

Master Title IX Investigations & Investigative Techniques



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Terms

- **Complainant** is an individual alleged to be the victim of conduct that could be sexual harassment.
- **Respondent** is an individual alleged to have engaged in conduct that could be sexual harassment against the Complainant.
- **Formal Complaint** is a document filed by a Complainant (or parent/guardian) or signed by a Title IX Coordinator alleging sexual harassment against a Respondent and requesting that the school investigate the allegation.
- The **Grievance Process** applies "irrespective of whether the complainant or respondent is a student or employee."

Have Your Procedures in Place

Investigation procedures should be developed prior to receipt of complaint

- Identify Investigator(s)
- Have Investigators trained
- Know what you will do when you receive a complaint
- Are you ready if witness needs translating? What if they have a disability (auditory)? Plan for all possibilities.

After you have...

- Reported to CPS/Police
- Determined complaint meets requirements under Title IX
- Offered supportive measures
- Decided if emergency removal is appropriate
- Notice to the parties, discussed confidentiality with parties and supplied Respondent with copy of the complaint
- Gotten past Facilitator efforts, if any

Confidentiality

- Prior OCR guidance instructed schools to investigate even when the Complainant did not want the school to investigate.
- The new regulations obligate schools to initiate the grievance process when a Complainant files or a Title IX Coordinator signs a formal complaint, so that the Title IX Coordinator takes into account the wishes of a complainant and only initiates a grievance process against the complainant's wishes if doing so is not clearly unreasonable in light of the known circumstances.

What are you looking for? Sexual Harassment*

1. Quid pro quo
2. Hostile environment
3. Sexual assault, dating violence, domestic violence, stalking



Severe, pervasive, and
objectively offensive

*In a school program or activity in the United States

Should I Investigate?

- Do I have an axe to grind with the Complainant or Respondent?
- Do I have any bias?
- Am I trained?
- Have I been involved in any incidents that prompted the investigation?
- Am I related to or under the supervision of the Respondent, if employee?
- Will my being the investigator be perceived as a problem?

What is the Local Standard of Evidence?

- The degree or level of proof demanded in a specific case.
- District choice: preponderance of evidence, clear and convincing evidence

Preponderance of Evidence

The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.

Clear and Convincing Evidence

Evidence indicating that the thing to be proved is highly probably or reasonably certain.

This is a greater burden than preponderance of evidence, the standard applied in most civil trials, but less than evidence beyond a reasonable doubt, the norm for criminal trials.

Remember: Equitable Treatment of Parties

- Providing remedies to Complainant where a determination of responsibility for sexual harassment has been made
- Following a grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a Respondent
- Presumption that Respondent is not responsible for the alleged conduct until the conclusion of the grievance process

Equitable Treatment of Parties

- Not making credibility determinations based on a party's status as a Complainant, Respondent, or Witness
- Not restrict the ability of either party to discuss "the allegations under investigation" or to gather and present relevant evidence

Equitable Treatment of Parties

- Equal opportunity to review evidence
- Equal opportunity to present witnesses and other evidence
- Considering inculpatory and exculpatory evidence
- Objective evaluation of evidence

Evidence: Inculpatory & Exculpatory

Inculpatory evidence: showing or tending to show one's involvement in a crime or wrong

Exculpatory evidence: tending to establish a person's innocence

Expert Witnesses

A person who, through education or experience, has developed skill or knowledge in a particular subject, so that he or she may form an opinion that will assist the fact finder.

E.g., medical doctor, psychologist, law enforcement officer/investigator

Legal Privileges

The new regulations ensure that the grievance process respects information protected by legally recognized privilege (e.g., attorney-client, doctor-patient, spousal privilege, priest-penitent).

Legal Privileges

The District cannot require, allow, rely upon, or otherwise use questions or evidence that constitute or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Law Enforcement Investigation

- The District may abate* its investigation temporarily, if request by law enforcement officials.
- Document the request.
- Get a timeframe.
- Check with law enforcement on a weekly basis to determine status of investigation.
- Do not want obstruction of justice charge against you.

