

Title IX Coordinator Training Online Course

Class Two: Conducting a Title IX Investigation

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April 18, 2023

Class Overview:



- Case Study – Review of Class I Concepts
- Investigations
 - Impartiality/Conflicts of Interest
 - Investigations Involving Employees
 - Investigating a Formal Complaint
- Understanding Relevance
- Investigative Report
- Violations of Other Policies
- NPRM Changes

Case Study

Part I: Reviewing Class 1 Concepts.

Anna Smith,
the Title IX Coordinator
at NACUA University,
woke to the following
email in her inbox.

To: TitleIX@nacua.edu
From: Prof. Jones, Dean, College of Arts & Sciences
Date: Wednesday, October 21, 2022

This morning, a student named Jordan Jones told me that they were sexually assaulted over the weekend and couldn't finish a paper in time. I spoke with Jordan at length about what happened and Jordan gave me permission to share this information with you. This isn't the first time I've learned of something like this. I need to know what I'm supposed to do. Heads up – the perp is in another class of mine.



Initial Outreach to Jordan Jones

Ms. Smith receives the following email that same day:

Is this a formal complaint, triggering an investigation under your school's Title IX policy?

To: TitleIX@nacua.edu
From: Jordan Jones
Date: October 21, 2022

Thank you for reaching out. On the way home from a party downtown Saturday night, I went with RK to his room at the ABC Fraternity house. That's where RK raped me. At this point, I really just want RK to have to meet with you and me, so that we can both tell him what RK did was wrong. If RK apologizes, I don't want to take this any further. I can meet tomorrow, at the time you suggested.

Jordan meets with Ms. Smith and decides to file a formal complaint.

Before calling RK in for an interview, Ms. Smith needs to send a Notice of Allegations to RK and Jordan. This is what it contains:

Is anything missing?

NOTICE

- Access to the Title IX-compliant policy.
- Notice of the allegations that may constitute the prohibited conduct, with sufficient detail for RK to prepare a response before any initial interview.
- Notice of the Parties' entitlement to an Advisor of choice.
- The identity of the Investigator – Jean McDonald.
- Notice that the Parties may inspect and review evidence gathered during the investigation.
- Notice that the University's policies prohibit knowingly making false statements or knowingly submitting false information.

The day after she issues the notice of allegations, Ms. Smith receives the following email:

What should Ms. Smith do?

To: TitleIX@nacua.edu
From: Amanda Law
Date: October 24, 2022

I represent RK's family. I have learned that RK is being falsely accused of rape, and I am writing to have the unfounded charges dismissed immediately. RK's parents and I will not permit RK's education to be disrupted by a vindictive college student with an ulterior motive. Jordan Jones is bitter because RK didn't reciprocate Jordan's feelings after they had a fully consensual sexual encounter. If the University insists on pursuing this matter, RK's family will take all legal measures available to them.

Investigations

Impartiality, Bias, Prejudgment & Conflict of Interest



Investigations Involving Employees

The Basics:

- The regulations also apply to employee complainants and respondents in matters involving allegations of Title IX sexual harassment.
- Investigations of formal complaints of conduct potentially constituting Title IX sexual harassment involving employees must comply with the regulations.
- Institutions must use the same procedures and standard of proof to address employee and student allegations of Title IX sexual harassment.

However:

- Title VII also applies.
- The Title VII and Title IX requirements are not completely aligned. For instance, Title VII may provide for broader remedies than Title IX.
- Collective bargaining and other contractual obligations may also apply.
- OCR expects institutions to comply with *all* requirements.

