



TITLE IX

POLICY AND PRACTICE

INVESTIGATOR TRAINING

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*Welcome
to...*

Overview of Investigator Training

- General Title IX basics
- Interview terminology
- Requirements and roles of the investigator
- Rights of the parties
- Evidence – burden of gathering, types, and considerations/relevance
- Gathering evidence
 - Investigation planning
 - Pre-interview evidence
 - Scheduling interviews / advisor Participation
 - Preparation for interviewing parties and witnesses
- The interview / trauma-informed interviewing
- Drafting the investigation report
- Review of draft investigation report by the parties
- Updating, finalizing, and submitting final report to parties before hearing





Rules of the Road

Questions are always welcome.

We are lawyers, but this is not legal advice.

If you haven't taken the intro session, you should.

Materials will be provided as required.

Finding our “True North”: The Starting Point for All Title IX Processes

Every participant, every witness, is a member of your campus community, inherently valuable as a human being, and worthy of being respected and believed.

Sexual violence causes extreme damage to individuals and to the campus culture you are trying to develop and maintain.



Model College is committed to providing a community in which the learning and working environment reflect our Mission. This environment is free from all forms of gender-based discrimination or harassment because **such behavior violates an individual's fundamental rights and personal dignity.** Model College considers gender-based discrimination to be a **serious offense** and has **zero tolerance.**

Sample Policy Language



Sample University believes in the **intrinsic value of all human beings**. Moreover, it is committed to the full, peaceable participation of all of its members in the educational endeavor it fosters. Sample University is committed to maintaining a learning and living environment which is **fair and respectful** and **will not tolerate** any threats or acts or sexual harassment, sexual assault or sexual violence.

Sample Policy Language



1

Title IX Basics

No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

This is Title IX

A bit of context...

Title IX

- Passed 1972, Regulations Updated May 2020 (and 2024?)
- Prohibits sex discrimination in schools receiving federal funds

Clery

- Requires timely reporting of crimes
- Includes requirement of policies and procedures regarding sexual assault

VAWA

- Expands Clery Act
- Includes dating violence, domestic violence, stalking

Title IX prohibits sex discrimination but... *what exactly does that include?*

- Sexual harassment
 - Education benefit premised upon participation in unwelcome conduct (quid pro quo); or
 - Unwelcome conduct that a reasonable person would determine is so **severe, pervasive, and objectively offensive** that it effectively denied a person equal access to the education program or activity.



Title IX prohibits sex discrimination but... *what exactly does that include?*

- Sexual harassment
- Sexual assault
- Dating violence
- Domestic violence
- Stalking
- *Sexual exploitation*
- Pregnancy and childbirth discrimination
- Retaliation



Retaliation

An institution's **response** to a complainant or respondent in response to a Title IX complaint may, itself, constitute discrimination on the basis of sex in violation of Title IX.



Title IX Principles and Limitations



- The school must have **actual knowledge** of the discrimination.
- The school must have **substantial control** over the Respondent, the context, and the building.
- Off campus buildings included only if owned or controlled by **official student organization**.
- Incident must have occurred **within the USA**.

Know and Understand the Standard of Proof

Preponderance of the Evidence

OR

Clear and Convincing
Evidence

The burden is on the institution, not the parties.



Informal Resolution



- Available as alternative
- Both parties must agree
- Cannot use when employee is party
- Can return to formal at any time until resolution is complete
- Enormous creativity available in possible resolutions

Formal Resolution

- Complaint Process
 - Notice of Allegations
 - Appointment of Investigator
- Live Hearing
 - Decision Maker or Panel questions
 - Cross Examination by Advisors
 - Determination of Responsibility
 - Consideration of all relevant evidence
 - Determination report



2

**Foundational
concepts
for investigators**

Selection of Investigator

- Internal or external to institution
- Appropriately trained
- Alone or in pairs
- Free from bias
- Able to maintain privacy
- Trust and temperament



Party Terminology

The Parties to the investigation should be referred to as:

“Complainant” and “Respondent”

Rather than:

“victim”

“survivor”

“reporting party”

“accuser”

“perpetrator”

“offender”

“responding party”

“accused”

Investigator Conflicts of Interest & Bias

Investigators must not have a conflict of interest or bias for or against the Complainant, Respondent, or the subject matter of the complaint. **Investigators must be neutral, objective, and impartial.**

- Recuse yourself if you know the parties, including if they have been one of your students.
- Do not make assumptions about guilt, a party's race, ethnicity, religion, sexual orientation, affiliation to Greek life or athletics, etc.
- Avoid implicit bias, such as sex stereotyping.
- Be careful of bias and assumptions related to a person's culture or neurodivergence.