Investigation Timelines

- The regulations do not dictate any timelines for initiating or completing investigations.
- They should be initiated and completed promptly.
- It will depend on the nature of the allegations and scope of the investigation.

Notice of Interviews

Parties are entitled to written notice of the following for any meeting in the grievance process, including interviews, with sufficient time to prepare:

- Date
- Time
- Location
- Participants
- Purpose of meeting

Notice of Interviews

- Parties may be accompanied by an advisor to interviews/any meeting in the grievance process that they are expected to participate.
- Students may have a parent and an additional advisor.

Role of Advisors in Interviews

The District may establish rules limiting the participation and role of advisors in interviews and other meetings in the grievance process, as long as any restrictions are applied equally to both parties.

Role of Advisors in Interviews

- Advisors may observe but cannot answer questions for the student.
- Make advisor sit behind student.
- Advisors may not question students or staff at interviews.

Confidentiality of Process - Parties

- Schools cannot prohibit parties from discussing the “allegations under investigation” or from gathering their own evidence.
- This does not apply to information that does not consist of “the allegations under investigation,” (e.g., the evidence provided to the parties or the investigative report).

Party Evidence

- Parties have the right to submit their own evidence (e.g., text messages, photographs, medical reports, psychological reports).
- Parties should be told that any evidence submitted will be shared with the other party.

Interviewing Witnesses

- No one can be required to participate in an investigation.
- The regulations prohibit retaliation against any person for participating or refusing to participate in a Title IX proceeding.

Witnesses

Witnesses are not entitled to written notice before being interviewed or to be accompanied by a parent/advisor.

But have parent permission to tape record.

Research Before Interviewing

- Review the policy and be familiar with the burden of proof and definition of sexual harassment
- Who are the parties?
- Employee? History...time with the District?
- Student disciplinary history?
- Relationship between the parties?
- Prior complaints?
- Prior claims made by others?

Look at Documents You Have

- Discipline records
- Academic records
- Personnel records
- Correspondence between Complainant and Respondent

Make Decisions on Note-taking and Recording

- Who takes the notes?
- Do we sign the notes?
- Do we want to record?
- Be consistent.
- Test your equipment.

Sherlock Holmes

“You see, but you do not observe.”

The Key to Lie Detecting

- **Comfort.** You must always begin with benign get-to-know-you questions and observe their mannerisms when relaxed (or at least semi-relaxed). This is seen as rapport building. Once you recognize how they answer relaxing non-challenging questions (weather, where they went to high school or grew up, sports, or other unrelated topics), it is time to truly begin.
- Your demeanor must always be calm.

Your Role: Neutral

- You are there to find facts; the verbal and nonverbal cues or tells we are discussing may help you evaluate who you believe and who you think is less credible.
- There is no such thing as a perfect lie detector – THERE IS NO SINGLE BEHAVIOR THAT IS INDICATIVE OF DECEPTION.

Sometimes the Goal of Questions is to Elicit Nonverbal Responses

If you had sexually harassed this person, would you have called her...

- a queer?
- a lesbian?
- a dyke?
- butch?

Observe eyes to see if they avoid you when you use "their term."

Nonverbal Communications that indicate discomfort in a question or subject*

- Eye-blocking
- Facial expressions
- Gestures
- Touching (haptics)
- Physical Movements (kinesics)
- Posture
- Tone

In Poker We Call These Nonverbal Actions "Tells"

Navarro v. Pease v. Gladwell

- Navarro spent 25 years at the FBI, working both as an agent and supervisor in the areas of counterintelligence and counterterrorism. He says there are no tell signs for lying; there are tell signs for stress, and stress *may* be lying.
- Gladwell's emphasis was not lie detection but trying to understand other people
- The Pease book (written by Mr. and Mrs. Pease) opines as if it is definitive based upon their experience having written 11 other books on communication and body language.

