



Title IX Sexual Harassment Training: The Investigation Procedure

Completing An Unbiased And Thorough
Investigation As Part Of The Title IX Sex
Harassment Complaint Procedure

Yavapai
COLLEGE

Quarles & Brady LLP

Road Map

- Importance of a Thorough and Unbiased Investigation
- Expectations of Investigators
- Expectations of the Investigation
- Beginning the Investigation
- Interviewing Witnesses: 101
- Taking Notes
- Preparing and Finalizing the Investigation Report
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Importance of a Thorough and Unbiased Investigation

- Why is it important to conduct a thorough and unbiased investigation of a Title IX Complaint ?
 - Legal compliance;
 - Liability to students/staff for failure to remedy if occurs again;
 - It's your job;
 - It's the right thing to do!

Importance of a Thorough and Unbiased Investigation

- The college will be liable for harassment or improper investigations if:
 - A violation occurs when the college has effectively caused, encouraged, accepted, tolerated, or failed to correct a hostile environment/harassment of which it has actual notice
 - Its personnel have notice of a hostile environment/harassment on campus and the college fails to take reasonable steps to respond to the situation
- Potential loss of federal funds for failing to comply with Title IX requirements

Expectations of Investigators

- Under the new Title IX regulations, investigators must:
 - Ensure that the Title IX policy's burden of proof is applied properly;
 - Provide an equal opportunity for the parties to present witnesses and evidence;
 - Not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

Expectations of Investigators

- Under the new Title IX regulations, investigators must also:
 - Provide the parties with the same opportunities to have advisors present during any investigation proceeding;
 - Provide written notice of the date, time, location, participants, and purpose of all investigative interviews or other meetings, with sufficient time for the party to prepare to participate; and
 - Provide both parties an 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.

Starting the Title IX Investigation

- Start by reviewing your college's Title IX policy and procedures and ensure you understand your role as investigator
- Review your college's investigation template
- Determine the identity and contact information of the complainant and meet with the complainant

Starting the Title IX Investigation

- Ensure the complainant understands his or her right to raise concerns, have an advisor present, and to feel free from retaliation
- Give an overview of how you intend to proceed with the investigation
- Don't promise to keep the complainant's identity a secret from the respondent
- Don't promise anyone that the respondent will be punished

Starting the Title IX Investigation

- Pledge a fair and prompt investigation (but don't overpromise on time of completion)
- Find out what the complainant's expectations are and correct any misperceptions (i.e., anonymity or a determination of responsibility from you as the investigator)

Starting the Title IX Investigation

- Identify all policies implicated by the alleged misconduct
- Develop a strategic investigation plan, including a witness list, evidence list, intended investigation timeframe, and order of interviews for all witnesses and the parties

Starting the Title IX Investigation

- Make good faith efforts to notify the parties of any meeting or interview involving the other party
- When participation of a party is expected, provide that party with written notice of the date, time, and location of the meeting, as well as the expected participants and purpose
- Interview all available, relevant witnesses, and conduct follow-up interviews as necessary
- Provide regular status updates to the parties throughout the investigation

Interviewing Witnesses: 101

- Whenever possible, conduct all interviews in person
- Interview each witness separately
- Conduct interviews in a private location out of sight and earshot of others
- Do not keep a witness against his or her will

Interviewing Witnesses: 101

- Explain the purpose of the investigation to the witnesses
- Tell every witness that full cooperation is expected
- If you are interviewing a witness who is uncooperative, consult the college's Title IX Coordinator and, if necessary, legal counsel

Interviewing Witnesses: 101

- Explain who you are and why the interview is being conducted
- Be honest, but remember, your job is to *gather*, not disseminate information
- Explain relative confidentiality of the investigation
- Review the anti-retaliation provisions of your Title IX policy with the witness
- Emphasize the obligation to provide accurate, truthful information

Interviewing Witnesses: 101

- **Don't** let the interviewee know what you believe to be true
- **Don't** agree or disagree with witnesses
- **Do** allow each witness the opportunity to suggest witnesses and questions they want you to ask of the other party/witnesses, and document in the report which questions were asked, with a rationale for any changes or omissions

Interviewing Witnesses: 101

- Start with broad questions, then specific, then "catch-all" (e.g., "Anything else?")
- Allow the witness to explain in his or her own words do not put words in the witness' mouth.
- Avoid leading questions (i.e., isn't it true that ...)

Interviewing Witnesses: 101

- Special considerations with the respondent's interview(s):
 - Explain that a fair and impartial investigation will be conducted;
 - Convey seriousness of matter and importance of honesty;
 - Don't suggest that the college has already determined the respondent is guilty or not guilty;
 - Don't suggest you disbelieve a witness or the complainant; and
 - Explain presumption of innocence and burden of proof.

Interviewing Witnesses: 101

- Special considerations with the respondent's interview(s):
 - Get the respondent's side of the story, witnesses, and all potential exculpatory evidence
 - Remind the respondent about your Title IX policy, including anti-retaliation provisions
 - Close the meeting and set follow up

Take Notes. Here Are Some Tips.

- Start a new page for each interview and make a note of the time and date of the interview and the people present
- Prepare your interview notes professionally -- they may be used as evidence in a future legal proceeding and may be relied upon by the decisionmaker or during the appeal process

Take notes. More tips.

