



Campus Administrator, P.I.

Austin ISD
Title IX Investigator Training
August 25, 2023

Thompson & Horton
HOUSTON • DALLAS • AUSTIN • FORT WORTH

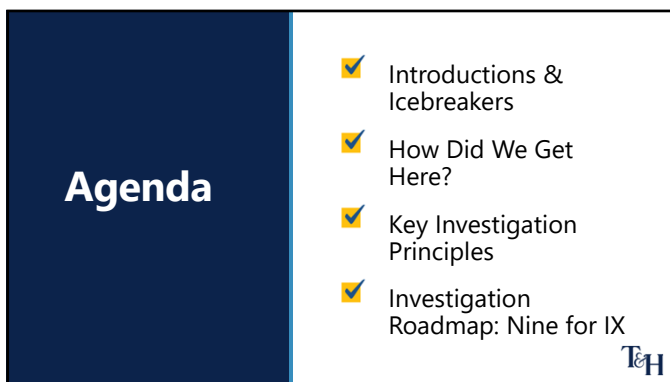
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Agenda

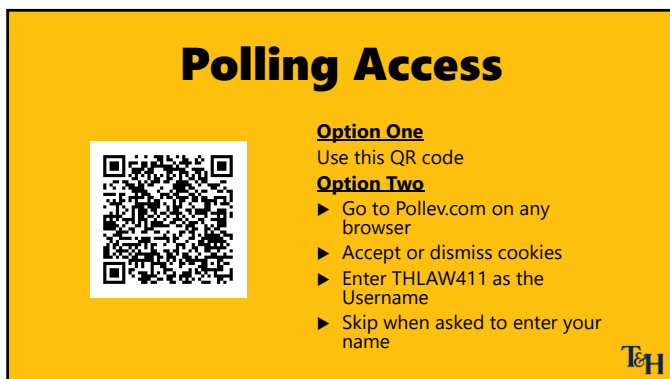
- ✓ Introductions & Icebreakers
- ✓ How Did We Get Here?
- ✓ Key Investigation Principles
- ✓ Investigation Roadmap: Nine for IX

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Option Two

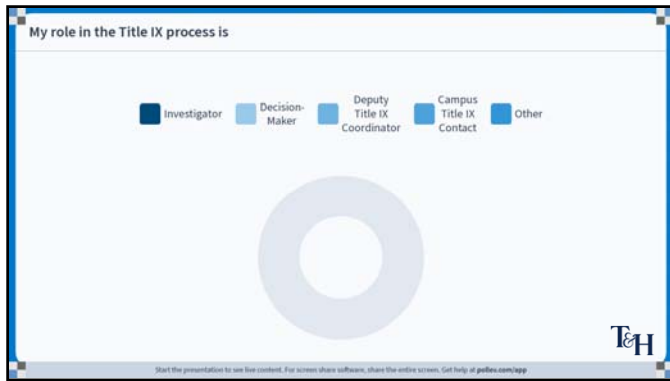
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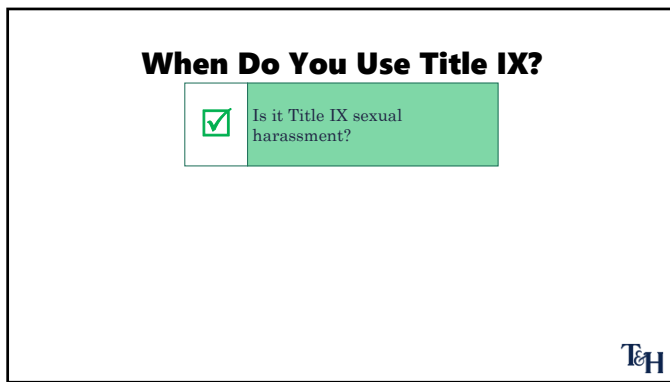
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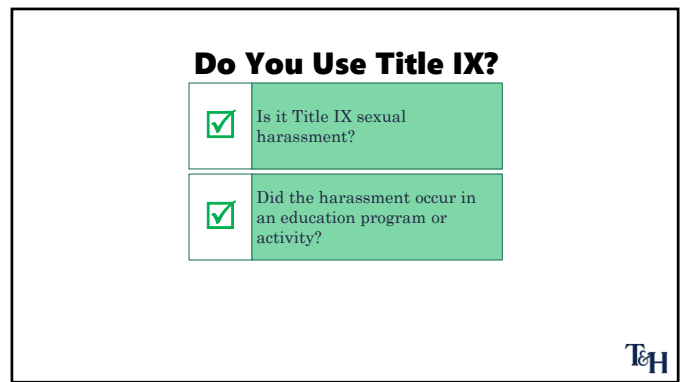
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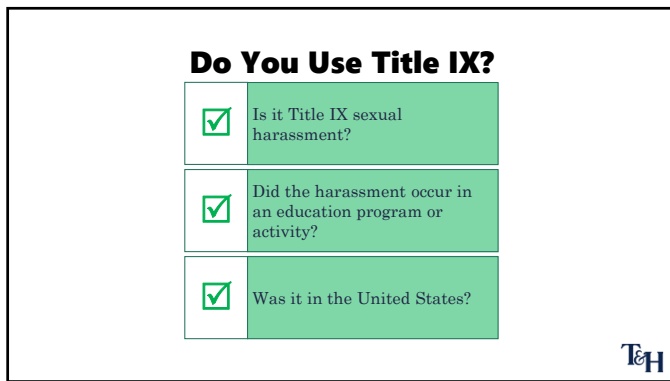
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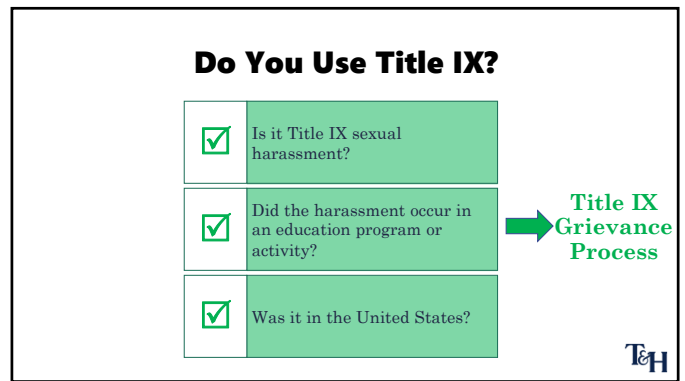
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Do You Use Title IX?

