

# Title IX Investigators: Running an Investigation



## THE TRUST

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## Introductions

- Meet your table mates.
- We encourage questions!

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## Disclaimer

The information provided in this document is for informative purposes only and should not be used in place of legal advice.

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**Learning Objectives**

- Review Title IX coverage
- Detail Title IX procedures for Title IX Investigators
- Practical application of procedures to typical Title IX scenarios

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**Title IX**

“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.”  
U.S. Congress, 1972

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**Tips**

- Title IX Packet (to be updated)
  - Resources
  - Templates
- District Governing Board Policies for Sexual Harassment, Title IX, Bullying

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### Review Type 1: Quid Pro Quo

A school employee conditions the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct

(effectively the same under 2020 and 2024 regs)

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### Review Type 2: Severe, Pervasive and Objectively Offensive (2020 Regs)

Unwelcome conduct, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity

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### Review Type 2: Hostile Environment (2024 Regs)

Unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity (i.e. that creates a hostile environment).

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**Review: 5 Hostile Environment Factors (2024 Regs)**

1. Degree to which the conduct affected the Complainant's ability to access the District's education program or activity
2. Type, frequency, and duration of conduct
3. Parties' ages, roles within the District's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct

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**5 Hostile Environment Factors**

4. Location of the conduct and context in which the conduct occurred
5. Other sex-based harassment in the District's education program or activity.

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**Review Type 3: Sexual Assault or Violence**

- Sexual assault  
[20 U.S.C. 1092(f)(6)(A)(v)]
- Domestic violence  
[34 U.S.C. 12291(a)(8)]
- Stalking  
[34 U.S.C. 12291(a)(30)]  
(effectively the same under 2020 and 2024 regs)

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### Reminders

- Respondent is presumed not responsible for conduct
- Disciplining Respondent for TIX conduct or conduct directly connected to the TIX conduct = Retaliation
- Both parties must have equal opportunity to present witnesses and evidence

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### Advisors

- Parties may have an advisor of their choice
- Advisor may be an attorney, but doesn't have to be
- Parents of minor students are not advisors, but do have the right to be there for their child
  - i.e. a minor student may have *both* a parent and another adult advisor present/notified

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### Parties' Right to Review Evidence

- Have the opportunity to inspect and review evidence collected during the investigation
- Should sign a non-disclosure agreement (NDA), which does not restrict either party's ability to discuss the allegations or gather and present evidence

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### Expanding the Investigation

If, during the course of the investigation, additional allegations are brought forward that were not included in the initial notice, alert the Title IX coordinator, who will:

- provide written notice of the additional allegations to the parties
- determine the course of action for the investigation of the addition allegations

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### Timelines

- You must meet the timelines set out in your district's policy
- The investigation must be reasonably prompt (specific number of days for completion of the process must be established)
- Coordinator can determine if temporary good cause delay (school administrative needs ARE NOT good cause for delay)

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### Investigator: Requirements

- Must be trained on Title IX regulations
- May be the Title IX Coordinator
- 2024 Regs allow to also be the Decision-maker
- Can be a third party hired for this purpose
- Must not have a conflict of interest

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### Pre-planning

- Review Title IX sex discrimination and what elements must be established
  - Quid Pro Quo
  - Hostile Environment
  - Sexual Violence
- Review the allegations made in the particular matter

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### Planning

- Interviews?
- Documents?
  - Student/staff records?
  - Server search?
  - Recordings from surveillance cameras?
  - Law enforcement report?
- Understand disabilities of persons involved?
- Need an interpreter?

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### Physical Evidence to Consider

- Attendance records and class schedules
- Discipline records
- Medical or counseling information
- Social media
- Screenshots
- Videos
- Compromising evidence (nude photos/videos) should be redacted and summarized

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**More Possible Physical Evidence**

- Emails
- Technology records
- Law enforcement reports
- Photos

*Not every stone needs to be turned over—  
but the pertinent ones do*

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**Note re: Sexual History**

The Complainant's sexual predisposition and prior sexual behavior are not relevant, unless:

- It is needed to prove that someone other than the Respondent committed the conduct alleged
- Specific incidents of the Complainant's prior sexual behavior with the Respondent are needed to prove consent

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**Activity**

Plan Investigation

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### Collecting Evidence

- Do not require or rely on the parties to anticipate and provide you with the evidence you need
- You may not require a party to provide evidence (documentary or verbal) that would be legally protected under attorney-client privilege, doctor-patient privilege, or spousal privilege

