160

- ▶ What questions do you have for the Respondent?



160

## RP Interview

161

- ▶ Remi said at the start of the academic year, they and Cary were best friends and Remi thought they were going to be something more because they flirted a lot. They would tell jokes and talk a lot.
- ▶ They kissed early on but then when Remi asked Cary out, Cary said no.
- ▶ When Cary started dating someone else, Cary started acting weird toward Remi.



161

## RP Interview

162

- ▶ Remi denies making the comments or touching Cary other than jokes that a bunch of kids in the class would make ("break your back")
- ▶ Remi said it was the "step on a crack, break your mother's back" type of joke



162

## Brainstorm

163

- ▶ What follow-up questions do you have for the Complainant?



163

## CP Interview (#2)

164

- ▶ CP denies kissing Remi
- ▶ Cary acknowledges that Remi asked Cary out early on and Cary said no
- ▶ Cary acknowledges maybe changing toward Remi after starting to date someone else because their new significant other was the jealous type



164

## Directly Related Evidence

165

- ▶ What directly related evidence must you share in this case?



165

## Investigation Report

166

- ▶ Assume there are no responses to the directly related evidence
- ▶ What are the issues in dispute in this case?
- ▶ What evidence is relevant?



166

HIGHER EDUCATION TITLE  
IX INVESTIGATOR  
FOUNDATIONS & PRACTICUM

## QUESTIONS?

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