<input checked="" type="checkbox"/>	Is it Title IX sexual harassment?
NO	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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Please Remember

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Today Is Title IX but...

Complaints of discrimination, harassment, or retaliation based on protected statuses other than sex **should be reported** to the appropriate central administration official, and **must be addressed using the requirements of FFH (Local)**; they will **not** be addressed under the Title IX sexual harassment process we are talking about today, but are still important

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Remember from your Deputy Coordinator Training

Title IX Sexual Harassment Is....

- Unwelcome conduct
- Based on sex
- That:
 - Is one of the Title IX "Big Five" or
 - Creates a Title IX "Hostile Environment"

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Title IX Sexual Harassment

The Title IX "Big 5"

- Employee Quid Pro Quo
- Sexual Assault
- Domestic Violence
- Dating Violence
- Stalking

&

Hostile Environment

Unwelcome conduct based on sex that is so severe, pervasive, and objectively offensive that it effectively denies equal access to the educational program or activity

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Title IX #1 of the "Big 5" Employee Quid Pro Quo

- An employee of the school conditioning an aid, service, or benefit of the school on an individual's participation in unwelcome sexual conduct
- Examples include an employee:
 - Requesting sexual favors for a benefit or service
 - Threatening to remove a benefit or service unless a person engages in sexual favors
 - Expecting sexual favors for a benefit or service

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Title IX #2 of the "Big 5" Sexual Assault (Clery Definition)

- Rape, fondling without consent, incest or statutory rape
- Any act of vaginal or anal penetration, however slight, with any body part or object, or oral genital contact of another person, without consent
- Touching of the private body parts of another person for the purpose of sexual gratification, without consent (above or under clothing)

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Title IX #3 of the "Big 5" Domestic Violence (VAWA Definition)

- Felony or misdemeanor crimes of violence
- By
 - A current or former romantic partner
 - Spouse
 - Former spouse
 - Intimate partner
 - Person who shares a child
 - A person similarly situated to a spouse
 - An adult against a person protected under domestic or family violence laws of the jurisdiction

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Title IX #4 of the "Big 5" Dating Violence (VAWA Definition)

- Violence committed by a person who has been in a romantic or intimate social relationship with the victim
- Can include sexual, physical, emotional, or psychological violence
- Consider the complainant's description of the length of the relationship, the type of relationship, and the frequency of the interaction