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### Collecting Evidence

- If the parties want to provide otherwise privileged information, you must obtain written, voluntary consent (of parent or adult student) allowing the district to include that evidence (see forms for a template)
- **Even if the school/district has the medical evidence, it may not be used in the investigation without consent**

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### Pre-Interview Scheduling

- Minor students: parents stand in shoes of the student; ensure both understand the Title IX process
- Usually best to begin with Complainant, but be strategic in scheduling
- Plan location and seating
- Leave enough time between interviews so you don't have to rush

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### Interview Notice

- For all interviews, provide written notice of interview: date; time; location; participants; and purpose of any investigation activity that requires a **party's presence**—provide notice with enough time for the party to prepare to participate
- See forms for template

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### Preparing Questions

- Plan your interview outlines (checklists in forms may be helpful) including vocabulary
  - Go with the flow
  - To the extent reasonable, ask both parties the same questions and then allow the interview to take you down different roads
  - Ask witnesses the same or similar questions

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### Style

- Avoid putting words in mouth of witness
  - ASK: "How did \_\_\_\_'s behavior make you feel?"
  - DON'T ASK: "Did \_\_\_\_'s behavior upset you?"
- Avoid "why" questions
- Avoid conclusion questions
- Avoid compound questions

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### Setting the Stage for the Interview

- Summarize Title IX
- Explain process
- Share purpose
- Give the organization's need
- Establish credibility
- Explain investigator role

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### Interview

- Plan location—private, safe, comfort (tissues)
- Sense of formality
- Reassure no retaliation for participating
- Caution confidentiality to both parties and the District
- Put interviewee at ease/develop rapport
- Remember you are wearing your investigator hat

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### Explain Expectations

- Recording by parties
  - you can decide whether you will allow or not
  - realistically can't control
- Tell the truth
- Rules for advisors
- Virtual interview—confirm who is present

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### More Expectations

- Explain that they do not have to provide evidence protected by privilege (and if you use confidential information, you will need consent to disclose)
- Explain that no one may threaten, intimidate, or harass anyone who participates in the process

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### Questioning Pitfalls

- Arguing or becoming angry
- Showing personal prejudice
- Lying
- Hurrying (plan your schedule carefully)
- Interrupting
- Making assumptions
- Being dismissive
- Making promises

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### Questioning Pitfalls, cont.

- Losing track of elements of definition
- Leading questions: "When you touched her arm, did you . . ."
- Putting too much value on inconsistencies or irrelevant information
- Accepting one-word responses
- Phrasing things negatively

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### Questioning Techniques

- Monitor witness's (and parent's) body language
  - Take notes
    - Slows process
    - Provides reflection and reference
    - Make sure that you get an answer
- One question at a time
- Wait for a response—do not feel need to fill the silence.

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### Active Listening

- Paraphrase
- Repeat back
- Read notes
- Brief statements:
  - Yes...
  - Go on...
  - I see...
  - Okay...

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### Questioning

- Systematic order (timeline)
- One question at a time
- Wait for a response—do not feel need to fill the silence
- Ask in another way later
- Clarify fact from inference

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**Considerations When Questioning a Child**

- "I heard that some 6<sup>th</sup> grade students do not feel safe at your school. Have you heard that?" (Follow up: who, what, when, etc.)
- "Have you ever felt unsafe at school (or during P.E. class)?" (Follow up)

\*DO NOT use parties or witnesses or other potential victim's names or name location UNLESS and UNTIL the child does

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**Open-Ended Questions**

- "Explain what happened third hour"
- "What are some experiences you have had with..."
- Paraphrase/summarize back
- Start broad and narrow down
  - "Tell me more about..."
  - "What are some other details?"

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**Nearing end...**

- Ensure the pertinence and accuracy of information
- Ask if there is anything else
- Every time more information is given, ask again if there is any else
- Ask if there are others with whom you should speak
- Share relevant evidence or documents

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### Closing Interview

- Reassure if any concerns raised
- Ask to contact later if something comes to mind
- Inform you may be in touch if you need more information
- Thank and express empathy for their time and cooperation
- Provide your contact information

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### Closing Interview of Parties

- When you expect concluding interviews and will send evidence
- Give non-disclosure agreement
  - May sign now or return later, before evidence disclosure
- If you do not receive signed NDA, only provide access to review of documents
  - Notify them that access will be facilitated by the Title IX Coordinator and provide contact info

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### Activity

Mock Interview

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### Investigation Tips

- Keep written documentation of all communications
- Update the complainant and respondent periodically as to progress/status (not insight or details of the investigation) — your Title IX Coordinator may do this
- When possible, copy both parties **separately** on responses or when informing the other party