Roles of the Investigator

- Conduct an investigation that is prompt, thorough, fair, equitable, and impartial.
- Make a thorough search for relevant facts and evidence sufficient for adjudicators to reach a determination.
- Maintain an investigation file.
- Prepare investigation report.

Investigations are for evidence gathering, not fact finding:

Do not make determinations.

Rights of the Parties

- Present their statements, evidence, and identify witnesses
- Discuss the allegations under investigation
- Opportunity to review and comment on the draft investigation reports and evidence
- Be accompanied by an advisor of their choice to any meeting, interview, hearing, etc.
- Written notice of the date, time, location and purpose of meetings, interviews, hearings, etc., with sufficient notice to prepare

3

Gathering Evidence

Burden of Gathering Evidence

- The burden of proof and the burden of gathering evidence is **on the school**, not on the parties.
- The burden of proof is either:
 - **Preponderance of the evidence** (more than 50%)
 - **Clear and convincing evidence** (more stringent)

Types of Evidence to Collect

Testimonial

Interviews of:

- Parties
- Witnesses
- Expert witnesses

Can include hearsay and character evidence

Non-Testimonial

Electronic:

- Text messages
- Photos/videos
- Call history/voicemail
- Screen shots/clips
- Social media posts
- Security video
- Key card logs
- Information on school servers/email

Documentary:

- Police reports
- Medical records
- SANE reports
- Receipts
- Credit card statements

Evidentiary Considerations - Relevance

Four Buckets of Evidence:

1. Relevant and directly related
2. Directly related, but not relevant
3. Neither relevant nor directly related
4. Privileged Information

Evidence in bucket 1 is included in the Investigative Report.

Evidence in bucket 2 is included in the evidence review. Therefore, evidence in buckets 1 and 2 are provided to the parties, advisors, and adjudicators.

Evidence in buckets 3 and 4 is not provided to the parties, advisors, or adjudicators.

Evidentiary Considerations – Relevance - Continued

- Relevant Evidence – Evidence is generally considered relevant if it tends to **prove or disprove** a material fact/allegation. It includes both inculpatory and exculpatory evidence.
- Directly Related Evidence – Evidence that is “directly related to the allegations” may encompass a broader universe of evidence than evidence that is “relevant.”

Evidentiary Considerations Prior Sexual History

Evidence regarding a Complainant's sexual behavior is not relevant unless:

- Offered to prove that someone other than Respondent committed the conduct the Complainant alleges; or
- Offered to prove consent, if the questions and evidence concern specific incidents of the Complainant's prior sexual behavior with the respondent

The above does not apply to the Respondent – evidence of a pattern of inappropriate behavior by Respondent is permitted if relevant.

Evidentiary Considerations Privileged Information

Investigators can not require a party to provide information protected by a legally recognized privileged, unless the person **voluntarily waives** the privilege and/or provides **written consent** to do so.



Investigation Planning

- Review Notice of Allegations and other information provided by Title IX Coordinator
- Review applicable policies
- Understand the elements of the alleged policy violation, and definitions such as consent if at issue
- Create communication log and evidence log
- Create an interview list and anticipated order of interviews
- Determine if interviews will be in-person or via Zoom
- Decide whether to record interviews or take notes

Gathering Evidence

Pre-Interview

Determine what evidence may be available **prior to starting interviews**, such as:

- Security video
- Key card access records
- Police reports
- Emails reporting misconduct from an RA or campus police/security

Determine if **deletion holds** need to be placed on school emails, security video, or server data

4

The Interviews

Scheduling Interviews / Advisor Participation

- Determine location if in-person interview (quiet and private)
- Request interviews – usually via email – provide sufficient notice for party to prepare, include dates and times
- Once confirmed, send email with date, time and location and other information requesting
- Since advisors may accompany parties, confirm advisor participation and inform/remind of advisor's role: supportive, cannot answer for party, non-disruptive, potted plant
- Consider procedure meeting with advisor prior to interview to discuss policy and expectations

Preparing for Interviews

- Review policy, including elements and definitions
- Prepare an outline for the interview that includes an opening script, must ask questions, and closing questions
- Examples of items to include in the script are:
 - State date, time, place, and have persons in attendance state name if recording
 - Introductions and investigator role
 - Confirm private location
 - Relevant policy/amnesty policy/no retaliation
 - Acknowledge difficulty
 - Invite questions regarding interview or process

Preparing for Interviews (Cont.)