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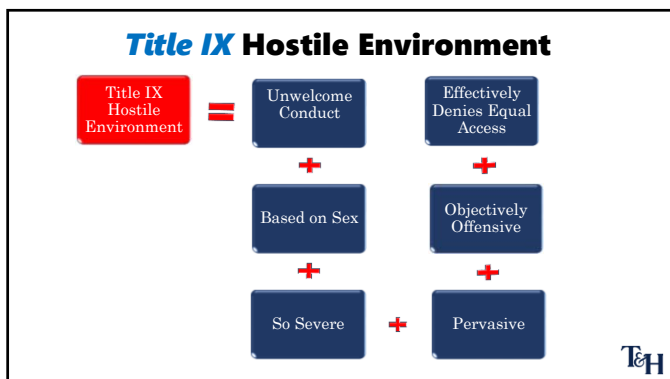
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Title IX #5 of the "Big 5" Stalking (VAWA Definition)

- A course of conduct based on sex (2+ times)
- Directed at a specific person
- That would cause a reasonable person to:
 - Fear for the person's safety or
 - Fear for the safety of others or
 - Suffer substantial emotional distress
- Can be direct or indirect

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Initial Grievance Process Steps

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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A minor student's parent files a formal complaint; the student is too young to receive notices about the case. Who is the complainant?

The student

The parent

The student and the parent

Start the presentation to see live content. For screen share software, share the entire screen. Get help at pdhhs.com/egp

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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 100%

The Title IX Coordinator

The Educational Institution

No one

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

Complainant

- 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

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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Initial Grievance Process Steps


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- Step 3: **Notice of Allegations**
- Step 4: Consider Dismissal
- Step 5: Informal Resolution (in appropriate cases)




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Title IX Notice of Allegations

- ▶ Notice of Allegations to the Respondent is required before the school 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
- ▶ If you learn of new allegations, make sure a supplemental NOA goes out
- ▶ 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

- 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)?



Element	Percentage
Penetration of the anus or vagina, no matter how slight	
The conduct was non-consensual	
The conduct was done for purposes of sexual gratification	67%
None - they are all required elements	33%




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Initial Grievance Process Steps

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Initial Grievance Process Steps

- Step 0: Contact Complainant (Intake)
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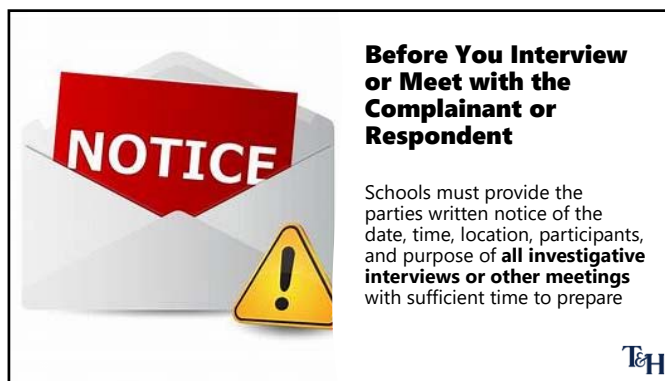
- Step 3: Notice of Allegations
- Step 4: Consider Dismissal
- Step 5: **Informal Resolution (in appropriate cases)**