According to Pease...

"Eight of the Most Common Lying Gestures"

1. The Mouth Cover
2. The Nose Touch
3. What about itchy noses? That results in a rub or scratch, as opposed to a touch
4. The Eye Rub
5. The Ear Grab
6. The Neck Scratch
7. The Collar Pull
8. Fingers-in-the-Mouth

Back to the FBI: Rules for Observing

Get to Know People's Baseline Behaviors

- Get to know how your friends look normally, how they sit, where they place their hands, how they position their feet, their posture, tilt of head, where they generally place their possessions (e.g., purse).
- By examining what is normal, we more easily recognize what is not normal.
- Do they stutter, ticks, shake, have a disease or condition that causes atypical baseline mannerisms?

Rules for Observing

Be a competent observer of your environment

- DON'T MAKE IT OBVIOUS YOU ARE OBSERVING THEM FOR NONVERBAL CLUES!!! **DO NOT STARE!**
- Becoming aware of your world is not a passive act – effort, concentration, and constant practice
- Do things look normal, smell normal?
- *"My wife just filed for divorce. I never had a clue she was unhappy with our marriage."*

Rules for Observing

Observe in context helps to understand

- What would the normal reaction be to a situation?
- After auto accident – we expect shock and dazed, hands trembling, disorientation, nervousness, discomfort, making poor decisions
- Job interview – nervousness should dissipate along the way

Begin with friendly questions to put subject at ease so you recognize their at ease nonverbal cues. Do not start on interview until you have observed.

Rules for Observing

Recognize and Decode Universal Behaviors

- Pursing lips is a sign of someone troubled/something is wrong
- Eyebrows knitted – troubled or concentrating hard
- Face contorted, forehead furrowed
- Tense or Intense looking
- Voice crack, dry throat
- Chatter is not truth; truth is revealed in verification of facts, not volume of information spewed by witness

Rules for Observing

Recognize and Decode Idiosyncratic Nonverbal Behaviors

- By observing at-ease behavior you can more easily recognize behavioral patterns.
- Talk about an interest and observe their mannerisms when they get excited about something
- Some people stick out their tongue or move to corner of mouth when concentrating harder
- Eyes may open wider on topics they prefer to discuss

Rules for Observing

Look for Multiple Tells

- When negotiating with someone if they appear stressed you know they are bargaining from a position of weakness
- When the person is nonplussed or indifferent it could mean it is not important to them or they don't feel the need to compromise

Rules for Observing

Changes in Behavior Can Signal Changes in Thoughts, Emotions, Interest, or Intent

- A child that hugs all their aunts and uncles but then hesitates with one relative
 - Could have been a disagreement
 - Could have been something worse

Rules for Observing

Distinguish Between Comfort and Discomfort

- Comfort Behavior (e.g., relaxation)
- Discomfort Behavior (e.g., stress, anxiety, tension)
 - Nostrils flaring, eyes fixed on something

The Three F's of Nonverbals

Freeze
Flight
Fight

Freeze Response

Hold breath, try to be invisible
Turtle look – shoulders up, lower head – like dejected team after football game walking to locker room
Arms not moving freely when walking

Flight Response

- Leaning Away
- Eye Blocking with hands
- Placing objects between oneself and threat (purse in lap)
- Feet – are they turned away?

Fight Response

- Aggression
- Insults, sarcasm
- Posture, puffing our chest, stern eyes, violating one's personal space

Discomfort Signals

People under stress give tells:

- Rubbing neck when asked a question, pulling on collar
- Touches hair
- Touches mouth
- Looks away
- Touching neck dimple
- Presses or strokes legs or arms, tapping
- Chew gum, play with objects, jewelry, play with pencil
- Yawning can be a sign of stress –dry mouth

Discomfort Signals

People under stress give tells:

- Tightening of jaw muscles
- Flaring of nose wings
- Crinkle of nose
- Squinting of eyes
- Quivering of the mouth
- Stiff neck, no head tilt