Title VII



- Standards
 - Submission becomes a term or condition
 - Unreasonably interferes with work performance or creates a hostile environment
 - Employer knew or should have known
- Immediate and appropriate corrective action
 - End the harassment and prevent recurrence

Special Considerations

- Administrative leave
- Title IX
 - “Reasonably prompt timelines,” and
 - Supportive measures must be non-punitive and non-disciplinary until the process is complete
 - Administrative leave for non-student employees as well as emergency removal.
- Title VII
 - “Immediate and appropriate corrective action”



Investigating a Formal Complaint

Conducting an Investigation



- Don't restrict the ability of either party to discuss allegations or gather evidence.
- Provide parties written notice sufficient to prepare.
- Allow parties an equal opportunity to identify witnesses, as well as inculpatory and exculpatory evidence.
- Allow parties to have advisors.
- Don't access, consider, disclose or otherwise use a party's records prepared by a professional in a treatment capacity without the party's voluntary, *written* consent.

Interviews



Consider whether interviews will be:

- Recorded or not recorded.
- Followed with written statements or summaries.

What does your policy say?

When interviewing, the investigator must:

- Be free of conflicts of interest.
- Be prepared.
- Be objective, unbiased, and free from stereotypes.
- Avoid prejudging parties or responsibility.
- Demonstrate respect for all parties and witnesses.
- Take the lead in seeking evidence (inculpatory and exculpatory) – it is not the parties' responsibility to investigate.
- Be alert to/consider carefully non-verbal communications.

Evidence: Directly Related vs. Relevant

Investigation vs. Hearings:

- **Investigations:** Directly Related to the Allegations
- **Investigation Report:** Relevant Evidence
- **Hearings:** Relevant Evidence
- “The Department acknowledges that the evidence gathered during an investigation may be broader than what is ultimately deemed relevant and relied upon in making a determination regarding responsibility, but the procedures in § 106.45 are deliberately selected to ensure that all evidence directly related to the allegations is reviewed and inspected by the parties, that the investigative report summarizes only relevant evidence, and that the determination regarding responsibility relies on relevant evidence.”

Understanding Relevance

How is Relevance Defined?



- The Department declines to define certain terms in this provision such as “upon request,” “relevant,” or “evidence directly related to the allegations,” as these terms should be interpreted using their plain and ordinary meaning.
- The Regs do not adopt the Federal Rules of Evidence.

September 4, 2020 Guidance from OCR

So What Is the Ordinary Meaning of the term?

- Evidence is relevant if:
 - It has any tendency to make a fact more or less probable than it would be without the evidence; *and*
 - The fact is of consequence in proving or disproving the allegations.
- In other words: Does the evidence tend to prove or disprove the allegations?
- A determination regarding relevancy can rely on logic, experience or science.

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

BUT YOU JUST SAID ...



National Association of College and University Attorneys

Should All Relevant Evidence Be Considered?

- Schools are not permitted to adopt rules that would exclude relevant evidence, e.g., that may be deemed to be unduly prejudicial, concern prior bad acts, or constitute character evidence.
- A school may not exclude relevant evidence (e.g., lie detector test results, or rape kits) unless the evidence is identified as “NOT RELEVANT” under the Regulations.

What Evidence is “NOT RELEVANT” Under the Regulations?

- A party’s treatment records, without the party’s prior written consent [§106.45(b)(5)(i)];
- Information protected by a legally recognized privilege [§ 106.45(b)(1)(x)];
- Questions or evidence about a complainant’s sexual predisposition, and questions or evidence about a complainant’s prior sexual behavior unless offered to prove
 - that someone other than the respondent committed the conduct alleged by the complainant, or
 - if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. [§ 106.45(b)(6)(i)-(ii)];

AND (as we will address with hearings)...

- Although the regulations provide that a decision-maker may not rely on the statements of a party or witness who does not submit to cross-examination [§ 106.45(b)(6)(i)], this provision is **not enforced by OCR but may apply under state law or law in some federal circuits.**
- A school's investigators and decision-makers must be trained specifically with respect to "issues of relevance" and any relevance rules adopted by the school should be detailed in its Title IX training materials.



Weighing of Relevant Evidence

Weight, Credibility, or Persuasiveness

- There is a difference between the admission of relevant evidence, and the weight, credibility, or persuasiveness of evidence.
- A school may adopt rules around weighing of evidence so long as they do not conflict with the regulations and they apply equally to both parties.
 - For example: A school may adopt a rule regarding the weight or credibility (but not the admissibility) that a decision-maker should assign to evidence of a party's prior bad acts, so long as its rule applies equally to the prior bad acts of complainants and the prior bad acts of respondents.