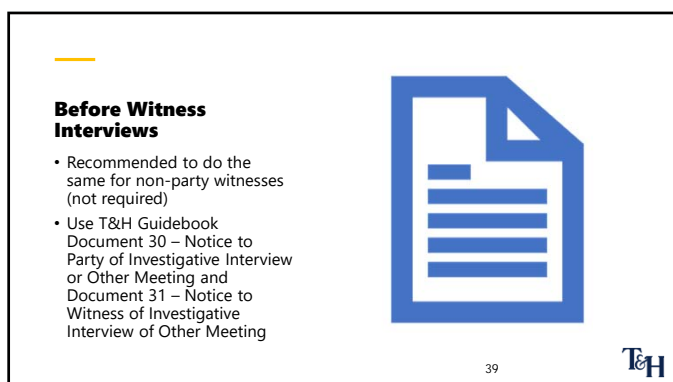
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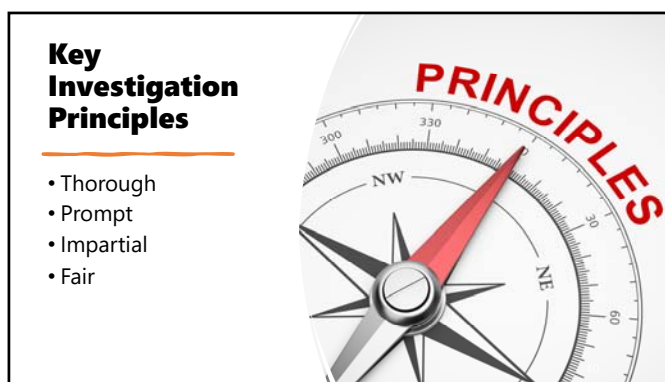
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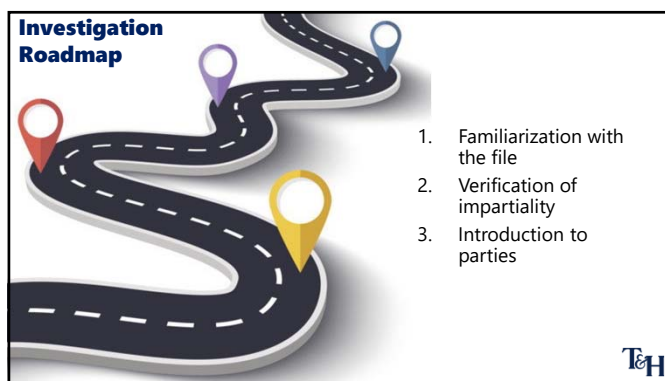
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Investigation Roadmap

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

Title 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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1. Familiarization with the file

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

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Case Study

On August 22, 2023, Francis F. requested to speak with me after school about a friend in the class. Francis reported that this friend had experienced sexual assault at school. Francis did not initially name the student, but eventually told me it was Carson C., another student in my class.

- Teacher Thompson
 Handwritten Statement
 August 22, 2023

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From: Principal Patterson
 To: Title IX Coordinator
 Subject: Statement (Confidential)
 Date: Monday, August 22, 2023 3:23:08 PM
 Re: Statement Allegations of Sexual Assault

On Monday, August 22, 2023, at approximately 1:30 p.m., Teacher Thompson reported to me that a sixth-grade student, Francis Friend, reported concerns of sexual assault against a peer, Carson Complainant (6th grade). Francis F. reported that another student, Robin Respondent (6th grade), has inappropriately touched Carson in private areas and would repeatedly ask to "make out" even when Carson said no. Francis F. reported that these incidents occurred last spring, over the summer, and in the first weeks of school as per self reports by Carson to Francis. Francis was unable to recall any specific dates. The alleged assaults occurred in the hallways during the school day and at the student's houses. Francis said Robin has attempted to apologize to Carson on a few occasions, including in an in-person conversation with Francis and maybe by electronic messages to Carson. Francis said Carson appears to be in a "downward spiral." Francis is worried about the potential consequences that Carson will face if Carson's parents are made aware of the situation due to dating restrictions, some of which appear to be cultural/religious.

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From: Ms. Complainant
 To: Title IX Coordinator
 Subject: Carson Complainant
 Date: Thursday, August 25, 2023 7:18:28 PM


Today I received a call from the school that on Monday, you became aware that Robin Respondent sexually touched my child on their private part. I'm not sure why it took y'all so long to let me know, and I am going to be calling a lawyer. I assume Robin has been expelled from school? That needs to happen right now.

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Our Case: More Facts

- A formal complaint was filed on August 25, 2023 by CP's parent
- 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 "hostile environment sexual harassment"
- A notice of allegations was sent on August 30, 2023




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NOA: Allegations

It is alleged that during the Spring semester of 2023 or during the first weeks of school in August 2023:

1. Robin Respondent (the "Respondent") touched Carson Complainant's (the "Complainant's") genitals over the clothing without consent, and
2. The Respondent repeatedly asked the Complainant to "make out" even when Carson said "no."




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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 District's educational program or activity is "hostile environment sexual harassment" prohibited under Title IX.



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2. An impartial investigator ...

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




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The investigator is a basketball coach and Robin is the star of the team, key to winning State; can they be impartial?

Yes, coaching a student does not create a conflict of interest.

Yes, as long as the investigator is not responsible for deciding playing time.

No, the relationship creates an impermissible impression of a personal conflict of interest for the coach.




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The investigator has a disciplinary role in the educational institution 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.

No, 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

- 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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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
 - [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


- 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

- Carson's parents filed a police report regarding the alleged fondling
- 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 school must turn over the investigation to the police and stop "meddling" in police business



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Can the educational institution stop its investigation?