Eyes – the Other Pupils We Worry About

- When we like something we see, our pupils dilate; when we don't, they constrict
- When surprised, or suddenly confronted, our eyes open up – not only do they widen but pupils quickly dilate to let maximum amount of available light, thus sending max amount of visual info to brain

Eyes – the Other Pupils We Worry About

- Do not make assumptions based upon eye aversion. Some people avert eyes from authority, others when thinking. Do not presume it is a sign of deception.
- However, blinking can be a sign of trouble, nervousness, or concern. A sudden series of rapid eye links could be a sign of stress or surprise, but you must base that on the base eye blinking when relaxed.
- Eye rolling can be a sign of contempt

The Lips

- Lip compression or disappearance of lips can mean someone is being less than truthful. A good question to ask is *“Are you hiding something from me?”* and watch their lips. If the lips disappear or compress, they probably are hiding something.
- People also purse their lips when reading something with which they might disagree

The Feet Can Lead to Defeat

- Happy feet is an example of high confidence – child excited to go on Disney ride or to see Mickey
- Could be nervous behavior, so make them at ease to see what “normal is” – it could also be impatience, or a disease (e.g., Parkinson’s)
- Moving feet or torso in direction other than straight can mean discomfort, disengagement – watch for shifts – sign for wanting to depart

The Feet Can Lead to Defeat, Part II

- People in confrontational situations do not cross their legs – that would take away their balance
- When one’s feet go from being together to being spread apart it can mean increasingly unhappy – managing and protecting space.
- If you wish to lessen tension, cross your legs or pull them together
- Crossing leg toward someone shows comfort, away or toward door can mean less comfort/fleeing response
- Interlocked feet (ankle lock) below chair – discomfort or insecurity

Hands can be Handy

- Stress and nervousness can often be seen in hands.
- Hidden hands is a sign of discomfort, hiding sweating, quivering
- Give them a piece of paper or pen to hold (perhaps have them read something aloud) to see if hand is shaking
- Remember context – Parkinson's or excitement can cause quivering, too (think Beatles with fans shaking in excitement)

There are phrases that should also alert you to possible lying

- “Believe me when I tell you....”
- “Honestly, ...”
- “To tell you the truth...”

Silence is **Golden**

- Do not feel you must fill the void
- Silence is an opportunity to observe their mannerisms
- Do not let them off the hook through silence – wait them out for an answer to your question.
- Questions like “I don’t understand” and “Can you explain how that happened again?” will help in sorting between deceit and truth.

Words Matter – Analyzing What they Say

Statement Analysis

The Letter “I”

- Truthful people give statements using the pronoun “I”
- Any change in the use of a pronoun is significant
- Lack of pronoun should tell the investigator that the statement has become devoid of personal involvement

Statement Analysis

“I” versus “We” when asked a direct question

- Look for the overuse of the pronoun “We”
- Ask yourself, why is there no individual involvement?
- Perhaps the person is trying to conceal something or avoid sole responsibility for some act

Statement Analysis

The Pronoun “We” when talking about other people

- “We” denotes togetherness; it indicates a relationship between two persons.
- Omission of the word “we” is significant, particularly if the two individuals are spouses.
- The lack of the word “we” reveals distance.
- Use of the word “we” reveals personal involvement .

Statement Analysis

Possessive Pronouns

- Possessive pronouns reveal the attachment that the writer/speaker acknowledges toward a person or object.
- Investigators should look for the exact point at which the owner stops taking possession by failing to use the pronoun “my.”

Statement Analysis

Nouns

- Look for changes in noun usage.
- Ask yourself what makes this point in the narrative significant?

Verbs

- In truthful statements the use of the past tense is normal.
- A change to present tense could indicate deception.

Statement Analysis

Extraneous Information

- A truthful person with nothing to hide will reveal the events chronologically and concisely.
- Extraneous information should be a clue to possible deception.