Completing the Investigative Report

Review of Evidence

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- Parties must have equal opportunity to inspect and review *all* evidence directly related to the allegations.
- Schools must:
 - Provide access to evidence to both parties and their advisors.
 - Allow the parties at least 10 days prior to inspect, review and respond to the evidence prior to completion of the investigative report.
 - Consider parties' written response before completing report.

Evidence Review - What do parties get to see?

- **Any evidence that is *directly related* to the allegations raised in the Title IX formal complaint.**
- This includes evidence that is:
 - (1) relevant,
and/or
 - (2) directly related.
- Only relevant evidence is included in the Investigative Report.

Investigative Report



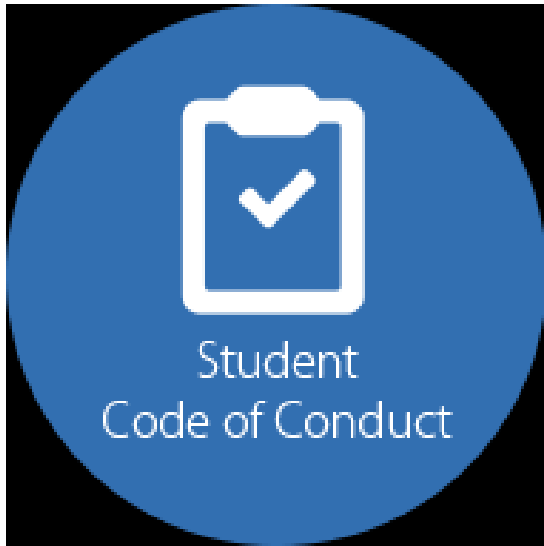
- Must fairly summarize the relevant evidence.
- Must provide the report to parties and their advisors for review and response at least 10 days before hearing.
- Either electronic or hard copy

Recommendations Regarding Responsibility

- Investigative Reports MAY include a recommendation regarding responsibility and related analysis.
- **However:** “The decision-maker is under an independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.” [Preamble, Fed. Reg. Vol. 85, No. 97, May 19, 2020, p. 30308]
- Decision-makers must make independent decisions based on:
 - Investigative report and related evidence, and
 - Information presented at hearing, including information resulting from cross-examination.

Violations of Other Policies

Violations of Other Policies



- Knowingly making false statements or submitting false information
 - Being alert to potential claims of retaliation
- Sexual Harassment not covered in the regulations but violating campus policies
 - Violations occurring in programs or at locations outside the current definition
 - Violations that don't meet the standards under the regulations
- Student Conduct violations
- Employee Conduct standards

Remember to update notice with later-discovered allegations.



NACUA

NPRM:

REMEMBER: NOT IN PLAY NOW



Proposed Changes

7/22 and 4/23



- Handling complaints
 - All allegations of sex discrimination, including sexual harassment, must be handled using procedures required by the regulation.
 - The single investigator model is permitted with provisions prohibiting bias or conflicts of interest in addressing all complaints of sex discrimination.
- Title IX Coordinator
 - May investigate and/or decide Title IX grievances.
 - Must monitor for barriers to reporting and take steps to address
- **NEW** - Eligibility Criteria for Male and Female Athletic Teams
 - Sets limits on the criteria that would limit or deny a student's eligibility to participate on a male or female athletic team consistent with their gender identity.
- Investigations
 - Burden is on the institution to gather evidence
- Relevance is defined (!!!)
- Institutions must provide parties a description of the relevant evidence
- Requirements that apply only to sexual harassment complaints involving students at post-secondary institutions
- Require all, except confidential, employees to notify the Title IX Coordinator of possible sex discrimination
- Clarify obligations to students and employees who are pregnant or experiencing pregnancy-related conditions

Questions?

Note

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