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### Investigation Tips

- The need to delay: Notify the Title IX coordinator who will notify both parties of Good Cause Delay
- Report any child abuse information not previously reported directly to DCS
- Remember your mandatory reporting obligations
- Report possible crimes to Title IX Coordinator and law enforcement (e.g. threats or photos)

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### Good Cause Delay Reasons

- Concurrent law enforcement activity
- Witness unavailability
- Illness
- School breaks
- Absence of a party or party's advisor
- Need for language assistance or ADA accommodations
- Overburdened school administrators (true!) is not good cause

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### Let Title IX Coordinator Know

- Additional Supportive Measures are needed or need to be modified
- Additional allegations that were not included in the initial notice
- New mandatory or permissive dismissal comes to light
- Informal Resolution—if wanted by either party
- Expansion of investigation

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### Sharing Evidence with Parties

- Form for notice
- Not your personally created reference materials to complete the report (e.g. personal notes)
- Information that will go into the report for the decision-maker
  - Statements
  - Summaries of interviews
  - Documents
  - Records

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### Redactions

- Check with Title IX Coordinator regarding redaction of witness names
- Must redact information protected by privilege unless there is written consent
- May redact information in the evidence that is not directly related to the allegations

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### Redactions

- May not redact confidential information that is directly related and relevant
- Redact disability information related to a 504 Accommodation Plan or an Individualized Education Plan, but give summary of relevant facts

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### Evidence Sharing with NDA

- Send the signed NDA with evidence
- Provide parties an equal opportunity to inspect and review (with necessary redactions) evidence gathered as part of the investigation that is directly related to the allegations raised in the complaint; include evidence on which you do not intend to rely in drafting your report

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### Evidence Sharing with NDA

- Send the evidence to the parties in an electronic and/or hard copy format and allow the parties 10 days to submit a written response
- Send to both parties at the same time
- May begin drafting report

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### Evidence Sharing - No NDA

- Inform Title IX coordinator
- Provide opportunity for physical review of evidence
  - Notify them of their right to access the evidence to review
  - Notify them how they can do this – contacting the Title IX Coordinator w/i the 10 day timeframe to schedule
- No copies or photographs of evidence permitted

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### Additional Evidence (Post Evidence Sharing)

- The district's Title IX Coordinator will decide whether parties must provide all evidence PRIOR to the disclosure of evidence for review has been provided by the investigator OR whether to allow parties to provide additional evidence after disclosure evidence has been shared

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### Review Written Responses

- Consider the written responses to be evidence provided by the parties and address in the report
- Consider additional evidence shared after initial disclosure (if allowed)
- Questions submitted for other party should be given to the decision-maker to manage, but noted in your report
- See form for Notice of Party's Written Response to the Evidence

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## Investigation Report

Use the template from the Title IX forms packet to ensure that you include all of the required elements

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## Investigation Report

- Be thorough
  - In interview summaries, include observations of witnesses—report on credibility
  - Details and witness observations
  - If you were the decision-maker, what would you NEED to know?
- Decision-maker should not need to contact investigator for clarification

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## Report Submission

- Email to Title IX coordinator
- Email separately (read receipt) to both parties and copy Title IX coordinator on each and/or mail hard copies
- Send at same time
  - Scheduled/delayed sends are very helpful for this in Outlook, Gmail, etc.

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## Activity

### Review and Discuss Investigation Report

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### After Submitting the Report

- The Investigator should be done
- However, the Decision Maker can either ask additional questions of parties (2024 regs) or ask the Coordinator to ask the Investigator to ask additional questions

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### After Report is Submitted

- Each party has at a number of days to review the investigation report and provide a written response; District can decide whether to allow additional time (typically 10 days in Governing Board Policies)
- Decision-maker will consider the written response in addition to the investigation report

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### Parties' Written Questions to Decision Maker

- Each party may submit relevant questions to the decision-maker after receiving the investigation report
- If a question is excluded by the decision-maker, he/she must explain why the question is not relevant
- Each party will be provided answers to its questions and then have a limited opportunity to ask limited follow-up questions

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### Decision Maker and Decision

- Preponderance—50% + a feather
- More probable that it happened than not
- Plausibility
- Consistency
- Validity

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### Decision and Remedies

- If there is a finding that the Respondent committed violations of Title IX, discipline will be determined
- If there is a finding that there was no violation of Title IX, no discipline should be discussed—the matter will return to the administration to consider under District's discipline policy
- Supportive Measures may continue

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## Questions?



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