Statement Analysis

Lack of Conviction

- Look for feigned memory
- Look for phrases like “I think” or “I believe”
- Avoiding commitment should send up red flags

Statement Analysis

Balance

A truthful statement has three parts:

- 1) what happened before the event occurred;
- 2) the occurrence itself;
- 3) what happened after the event, including actions and emotions

The more balanced the 3 parts, the more likely the statement is true

Statement Analysis

1) Start with innocent questions

Name age address employment etc.

The purpose of this is to acclimate the accused to the interrogation environment, while at the same time affording the interviewer an opportunity to evaluate the suspect's normal verbal and non-verbal behavior.

Statement Analysis

2) Ask a "know why" question

Do you know why we are here?

Do you know why you are here?

If the suspect is vague, naïve or evasive in his reply, that should suggest guilt.

"I suppose you want to talk about ..."

A blunt response is more characteristic of an innocent person.

"You're trying to find out who stole the money"

Statement Analysis

3) Provide an opportunity for confession

We have interviewed a lot of people, the pieces are falling together quickly. If you had anything to do with this, you should tell me.

In the absence of an admission of guilt, the interviewer's question will nonetheless serve the purpose of inducing a display of behavior response suggestive of guilt or innocence.

Compare both verbal and nonverbal behavior.

Statement Analysis

4) Ask questions about the event

Why do you think someone would do this?

The guilty will be faced with a dilemma when asked this because he is in essence having to reveal why he committed the crime; he may hesitate or repeat the question as a stall tactic. The guilty are more likely to provide a possible motive. Watch for body language.

Statement Analysis

5) Invite the accused to assist in the investigation

Of the other custodians you know, who would be above suspicion?

If he is being truthful, he will rapidly name specific individuals who he feels would be above reproach or for whom he would vouch for as not being involved.

The guilty usually do not want to eliminate anyone from suspicion b/c that would tend to narrow the search down to them. Again, watch for shifting body language.

Statement Analysis

6. Ask the accused to assess proper punishment

What do you think should happen to the person who stole this money?

Listen CAREFULLY to Answers

- Did they answer your question?
- Did they equivocate so they can deny later?
- Remind them that if they do not understand a question to ask to tell you so you can clarify.
- If you do not have a clear answer to your question either ask it again or ask it in a different way.
- Do not let them answer the questions they want, make them answer your questions. However, letting them talk sometimes will give you more questions, so be cautious about cutting them off.

Interviewing

- Generally, meet with the Complainant first.
- Provide enough time.
- Make it a neutral area.
- Do not rush. Remember this may be embarrassing.
- You want as much detail as possible. Provide time to think and opportunity to return.
- Tell them there will be no retaliation and to report any retaliation to you immediately.

Written Statement

Determine whether age/developmentally appropriate to obtain a written statement from a student.

Written statements:

- Shows seriousness
- Helps assure later testimony
- Solidifies testimony
- Helps determine requested outcome

Questions for the Complainant

- What happened – exactly?
- When – date and time?
- Where – specific (room, trip, outdoor)?
- Happen online?
- Why were you and this other person together?
- What happened or was said just before?

Questions

- What exactly was said?
- What was the tone?
- Expression when said?
- Gestures or motions?
- Touch you in anyway?
- Did you touch them?

Questions

- Can you describe the type of touching?
- What did you say in response to any touching?
- How did the words or conduct make you feel?
- Have you had conversations or interactions with this person before?
- Was the tone or atmosphere different?

Questions

- How long have you known the person?
- Was anyone else present?
- Who?
- Have you told anyone else about this?
- Who, and when, and what did you say?
- Has anything similar happened before?
- If yes, ask the same type of questions about each prior incident.

Questions

- Do you have any written documentation?
- Anything on social media such as Instagram, Snapchat, Facebook, Twitter, or other evidence for me to review?
- Are there any other individuals you would like me to interview?

Remember:

Do not ask about prior sexual behavior or sexual predisposition unless to establish that another person committed the alleged conduct or that the conduct was consensual.