Yes, it should not be involved in investigating such serious crimes when the police are involved

Yes, but only for as long as is necessary for law enforcement to decide whether to prosecute

Yes, but only for as long as is necessary for law enforcement to gather initial facts

No, it cannot delay at all for a law enforcement request



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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





- The District 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

- The District 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 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 the Respondent because it's a "they said, they said" case. How does it impact your case?

- 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?

- Police evidence may be useful for fact-gathering
- But the standards for and purposes of criminal investigations are different from school 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



- 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 school'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 are the issues and facts in dispute?
- Who will you interview and in what order?
- Is there physical evidence to preserve or obtain?
- What other evidence might be helpful? How can you get it?



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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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Who Will Investigators Interview?


- Complainant
- Respondent
- Witnesses
- Administrators, teachers, school personnel
- Student witnesses
- Authors or recipients of relevant evidence
- Persons identified by Complainant and Respondent



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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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You are!


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



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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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Gathering Evidence


- It's your job to **promptly** identify and preserve likely sources of evidence
 - Paper Documents
 - Hard Drive
 - Audio or Video Recordings
 - Photographs
 - Email
 - Text messages
 - Social media (posts and comments)



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But if the Parties Want to Share...



- 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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Preparing for Interviews



- Determine logical order of interviews
 - Typically interview CP first, then witnesses, then RP
 - Sometimes will interview witnesses first (e.g., employee witnesses)
 - Often will interview CP and RP (and some witnesses) multiple times
 - Follow up can be conducted by email



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Preparing for Interviews

- Determine location of interviews
 - Consider privacy, neutral location, impact of conducting interviews on campus
 - If objection to location, try to accommodate the objection




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Preparing for Interviews





- Prepare opening statement
- Organize evidence you may need for the interview
- Prepare questions or outline of key subjects to address and check off to avoid missing issues



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Interviews – Outline

- 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 Tips for Investigators

- ✓ Let the witness tell his or her story
- ✓ Start with open-ended questions
- ✓ Ask for the particulars—the 5Ws and H
 - ❖ Who? What? Where? When? Why? How?
- ✓ Follow up with more directed questions
- ✓ Consider trauma in questioning




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Types of Questions

- Open-ended, narrative, or descriptive
- Closed or narrow
- Reflective
- Leading



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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 District’s education program and activities?
- ▶ How was the complainant denied equal access to District programs or activities?




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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 support person if a non-minor student has an advisor
- The investigator can deny a request to have a student or employee unconnected with the case as an advisor
- The investigator can deny a request for a party to have a witness as an advisor with them
- None of the above

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Title IX Right to an Advisor

- 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

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What if an 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 give a notice of expectations before the meeting or interview


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Title IX Advisor Expectations


- The District may establish reasonable restrictions regarding the extent to which the advisor may participate in the proceedings, including behavior, 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](#)



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During Interviews


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



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During Interviews

- Do not use terms that suggest prejudgment 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




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Title IX
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



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Title IX
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



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Title IX
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



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Title IX
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
- Two Narrow exceptions
 - To show that someone other than the Respondent engaged in the alleged conduct
 - Prior conduct between the parties to be used to show consent



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Title IX
Don't Tell...


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



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Sources of Evidence


- Testimony
- Documents
- School 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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Title IX

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




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Title IX

Directly Related Evidence

- Even evidence the school 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](#)



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


"Sexing" messages between Robin and Carson in the Spring and Summer

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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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




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What must be included in the report


A summary of all evidence obtained in the investigation

A summary of all directly related evidence obtained in the investigation

A summary of all relevant evidence obtained in the investigation




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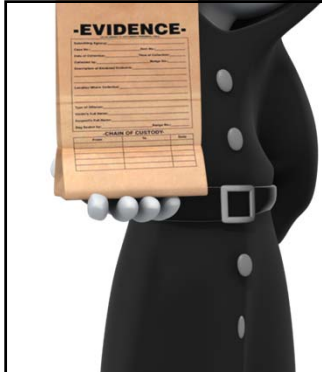
Title IX

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



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Relevant Evidence

(1) Does this evidence apply or relate to a disputed "fact" in this matter?