- Example end of interview questions/info to include in outline:
 - Go over list of evidence they said they would provide
 - If they have any evidence regarding the incident
 - Witnesses the party wants you to interview
 - Anyone else may have witnessed the incident or that you should speak with
 - Were there any questions they expected but were not asked
 - Is there anything else they think you need to know or want to tell you about
 - If they remember anything else or want to add something, to reach out
 - Any questions
 - Explain next steps
 - Thank them

The Interview

- Ensure a neutral, private setting – tissue, water
- Goals: learn the facts, gather evidence, establish a timeline, understand each party's perception of what happened
- If recording, short conversation first to get permission, then record and start with script
- Understand this is an interview / relaxed conversation, not an interrogation
- Build rapport, identify mutual interests, be empathetic, understanding and non-judgmental
- Active listening skills – pay attention – not distracted / make eye contact / nodding / body language / not thinking of question while listening
- Open ended questions / Non-leading questions – followed by more focused questions once an initial narrative has been provided – funnel method –
 - “Help me understand what you meant by x.” “Tell me about x.” “Describe x.” “Please tell me more about x.”

The Interview (Continued)

- Mirror language used by the person you are interviewing, but find out what it means – ex. You mentioned you and x “fooled around”, what does it mean to “fool around”? Once you know what is meant, then you can use it
- Clarify language that has multiple meanings such as “had a few drinks,” “drunk,” “was acting strange,” “sex”
- Use medical terms for clarification
- Let them tell their account of what happened first, without interrupting, then follow up with open ended questions, paraphrasing, and funneling
- Acknowledge hesitation or awkwardness as normal
- Ask to send evidence such as text messages during the interview
- Ask wrap up questions

The Interview (Continued)

- Do **not** do the following:
 - Ask compound, multiple choice, or leading questions
 - Ask irrelevant questions out of curiosity
 - Ask accusatory questions – “victim blaming” – “Why did you stay after? Why did not report the incident sooner? Why were you wearing that?”
 - Say “I am sorry this happened to you. That’s too bad.” Instead, I understand this is difficult for you to talk about.
 - Treat parties differently, use same technique for both parties

Trauma Informed Interviewing

- Signs of Trauma may include memory loss, lack of focus, lack of accurate detailed information, lack of linear memory, multiple versions of the same story.
- Understand individuals who experience a traumatic event may not have a chronological recollection of the trauma, and therefore may jump around or be inconsistent with account of what happened.
- Everyone reacts differently to trauma; the presence of the signs of trauma does not prove that the misconduct occurred nor does the lack of trauma provide a reason to believe it did not occur.

Trauma Informed Interviewing (Cont.)

- Acknowledge the difficulty of the situation.
- Have empathy / build rapport.
- Silence is okay – give chance to gather self / offer breaks / finish interview later.
- Allow them to begin where they want, “Where would you like to start?”.
- Allow an uninterrupted statement
- Do not push about chronological questions as a chronological narrative may be difficult.
- Use follow-up questions – avoid asking about information already provided (but still must ask necessary questions) – start with open ended questions, “What do you remember happened?” “Tell me more about that.”
- Ask “What are you able to tell me?” – this relieves some pressure.
- Ask sensory questions – “What do you see, hear, smell?”.
- Explain reasoning behind difficult questions.
- Address inconsistencies, “Help me understand . . .”



5

The Investigation Report

Drafting the Investigation Report

- The report must fairly summarize the relevant evidence.
- The report typically includes:
 - Overview of allegations and issues for determination
 - A statement of jurisdiction
 - Applicable portions of policies
 - Describes and includes gathered information, evidence and interviews
 - Timeline
 - Overview of disputed and non-disputed facts
 - Summaries of the interviews of the parties and witnesses and non-testimonial evidence
- The investigator may redact information that is not directly related to the allegation or that is privileged.
- Do **not** make findings or recommendations; that is the role of the adjudicators.

Drafting the Investigation Report

(Continued)

- Writing mechanics and clarity
 - Neutral tone
 - Past tense
 - Use footnotes for references to appendices for source citation or for context, background that would otherwise be disruptive
- Summarizing interviews:
 - Parties first, then witnesses
 - Point out issues that may bear on credibility
 - Point out areas of corroboration
 - Use quotes



Party Review of Draft Report

- Once the draft report is completed, it must be shared with the parties and their advisors.
- They will have at least 10 days to review the draft report and provide a written response.



Updating, Finalizing, and Submitting Final Report to Parties Before Hearing

- Investigator reviews comments from parties and decides if changes to the report, a response, and/or additional investigation is required
- Investigator updates report with any changes and/or additional evidence and finalizes the report – include responses to any comments from parties if applicable
- Final report is provided to parties for their review at least 10 days before the scheduled hearing

6

Final thoughts on hearings and document management

Questions? Please feel
free to reach out!

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Thank You