Thoroughness

- **Do not interview only the Complainant and the Respondent.**
- Who else was there? [Corroboration]
- Who else knows about this? How? [Contemporaneous discussions]
- Is there anyone else you would like me to interview about this? [Thoroughness; other victims]
- Are there any other documents you would like me to review?
- Must thoroughly document procedures

Questions for Corroborating Witnesses

- Where were you at on (fill in the date and time of the incident as alleged)?
- If online – have you seen the online material?
- Who else was there at the time, or does anyone else know about this?
- Did you see the parties in that place or at that time?
- Did you see or hear any interactions/conversations between the parties?

Questions for Corroborating Witnesses

- Please tell me in your own words what you saw or heard.
- What exactly did you hear – the precise words?
- What exactly did you see and from how far/angle/obscured?
- How did alleged victim look?
- Did the subject make any motions or gestures?
- What response did you see or hear from the alleged victim?

Questions for Corroborating Witnesses

- What impressions do you have about what you saw or heard?
- Do you have personal knowledge of prior interactions?
- Do you know either party? How well and in what capacity?
- How long have you known either?
- Is there any current or former relationship with either?
- Do you have opinions about trustworthiness? What led you to that opinion?

Questions for Corroborating Witnesses


- Do you know either of the parties?
- How well do you know them?
- How do you know?
- Is there an official relationship?
- Description of their character, personality, nature.
- Know of any similar past events?

Questions for Corroborating Witnesses

- Have you observed either or both interact with persons of different (sex, race, age, size, religion)?
- What were your observations or impressions?
- Do you know if either is generally truthful or deceptive?
- Do you know anyone else that may know about any of these issues?
- Have you heard others talking about it – who?

Issues for Students

- Do not need parental consent to interview
- Written consent is needed when recording (A/V) a student interview related to an investigation. See Tex. Educ. Code § 26.009.

*Including recording a video conference that is not related to a regular classroom purpose.

Issues for Students

- Consider interviewing in environment comfortable to them
- Classroom or library, other than office
- Who will be present?

Issues for Students

- Involve the professionals on campus when appropriate and able.
- Do not ask leading questions: Isn't it true that you did X because of Y?
- What did you do? Why did you do it?
- Consider audio recording with consent if child cannot write statement.

Issues for Students

- Never interview together
- Always take students one at a time – protects against duplication, false memories
- Provides a clearer picture of events
- If parents present, set the ground rules – silent observer, cannot lead.

Issues for Students

- Start with small talk* – developing trust.
- Learn what the student has told others about incident.
- Determine how others have reacted.
- Ask questions many times in different ways.
- Don't have an agenda. Students often say what they think you want to hear.

*The Investigator should assess the credibility of witnesses, so observe how witnesses respond to simple questions to learn the baseline of behavior of a witness.

Interviewing Respondents

- Do you know the Complainant?
- How and for how long?
- What type of relationship, conversations, interactions in the past?
- Where were you on the date and time alleged?
- Why were you there?
- Who else was there?

Interviewing Respondents

- Was the Complainant there?
- Did you do or say anything in relation to the alleged victim?
- What exactly did you say or do?
- Tone of voice?
- Did you make any gestures or motions while speaking? What type? Show me.

Interviewing Respondents

- What did the Complainant say or do then?
- Did they make any gestures or motions? What? Demonstrate.
- Did they say or do anything in response to your statements or actions? What?
- Expression on his/her face?
- Did you touch them in any way? Demonstrate how.

Interviewing Respondents

- How did the words or conduct overall make you feel?
- Have you talked to anyone else about this matter?
- Who, when, where? Do you mind if I talk to them?
- Do you have anything else that you feel is important for me to know?
- Would you do the same thing if you were in front of your parent/grandparent/the principal?
- How would you feel if something similar happened to your younger sister/brother?

Things To Tell All Witnesses*

We will try to keep this confidential, but we cannot guarantee. You should not speak to others about what we have discussed.