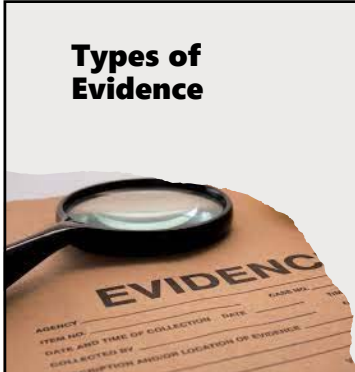
(2) If so, does it have a tendency to make the fact more or less probable?

Answer should be "yes" to both for relevance to exist



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Types of Evidence




Recognize and understand the different types of evidence:

- ✓ Direct Evidence
- ✓ Circumstantial Evidence
- ✓ Statistical Evidence
- ✓ Hearsay

Rumor and innuendo are not competent evidence and cannot support an investigative finding

That said, rumor & innuendo could possibly lead to further investigative leads!





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Direct Evidence

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 (10th 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

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 (10th ed. 2014)



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

Nobody has responded yet.
Hang tight! Responses are coming in.




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Inculpatory vs. Exculpatory



- Inculpatory: Evidence tending to make a disputed fact or issue *more likely to be true*
- Exculpatory: Evidence tending to make a disputed fact or issue *less likely to be true*




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Case Study

- Carson produces a TikTok video in which Robin was using racial epithets
- Robin's friend, Frankie, says Robin has lots of friends of different races and would never say anything like that to anyone




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When poll is active, respond at polllev.com/thlaw411
 Text THLAW411 to 22333 once to join

Which evidence is inculpatory

The evidence of Robin's racial epithets on TikTok

The testimony of Robin's friend that Robin has friends of all races and would never say anything racist



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When poll is active, respond at polllev.com/thlaw411
 Text THLAW411 to 22333 once to join


Which evidence is relevant

The evidence of Robin's racial epithets on TikTok

The testimony of Robin's friend that Robin has friends of all races and would never say anything racist

Both A and B


Neither A nor B



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Relevance vs. Weight

- The standard of proof (preponderance of the evidence)
 - More likely than not
 - "50% and a feather"
- Relevant evidence tips the scale *even a feather*
- Weight is *how much* the evidence tips the scale



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Rank the evidence in order of the weight on the question of whether Robin made the alleged statements to Carson


Evidence Robin used racial epithets on TikTok unrelated to Carson

Testimony of Robin's friend that Robin has friends of all races and would never say anything racist

Copies of electronic communications in which Robin made the alleged statements to Robin

A witness's testimony that they heard Robin make the alleged statements to Carson



A witness's testimony that a friend told them they heard the alleged statements to Carson



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What is Credibility/Reliability?


In the investigative process, credibility refers to the process of weighing the accuracy and veracity of evidence. A credible witness has testimony worthy of belief.


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Assessing Credibility

According to the U.S. Department of Education's Office for Civil Rights
 "...[A]ssessing credibility based on factors such as witness demeanor, plausibility, and consistency are functions of common sense...."
But decision-makers must "show their work"




U.S. Department of Education
 2020 Title IX Regulations




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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



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Relevant vs. Credibility/Reliability


Relevant evidence tips the scale (even a feather).
 Reliability goes to weight – it can impact how much the scale is tipped – a feather or an elephant.

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Credible/Reliable ≠ Truthful


- Just because you don't find someone or something reliable does not mean it's not true or is a lie
- We all remember experiences differently and have different perspectives that shape how we view incidents
- An individual's experience is always valid, but that experience may or may not be sufficient to establish the fact or issue in dispute




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Credibility Determinations

Inherent Plausibility	Demeanor	Motive to Falsify	Corroboration	Past Record
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U.S. Equal Employment Opportunity Commission
 EEOC Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (Jun. 18, 1999)



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Credibility Factors


<ul style="list-style-type: none"> ▶ Corroborating evidence ▶ Contradictory evidence ▶ Source of information (and source motive) ▶ Body language and demeanor ▶ Specific details ▶ Reasonableness of testimony / plausibility 	<ul style="list-style-type: none"> ▶ Witness's memory (impact of time, outside influence, trauma, intoxicant) ▶ Witness's demeanor ▶ Witness's motivations or interest in the outcome ▶ Witness's bias or prejudice ▶ Internal consistency ▶ Other factors of believability
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Example


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



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Example


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.



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Finalize the Report

- 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 school 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



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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?*




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Investigator Tips



DOs




DON'Ts



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Investigator "DOs"


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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Investigator "DONTs"

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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Title IX
9. Finalizing and transmitting investigation file to Title IX Coordinator

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



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Questions?

Thank you!

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