- Document facts and observations
- Make a note of information relevant to credibility
- Observe subjects for implausible statements, questionable physical and verbal reactions, inconsistencies, and so on

Take notes, but:

- **Don't** include irrelevant information in your notes
- **Don't** record your **conclusions** regarding credibility in the interview notes
- **Don't** document your opinions

Preparing the Investigation Report

- Write a comprehensive investigation report fully summarizing the investigation.
- The report should include:
 - ***Procedural history of claim***
 - Outline how the complaint progressed to the investigation stage
 - Describe the process undertaken to review the evidence and disseminate the investigative report including the adherence to mandated procedural timelines
 - ***Summary of the allegations potentially constituting sexual harassment***
 - ***Any relevant policies referenced/the evidentiary standard utilized***

Preparing the Investigation Report

- ***All witness interviews***
 - Include the date of the interview, attendees, and a summary of the interview
- ***All relevant evidence (inculpatory and exculpatory)***
 - Include all relevant evidence gathered throughout the investigation
- ***Investigation Timeline***
 - Note any irregularities in the timeline of the investigation
 - Note if any of the witnesses asked the investigator to follow certain “leads” that the investigator was unable to pursue due to lack of time/resources
- ***Appendices that include relevant physical or documentary evidence***
 - Include any physical, demonstrative, or documentary evidence as an appendix to the report

Preparing the Investigation Report

- As the investigator prepares the report: The investigator gathers, assesses, and synthesizes evidence, **but** makes no conclusions, engages in no policy analysis, and renders *no recommendations as part of the report*
- *If there is a conclusion or a finding of responsibility in your draft report, REMOVE IT!*

Finalizing the Investigation Report

- Prior to the conclusion of the investigation, you must provide the parties and their respective advisors a copy of the *draft* investigation report.
- The parties get an opportunity to inspect and review all of the evidence obtained as part of the investigation.
- The parties must get ten (10) calendar days to review and comment so that each party may meaningfully respond to the evidence (which they could waive).

Finalizing the Investigation Report

- The investigator should incorporate relevant elements of the parties' written responses into the final investigation report.
- The investigator should document all rationales for any changes made after the review and comment period in the final report.

The Final Investigation Report

- The investigator must share the final investigation report with all parties and their advisors through secure electronic transmission or hard copy at least ten (10) calendar days prior to a hearing.
- The final investigation report should note the date on which it was sent to the parties and their advisors.

The Final Investigation Report

- The investigator must also send the final investigation report to the Title IX Coordinator.
- Provided the complaint has not been resolved through Informal Resolution during this period, the Title IX Coordinator will then refer the matter to the college's hearing process and issue a notice of hearing to the parties.
- The parties will be able to submit arguments to the decision-maker regarding the report as part of the hearing process, including why certain evidence is (or is not) relevant to the allegations in the complaint.

Quiz – Test Your Investigation Skills!

- Mike is preparing an investigation report regarding a claim of sexual harassment filed by a complainant, Will. In Mike's investigation report, he states the following:
 - *The complainant, Will, frequently contradicted himself with respect to his claims that he was sexually harassed. Will is lying about the conduct in question and his complaint should therefore be dismissed.*
- **Quiz: Is this acceptable language for the investigation report?**

Quiz – Test Your Investigation Skills!

- **Answer:** No – the language in the report contains a conclusion that Will is lying about the conduct in question and a recommendation with respect to the disposition of the complaint (i.e., that it be dismissed), which the investigation report *cannot* contain and is not for the investigator to decide.
- The investigator can note the instances when Will contradicted himself throughout the interview but should not include an opinion on his credibility or any conclusions in the report.

Quiz – Test Your Investigation Skills!

- The college's Title IX investigator, Paige, notes the following in her investigation report regarding her interview with the respondent, Callie:
 - *Callie directed to me to speak with three witnesses whom she believed would provide exculpatory evidence on her behalf. These witnesses were not contacted as part of the investigation because they are not students or employees of the college.*
- **Quiz: Is Paige's decision to not interview the witnesses because they are not affiliated with the college appropriate investigatory conduct?**

Quiz – Test Your Investigation Skills!

- **Answer:** No – the fact that Callie's witnesses are not students/employees of the college does not render them ineligible as potential witnesses, and Paige should have contacted them to schedule interviews/obtain evidence from them.
- If Paige had contacted the witnesses and they were not willing to participate in the investigation, Paige should describe in the report her efforts to contact the witnesses and the reason(s) for their refusal to participate.

Quiz – Test Your Investigation Skills!

- Carl is interviewing a student witness (Margot) identified by the complainant in a sex harassment case. Margot informs Carl that she has no interest in providing testimony and that she wants to leave the interview. Carl informs Margot that she may not leave until the interview is complete and that if she does not participate, she will be subject to disciplinary measures, up to potential expulsion.
- **Question: Are Carl's actions appropriate for a Title IX investigator to take with an uncooperative witness?**

Quiz – Test Your Investigation Skills!

- **Answer:** No – Carl should allow Margot to leave the interview and should not threaten her with potential discipline (including expulsion) for indicating that she does not want to participate in the investigation.
- In this instance, Carl should contact the college's legal counsel and inform him/her of the Margot's unwillingness to participate in the investigation and together they can determine whether any recourse is available besides excusing her from the investigation.

WHAT QUESTIONS DO YOU HAVE?

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