Remind all about the anti-retaliation provisions.

*Remember that parties cannot be prohibited from discussing the allegations raised in the Complaint.

Dealing With Hostile People

- People become hostile or confrontational when talking about uncomfortable things.
- Appreciate and respect hostility – especially in parents.
- Understand where their concern comes from.
- Also understand that such behavior is ultimately counter-productive.

Dealing With Hostile People

- Do not respond in kind
- Think and talk positively
- First impressions are critical
- Show you are listening by repeating
- Speak softly, and they may do the same
- Give praise where you can

Dealing With Hostile People

- Acknowledge frustration
- Take time-outs
- Don't allow things to get personal
- Walk away when you need to

Evidence & Investigative Report

Parties' opportunity to inspect and review evidence and draft investigative report

Right to Inspect Evidence

Prior to completion of the investigative report, the investigator must send an electronic or hard copy of the relevant evidence* gathered to the parties and the parties' advisors, if any. The parties must be provided at least 10 days to submit a written response that the investigator must consider before completing the investigative report.

*Includes evidence not relying on for determination.

Right to Review Draft Investigative Report

The parties also have the right to see a draft of the investigative report and 10 days to provide a written response before it is finalized and sent to the Decision-Maker.

FERPA

- The Family Educational Rights & Privacy Act
- The U.S. Department of Education administers both FERPA and Title IX.
- The Department does not interpret compliance with its regulations under Title IX to violate requirements in its regulations under FERPA.

FERPA –Mixed Records

- The Department does not think that evidence obtained as part of an investigation pursuant to these final regulations that *is directly related to the allegations raised in a Formal Complaint* can be segregated and redacted because the evidence directly relates to allegations by a Complainant against a Respondent and, thus, constitutes an education record of both the Complainant and a Respondent.
- A Formal Complaint that raises allegations against a Student-Respondent is directly related to that student. The Department is bound by the U.S. Constitution and must interpret Title IX and FERPA in a manner that does not violate a person's due process rights, including notice and an opportunity to respond.

FERPA –Sharing Sensitive Records

- If a Complainant or Respondent provides sensitive records such as medical records as part of an investigation, then the parties must have an equal opportunity to inspect and review information that constitutes evidence directly related to the allegations raised in a Formal Complaint.
- If some of the information in the medical records is not directly related to the allegations raised in a Formal Complaint, then these final regulations do not require a school to share the information that is not directly related to the allegations raised in the Formal Complaint.

FERPA – Medical Records

Accordingly, a school would not have access to a party's medical records unless that party gave the recipient voluntary, written consent to do so for a grievance process under § 106.45(b).

FERPA – IEP/504 Plan

When a party offers an IEP or Section 504 plan as part of the evidence that a school should consider or has granted the school consent to use those records in a Title IX grievance process, then the other party should be able to inspect and review this evidence, if that evidence is directly related to the allegations raised in a Formal Complaint.

Right to Review Draft Investigative Report

The district can provide the evidence and investigative report using a platform that prevents copying and downloading to protect confidentiality.

Writing Investigative Rpts

Grievance Process: Investigative Reports 34 C.F.R. 106.45(b)(5)

Written investigative report “fairly summarizes the relevant evidence” provided to parties and advisors at least 10 days before hearing or other determination of responsibility

Investigative Reports

- Can include proposed findings of fact
- **Should follow format of requirements for decision**

Record Keeping

34 C.F.R. 106.45(b)(10)

At least 7 years. Check your FB(LOCAL).

Records related to alleged sexual harassment must be maintained for a minimum of 7 years.

- Investigation records
- Disciplinary sanctions
- Remedies
- Appeals
- Records of any actions taken, including supportive measures

At least 7 years.

Must document for every instance:

- why response was not deliberately indifferent
- that measures were taken to restore or preserve equal access to the educational program or activity
- if no supportive measures provided, why that was not deliberately indifferent

QUESTIONS?



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