

Title IX Investigations & Informal Resolutions

EASTERN OKLAHOMA STATE COLLEGE



Session Points

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Documentation

Writing Investigative Reports

Informal Resolution

Formal Complaint

- ❖ A **formal complaint** of Title IX sexual harassment means a document filed by a complainant **or** signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
- ❖ For the purpose of addressing formal complaints of sexual harassment, a school's formal Title IX complaint policy and process must comply with **specific requirements** set out in the new rule.

Formal Complaint Process

Core Requirements	• Details 10 core requirements of formal complaint process
Complaint Dismissal	• Grounds for dismissal and procedural requirements
Consolidation	• Complaint consolidation in specific circumstances
Notice of Allegations	• Requirements for initial and ongoing notice to parties
Investigations	• 7 required elements of formal investigation
Informal Resolutions	• Permits informal resolution where appropriate
Hearings	• Hearing requirements, including cross-x and advisors
Determinations	• Requirements for adjudicators and determinations
Appeals	• Grounds and procedures for appeals
Recordkeeping	• Record maintenance requirements for specified periods

Key Concepts



Key Concepts

- ❖ Treat complainants and respondents equitably.
- ❖ Objectively evaluate all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- ❖ Ensure investigators do not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

Key Concepts

- ❖ Understand the presumption that the respondent is not responsible for the alleged conduct until a determination is made at the end of the grievance process
- ❖ Understand the standard of evidence – either the preponderance of the evidence or clear and convincing evidence standard
- ❖ Do not 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.

Key Concepts

What does it mean to objectively evaluate evidence?

- Impartial consideration of available evidence
- No prejudgment of parties, witnesses, facts at issue, or how facts at issue are presented
- No deference to recommendations of an investigator

What is a legal privilege and how would this arise in an investigation?

- Legal privileges protect communications and documents from disclosure. Examples are:
 - Attorney – Client
 - Priest – Penitent
 - Doctor – Patient
 - Spousal

Key Concepts

Burden of Proof

- Ensure burden of proof and burden of gathering evidence rests on the school not on the parties.

Equal Opportunity

- Provide equal opportunity for the parties to present fact and expert witnesses, and other inculpatory and exculpatory evidence.

Restrictions

- Refrain from restricting the parties' ability to discuss the allegations or to gather and present relevant evidence.

Key Concepts

Notice Content and Timing

- Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

Investigative Report

- Include the issuance of an investigative report that fairly summarizes the evidence.

Key Concepts

Notice Content and Timing

- Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

Investigative Report

- Include the issuance of an investigative report that fairly summarizes the evidence.

Notice of Allegations



Notice of Allegations

Upon receipt of a formal complaint, schools must provide written notice to parties that includes:

- Discussion of the formal complaint process, including any informal resolution option.
- Sufficiently detailed statement of allegations.
 - Sufficient detail includes the identities of the parties, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.
- Statement that the respondent is presumed innocent and that a determination of responsibility is made at the conclusion of the process.

Notice of Allegations

- Statement regarding right to an advisor and to review and inspect evidence.
- Reminder that school prohibits knowingly making false statements or knowingly submitting false information.

Parties must be provided sufficient time to prepare a response before any initial interview.

Schools also must provide **updated** notice if the school decides to investigate allegations about the respondent or complainant that are not included in the initial notice.

Confidentiality

Schools must keep confidential the identity of any individual who has made a report or complaint of any form of prohibited sex discrimination, including any reporter, complainant, respondent, or witness, except:

- as may be permitted by FERPA;
- or as required by law; or
- to carry out the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

Access to Evidence



Access to Evidence

Throughout the investigation, institutions must afford both parties equal opportunity to review and inspect any evidence that:

- was obtained as part of the investigation; and
- is directly related to the allegations.

This includes evidence upon which the school does not intend to rely in reaching a determination, and inculpatory or exculpatory evidence, whether obtained from a party or other source.

Access to Evidence

Generally

- Must provide access early enough that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

Prior to issuing investigative report

- Must send parties all evidence subject to inspection and review and afford at least 10 days to submit a written response.

10 days prior to hearing or other determination

- Must send investigative report to parties for review and written response.

At and during any hearing

- Must make all evidence available to parties' and afford equal opportunity to review, including for purposes of cross-ex.



Serving Impartially

Serving Impartially

Investigators must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

Investigators must objectively evaluate all relevant evidence—including both inculpatory and exculpatory evidence.

Serving Impartially

What does it mean for an investigator to have bias or a conflict of interest?

- Avoid prejudgment of facts at issue.
- Avoid inferences based on party status.
- Avoid sex stereotypes.

How can an institution ensure that its investigator remains free of bias and conflict of interest?

- Ensure adequate training and understanding of bias and conflict of interest.
- Encourage/do not penalize investigator for disclosing bias or conflict of interest.

Serving Impartially

What is inculpatory and exculpatory evidence?

- **Inculpatory evidence** shows or tends to show respondent's responsibility.
- **Exculpatory evidence** shows or tends to show the respondent is not responsible.

Serving Impartially

What is inculpatory and exculpatory evidence?

- **Inculpatory evidence** shows or tends to show respondent's responsibility.
- **Exculpatory evidence** shows or tends to show the respondent is not responsible.

Issues of Relevance



Issues of Relevance

Investigators must create an investigative report that fairly summarizes relevant evidence.

Evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:

- such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant;
or
- if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Issues of Relevance

What is “relevance” and “relevant evidence”?

- Evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.
- Repetition of the same question is irrelevant.

Issues of Relevance

How does an investigator summarize relevant evidence?

- Have a clear record of steps taken during the investigation.
- Consider summarizing:
 - The alleged incident
 - Parties involved and witnesses identified
 - Key factual findings
 - Relevant evidence
 - Specific policy alleged to be violated

Issues of Relevance

How does an investigator summarize relevant evidence?

- Have a clear record of steps taken during the investigation.
- Consider summarizing:
 - The alleged incident
 - Parties involved and witnesses identified
 - Key factual findings
 - Relevant evidence
 - Specific policy alleged to be violated



Interviews

Interviews

How does an investigator determine which individuals to interview?

- Start with witnesses named by complainant or respondent that may have relevant evidence.

How does an investigator determine which questions to ask?

- Come prepared.
- FUNNEL METHOD!
 - General questions: based on the elements of the offense.
 - Specific questions: based on known facts, documentary evidence, and other interviews.

Interviews

How to keep order with advisors?

- Implement rules about appropriate conduct at an interview that require all participants to behave in an orderly manner.
 - Clearly explain those rule and expectations at the outset of each hearing.
 - Enforce rules equally.
- Keep control of the interview.
- Consider terminating an interview if an advisor or participant is not acting appropriately.

Interviews

How to handle concurrent law enforcement investigations?

- Concurrent law enforcement activity may constitute good cause for short-term delays or extensions.
 - For example, “if a concurrent law enforcement investigation uncovers evidence that the police plan to release on a specific time frame and that evidence would likely be material to the recipient’s determination regarding responsibility.”

Interviews

How to handle concurrent law enforcement investigations?

- Concurrent law enforcement activity may constitute good cause for short-term delays or extensions.
 - For example, “if a concurrent law enforcement investigation uncovers evidence that the police plan to release on a specific time frame and that evidence would likely be material to the recipient’s determination regarding responsibility.”



Credibility Determinations

Credibility Determinations

In light of Title IX's requirement prohibiting the investigator from being the decision-maker, should the investigator make credibility determinations?

- This is up to the institution. But note that:
 - Credibility determinations cannot be based on party status.
 - An investigator's determination regarding credibility cannot actually be a determination regarding responsibility.
 - "...the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report."

Credibility Determinations

In light of Title IX's requirement prohibiting the investigator from being the decision-maker, should the investigator make credibility determinations?

- This is up to the institution. But note that:
 - Credibility determinations cannot be based on party status.
 - An investigator's determination regarding credibility cannot actually be a determination regarding responsibility.
 - "...the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report."



Collection & Review of Documentation

Collection & Review of Documentation

Records of each sexual harassment investigation must be kept for seven years.

While investigators may not be responsible for maintaining records, their close cooperation with Title IX coordinators and counsel will be critical to ensuring that complete and accurate records are collected and preserved.

Collection & Review of Documentation

What are some best practices for the review and collection of written documentation?

- Transcript or audio recording for interviews, subject to state law.

What should an investigator know about potential future litigation or audit?

- Litigation and audit is a possibility of every Title IX investigation.
- Document retention requirements under Title IX are 7 years.

Writing Investigative Reports



Writing Investigative Reports

What are the main goals of an investigative report that fairly summarizes relevant evidence?

- Do not reach any conclusions.
- Put decision-makers in best position to understand relevant evidence.
- Demonstrate to parties that institution took the allegation seriously and responded appropriately.
- Be guided by the knowledge that the report may be “Exhibit 1.”



Informal Resolution

Informal Resolution

A school may not, under any circumstance, require a student or employee to waive the right to an investigation and adjudication of formal complaints under Title IX.

Similarly, a school may not require the parties to participate in the informal resolution of a formal complaint or even offer an informal resolution process unless a formal complaint is filed.

Informal Resolution

However, at any time prior to reaching a final determination, a school may facilitate an informal resolution that does not involve a full investigation and adjudication, provided that the school:

- provides the parties a written notice disclosing (1) the allegations, (2) the requirements of the informal resolution process (3) the circumstances under which it precludes the parties from resuming a formal complaint arising from the same facts, and (3) any other consequences of participating in the informal resolution process, (4) the records that will be maintained or could be shared;
- obtains the parties' voluntary, written consent to the informal resolution.

Informal Resolution

Informal resolution is not available to resolve allegations that an employee sexually harassed a student.

At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution and to resume the formal complaint process.

Informal Resolution

What are the pros and cons of informal resolution?

- Pros: simplified process, finality for the parties, control of outcome.
- Cons: delays process if unsuccessful, less process and safeguards, avoidance of consequences.

Informal Resolution

What are best practices for facilitating informal resolution?

- Trained, neutral facilitator.
- Make parties aware of the benefits and limitations of informal resolution.
- Don't take sides or try to adjudicate the dispute.
- Be compassionate.
- Help parties reach a just settlement **on their terms**.
Potential resolution terms include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and disciplinary measures.

Informal Resolution

What are best practices for facilitating informal resolution?

- Trained, neutral facilitator.
- Make parties aware of the benefits and limitations of informal resolution.
- Don't take sides or try to adjudicate the dispute.
- Be compassionate.
- Help parties reach a just settlement **on their terms**.
Potential resolution terms include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and disciplinary measures.



THANK YOU!